



# New Policy Document for Planning Obligations **Consultation**



# New Policy Document for Planning Obligations **Consultation**

Communities and Local Government  
Eland House  
Bressenden Place  
London  
SW1E 5DU  
Telephone: 0303 444 0000  
Website: [www.communities.gov.uk](http://www.communities.gov.uk)

© Crown Copyright, 2010

*Copyright in the typographical arrangement rests with the Crown.*

*This publication, excluding logos, may be reproduced free of charge in any format or medium for research, private study or for internal circulation within an organisation. This is subject to it being reproduced accurately and not used in a misleading context. The material must be acknowledged as Crown copyright and the title of the publication specified.*

Any other use of the contents of this publication would require a copyright licence. Please apply for a Click-Use Licence for core material at [www.opsi.gov.uk/click-use/system/online/pLogin.asp](http://www.opsi.gov.uk/click-use/system/online/pLogin.asp), or by writing to the Office of Public Sector Information, Information Policy Team, Kew, Richmond, Surrey TW9 4DU

e-mail: [licensing@opsi.gov.uk](mailto:licensing@opsi.gov.uk)

If you require this publication in an alternative format please email [alternativeformats@communities.gsi.gov.uk](mailto:alternativeformats@communities.gsi.gov.uk)

Communities and Local Government Publications  
Tel: 0300 123 1124  
Fax: 0300 123 1125  
Email: [product@communities.gsi.gov.uk](mailto:product@communities.gsi.gov.uk)  
Online via the Communities and Local Government website: [www.communities.gov.uk](http://www.communities.gov.uk)

March 2010

Product Code: 09PD06306

ISBN: 978-1-4098-2358-2

# Consultation summary

## Scope of the consultation

<b>Topic of consultation</b>	New policy on the appropriate use of planning obligations.
<b>Scope of Consultation</b>	The aim of this consultation is to seek the views of consultees on the Government's proposals for a new policy document on planning obligations (also known as section 106 of the Town and Country Planning Act 1990).
<b>Geographical scope:</b>	England.
<b>Impact Assessment</b>	A consultation stage initial impact assessment on planning obligations has been prepared – this is published alongside this consultation paper.

## Basic Information

<b>To</b>	This consultation is aimed primarily at: local authorities; landowners and developers; business; and planning professionals.
<b>Body responsible for the consultation</b>	This consultation is being run by the Planning Obligations Team within the Department for Communities and Local Government.
<b>Duration</b>	This consultation will run for 12 weeks. It will begin on 25 March 2010 and end on 21 June 2010.
<b>Enquiries</b>	Please contact: Natasha Trinidad 0303 444 1679 or <a href="mailto:planning.obligations@communities.gsi.gov.uk">planning.obligations@communities.gsi.gov.uk</a>
<b>How to respond</b>	By email to: <a href="mailto:planning.obligations@communities.gsi.gov.uk">planning.obligations@communities.gsi.gov.uk</a>  Postal communications should be sent to: Natasha Trinidad Communities and Local Government Zone 1/E2 Eland House Bressenden Place London SW1E 5DU
<b>Additional ways to become involved</b>	This will be a largely written exercise, though we do intend to hold informal meetings with interested groups.

<b>After the consultation</b>	A summary of responses to the consultation will be published on the Department's website within three months of the end of the consultation period.
<b>Compliance with the code of practice on consultation</b>	This consultation complies with the Government's Code of Practice on consultations, which can be downloaded from <a href="http://www.berr.gov.uk/whatwedo/bre/consultation-guidance/page44420.html">www.berr.gov.uk/whatwedo/bre/consultation-guidance/page44420.html</a>

## Background

<b>Getting to this stage</b>	As part of the introduction of the Community Infrastructure Levy (CIL) the Government has introduced new statutory restrictions upon the use of planning obligations to clarify their purpose and to ensure that the two mechanisms can work effectively and complement each other. The final CIL Regulations will come into force on the 6 April 2010.
<b>Previous engagement</b>	Consultation with stakeholders as part of the development of the Community Infrastructure Levy.

# Contents

<b>Consultation summary</b>	<b>3</b>
<b>Part 1 Introduction and overview of proposals</b>	<b>7</b>
<b>Part 2 Draft policy Annex on planning obligations</b>	<b>21</b>
<b>Part 3 About this consultation</b>	<b>27</b>
<b>Part 4 Consultation questions</b>	<b>29</b>
<b>Part 5 Consultation stage impact assessment</b>	<b>35</b>



# Part 1

## Introduction and overview of proposals

- 1.1 This consultation paper sets out the Government's proposals for changes to the planning system in relation to planning obligations (also known as section 106 of the Town and Country Planning Act 1990, see **Figure 1** on page 15).
- 1.2 As part of the introduction of the Community Infrastructure Levy (CIL) the Government has introduced new statutory restrictions upon the use of planning obligations to clarify their respective purposes and to ensure that the two mechanisms can work effectively and complement each other. The Final CIL Regulations 2010 will come into force on 6 April 2010.
- 1.3 As announced in the December 2009 Pre-Budget Report, this consultation concerns a new policy on the appropriate use of planning obligations to reflect changes made as a result of the introduction of CIL and to deliver the Government's 2007 Planning White Paper commitment to streamline planning policy. The Government's current policy on the use of planning obligations is set out in *Circular 5/05: Planning Obligations*.<sup>1</sup> This also contains general guidance and guidance on relevant legislation. The proposed new policy document will only contain relevant policy.
- 1.4 In its final form, this policy will form an Annex to the new Development Management Planning Policy Statement on which the Government launched a consultation in December 2009. The policy Annex will apply to England only.

## Background and context for change

- 1.5 Planning obligations are a flexible local tool which support the sustainable development of areas by facilitating the granting of planning permission for development which accords with, and can be tailored to, relevant national, regional and local planning policies.
- 1.6 The Government's reform of the planning obligations regime responds to recommendations of the 2004 Barker Review of Housing Supply, *Delivering stability, Securing our future housing needs*, which called for a scale back of planning obligations to cover direct impacts and mitigation along with affordable housing; and more recently the recommendations of the 2008 Killian Pretty Review, *Planning applications – A faster and more responsive system: Final Report*, which reaffirmed the call to scale back the use of planning obligations.

<sup>1</sup> ODPM (2005) Circular 5/05: Planning Obligations (see: [www.communities.gov.uk/publications/planningandbuilding/circularplanningobligations](http://www.communities.gov.uk/publications/planningandbuilding/circularplanningobligations))



- 1.7 These reports reflect a long history of concerns about the current system of planning obligations. Concerns have been raised about inconsistency in the use of planning obligations between different local authorities, a lack of transparency and of accountability in ensuring that contributions are used for the purposes for which they are sought. In addition, agreements can sometimes take too long to negotiate, often involving high legal costs, which can frustrate or delay development. These arguments, among others, led the Government to legislate for a new system, the Community Infrastructure Levy, in the Planning Act 2008.
- 1.8 Section 223 of the Act enables CIL regulations to include provisions about how section 106 of the Town and Country Planning Act 1990 can or can not be used (see **Figure 2** on page 17). Through the CIL regulations the Government has introduced new restrictions upon how planning obligations can be used. See **Figure 3** on page 18 for Part 11 of the CIL Regulations 2010 which concern the reform of planning obligations, regulations 122 and 123.

## Objectives underlying the reform of the planning obligations system

### (a) Clarifying the purposes of planning obligations in the light of CIL

- 1.9 Over time, the scope of planning obligations has been extended beyond its original intention, which was to make acceptable development proposals which might otherwise be unacceptable in planning terms, and thereby facilitate the granting of planning permission.
- 1.10 The current scope of acceptable uses of planning obligations is set out in Circular 5/05. In particular, paragraph B5 provides five policy tests for assessing whether or not a planning obligation should be sought in connection with a particular development proposal. The circular is capable of being a material consideration and where relevant it should be taken into account by local planning authorities in making their decisions. However, it is not binding upon local authorities.
- 1.11 Furthermore, the effect of various court judgements has been to extend the scope for which planning obligations may be sought, to include the types of more general contributions which CIL is intended to cover. As a result, local planning authorities can and have sought to maximise developer contributions through planning obligations in ways that do not appear to accord with the policy in Circular 5/05. The Government considers that, in the light of the introduction of CIL, it is not appropriate that planning obligations should continue to be used in this way.
- 1.12 The Government believes that CIL will provide a new, fairer and more transparent mechanism for the collection of more generalised developer contributions, which are not dependent upon demonstrating a close relationship to the application site making the contribution.

1.13 The introduction of CIL provides an opportunity to ensure that both planning obligations and CIL are effectively used for the purposes for which each was intended. Therefore, reform of the planning obligations system has been introduced through the CIL regulations made under the Planning Act 2008 to restrict the use of planning obligations to their original intended purpose of direct impact mitigation.

### **(b) Preventing the opportunity for 'double charging' through use of both planning obligations and CIL**

1.14 In light of the introduction of CIL, concerns have been raised, particularly by the development industry, that unrestricted use of planning obligations alongside use of CIL in an area could result in developments being asked to contribute towards a single item of infrastructure through both planning obligations and CIL. This could result in developers effectively being charged twice. This could significantly undermine the economic viability of developments.

1.15 The Government wishes to offer assurances to developers that they will not contribute excessively through a combination of planning obligations and CIL. This could occur if a developer was to be asked for a more 'general' contribution through a planning obligation as well as CIL.

1.16 Preventing generalised contributions towards indirect infrastructure requirements, obtained through the use of planning obligations, provides a very clear boundary between the use of planning obligations and CIL, as it removes the potential for planning obligations to be used for the same specific infrastructure items as CIL in a local area. If a piece of infrastructure is fully funded, whether through CIL or otherwise, it is not appropriate to also seek contributions to it through a planning obligation.

1.17 As the Government's intention is that the purposes of CIL and planning obligations should not significantly overlap, it is, in the Government's view, legitimate in principle to seek contributions through both routes provided that the purposes of each instrument are clear and separate, and that the design of each instrument is appropriate to those purposes. Planning obligations should aim to secure necessary requirements that facilitate the granting of planning permission for a particular development, while CIL contributions are for general infrastructure need.

### **(c) Putting tariff-style charges on a better statutory basis**

1.18 An important part of the argument in favour of introducing CIL has been that planning obligations have often struggled to contribute effectively to large infrastructure requirements, or infrastructure needs which are caused incrementally through the cumulative impact of a number of developments. This can result in either the first or last developer in an area contributing disproportionately to the cost of the infrastructure required in that area, because their development was the 'tipping

point' for the need for a piece of infrastructure, while others make a low contribution or no contribution at all.

- 1.19 In Circular 5/05, the Government sought to address this issue by encouraging the use of pooled contributions and standard charges. Because tariff type approaches spread the burden more fairly and evenly, and result in a more predictable flow of income, they are likely to be better at dealing with this difficulty.
- 1.20 However, Circular 5/05 made it clear that these improvements were intended as a temporary measure ahead of wider reform of the developer contributions regime. Through the introduction of CIL, the Government has established a new system explicitly set up as a vehicle to make pooled payments towards larger or more strategic infrastructure, building on existing practice in standard charging and tariffs through planning obligations.
- 1.21 The Government considers that section 106 of the Town and Country Planning Act 1990 is no longer a suitable basis for generalised pooled charges or tariffs in light of the introduction of CIL.
- 1.22 The Government believes that CIL is a better vehicle to achieve the objectives of pooled contributions and tariffs in addressing the cumulative impacts of development, that existing tariff schemes should, over time, be migrated to CIL, and the ability to establish a new tariff should be prevented upon the adoption of a local CIL or nationally after a suitable transitional period.
- 1.23 This is because, firstly, the process for establishing a CIL will involve greater transparency, public involvement and testing, compared to the use of tariffs through planning obligations. The Government has specifically responded to calls from the development industry to ensure that the testing of local CIL proposals is equivalent in its depth to that applied to development plans. This represents a higher standard than for tariff schemes.
- 1.24 Secondly, even when a planning obligation is sought on the basis of a 'tariff' in a development plan, such a tariff is a policy only and therefore is ultimately always subject to negotiation, even if the developer contribution policy is presented as a clear fixed 'tariff'. When adopted by a local authority, CIL will be a mandatory charge for most types of development. This clearly empowers the local authority to require the specified payment. This in turn better enables delivery of the objective of tariff schemes that more developments would contribute to mitigating the cumulative impact of development. A mandatory basis for collection provides greater certainty and predictability of income for the authority, but also has benefits for developers in that a more effective level playing field is created between different developers as to what they will pay.

1.25 Furthermore, it is a consequence of the policy tests set out in Circular 5/05 that planning obligation based tariffs should not be applied in blanket form, regardless of the actual impacts of the development. Local authorities should demonstrate in each case that contributions sought via a tariff meet the tests set out in Circular 5/05. This requirement does not and should not apply to CIL, because CIL is designed to provide a more flexible source of funding for infrastructure and enable investment across a local area. So, unlike planning obligations, contributions collected through CIL from development in one part of a charging authority can be spent anywhere in that authority area, or sub-regionally, in line with local plans.

#### **(d) Streamlining planning policies**

1.26 The Government committed in the Planning White Paper 2007 to significantly streamline the planning policy framework to achieve a more strategic, clear and focussed framework. The Killian Pretty review of the development management process reinforced the need to review the planning framework and recommended that it should be more user-friendly. The Department for Communities and Local Government is well advanced in the review of the framework, and is making significant progress in reducing the volume and complexity of planning policy.<sup>2</sup> Circular 5/05 contains a mixture of policy, legal commentary and guidance. The proposed new policy Annex will be streamlined to focus solely on policy. As with other new policy documents, the proposed new policy Annex focuses solely on policy and is organised around the key planning processes of plan making and development management.

## Summary of changes to planning obligations

1.27 Planning obligations are reformed as part of the package of CIL regulations in three respects:

- (i) putting the Circular 5/05 tests on a statutory basis for developments which are capable of being charged CIL;
- (ii) ensuring the local use of CIL and planning obligations does not overlap; and
- (iii) limiting pooled contributions towards infrastructure which may be funded by CIL.

1.28 How the above changes affect the use of planning obligations is illustrated in **Figure 4** (on page 20) which provides a decision tree for determining how planning obligations may be used following these reforms.

<sup>2</sup> Programme for replacement of Planning Policy Guidance Notes and Planning Policy Statements (see: [www.communities.gov.uk/planningandbuilding/planning/planningpolicyguidance/planningpolicystatements/programmereplacement/](http://www.communities.gov.uk/planningandbuilding/planning/planningpolicyguidance/planningpolicystatements/programmereplacement/))

## **(i) Making the Circular 5/05 tests statutory for CIL development**

1.29 CIL regulation 122 places into law for the first time the Government's policy tests on the use of planning obligations. From 6 April 2010 it will be unlawful for a planning obligation to be taken into account when determining a planning application for a development, or any part of a development, that is capable of being charged CIL if the obligation does not meet all of the following tests:

(a) necessary to make the development acceptable in planning terms;

(b) directly related to the development; and

(c) fairly and reasonably related in scale and kind to the development.

1.30 These three statutory tests are based upon three of the five policy tests in Circular 5/05 at paragraph B5 (tests (ii), (iii) and (iv)). The two remaining tests from Circular 5/05 (tests (i) and (v)) have been omitted from the new statutory set as they were considered unnecessary or repetitive.

1.31 Developments which are capable of being charged CIL includes most buildings that people normally use. Such development is considered capable of being charged CIL for the purpose of these tests whether there is a local CIL in operation or not. Buildings into which people do not normally go, and buildings into which people go only intermittently, for example, for the purpose of inspecting or maintaining fixed plant or machinery, will not be liable for CIL charges. For developments that are not capable of being charged CIL, the policy tests in Circular 5/05, along with the other policy therein, continue to apply, until it is replaced by the proposed new policy Annex.

1.32 The statutory tests are intended to clarify the purpose of planning obligations in the light of CIL, improve the effectiveness of their use and negotiation and provide a stronger basis to dispute planning obligations policies, or practice, that breach these criteria. This seeks to reinforce the purpose of planning obligations in seeking only essential local contributions towards the granting of planning permission, rather than more general contributions which are better suited to the use of CIL.

## **(ii) Ensuring the local use of CIL and planning obligations does not overlap**

1.33 Upon the local adoption of CIL, CIL regulation 123 (2) restricts the local use of planning obligations in relation to the intended use of local CIL monies. Where a charging authority sets out that it intends to fully or partially fund an item of infrastructure via CIL then that authority can not seek a planning obligation contribution towards the same item of infrastructure. This is to ensure that individual developments are not charged for the same items through use of both planning obligations and CIL and prevents any opportunity for 'double charging'.

- 1.34 CIL monies may only be spent on a given range of infrastructure. Section 216 of the Planning Act 2008 (as amended by CIL regulation 63) provides a wide definition of the types of infrastructure that can be funded by CIL, including roads and other transport facilities, flood defences, schools and other educational facilities, medical facilities, sporting and recreational facilities, and open spaces. It is these types of infrastructure to which these restrictions to use of planning obligations apply in order to avoid the opportunity for double charging.
- 1.35 Infrastructure or services that are not capable of being funded by CIL include other types of infrastructure, such as affordable housing, or other services and as CIL infrastructure may only be funded by capital receipts, revenue payments towards any infrastructure items, such as maintenance payments, are not able to be funded through CIL receipts. Use of planning obligation contributions for services or infrastructure which fall outside of the possibilities for CIL funding will remain unaffected by this particular reform as a charging authority could not seek to use CIL monies for such purposes and therefore there could be no risk of double charging. This regulation ensures that the purposes of CIL and planning obligations contributions in an area remain distinct.
- 1.36 A charging authority should set out its intentions for how CIL monies will be spent on the authority's website. If a charging authority did not set out its intentions for use of CIL monies then this would be taken to mean that the authority was intending to use CIL monies for any type of CIL infrastructure, and consequently that authority could not seek a planning obligation contribution towards any such infrastructure.

### **(iii) Limiting pooled contributions towards CIL infrastructure**

- 1.37 The way in which pooled contributions may be sought via planning obligations must be determined based upon whether the contribution is intended towards (a) infrastructure that is capable of being funded by CIL, or (b) items that are not capable of being funded by CIL (see 1.34 and 1.35).
- 1.38 CIL regulation 123 (3) has the effect that from 6 April 2014 and locally on the date that a charging authority's first charging schedule takes effect, whichever is earlier, local planning authorities will no longer be able to seek more than five individual planning obligation contributions towards infrastructure that is capable of being funded by CIL. Local planning authorities should not seek to define individual CIL infrastructure items by breaking them into smaller units or component parts for the purpose of circumventing this policy. For infrastructure that is not capable of being funded by CIL, local planning authorities are not restricted in terms of the numbers of obligations that may be pooled, but they must have regard to the wider policies set out in the proposed Annex.

## Funding for Crossrail

1.39 Crossrail will bring benefits to communities across London and beyond delivering a 10 per cent uplift in public transport capacity and bringing 1.5 million more people within an hour of London's key business areas. The Crossrail funding package is designed to strike a balance between those who will benefit, with businesses, taxpayers and passengers each contributing roughly a third. The funding package, announced by the Prime Minister in 2007, includes £300m from planning obligations and £300m from CIL. The London Mayor's proposals for the Crossrail planning obligation developer contributions, set out in draft Statutory Planning Guidance and the draft Alterations to the London Plan, were subject to an Examination in Public in December 2009. To effectively maintain the ability of planning obligations to raise revenue for Crossrail, the restrictions imposed by CIL regulation 123 (and as described in paragraphs 1.33 to 1.38) will not apply to planning obligations that relate to or are connected with the funding of Crossrail. Crossrail is expected to open from 2017.

## Affordable housing

1.40 Developer contributions towards affordable housing will continue to be made through planning obligations. Planning obligations enable affordable housing contributions to be tailored to the particular circumstances of the site, and crucially, enable affordable housing to be delivered on-site, in support of the policy of mixed communities. The Government considers that affordable housing is a legitimate planning requirement, which will remain within the scope of the new statutory tests applying to planning obligations.

## Guidance and support for local planning authorities

1.41 In light of the changes outlined in the proposed new policy Annex on planning obligations, the Government will review and if necessary replace the current *Planning Obligations: Practice Guidance*, which was published on 1 August 2006 to provide further practical guidance for practitioners in the use of planning obligations.

1.42 The Government is also intending to issue new practice guidance on the use of CIL. The proposed policy Annex may be read alongside these documents as they are published, where relevant.



# Figure 1

## Section 106 of the Town and Country Planning Act 1990 as substituted by the Planning and Compensation Act 1991

### 106 Planning obligations

- (1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A and 106B as “a planning obligation”), enforceable to the extent mentioned in subsection (3)—
  - (a) restricting the development or use of the land in any specified way;
  - (b) requiring specified operations or activities to be carried out in, on, under or over the land;
  - (c) requiring the land to be used in any specified way; or
  - (d) requiring a sum or sums to be paid to the authority on a specified date or dates or periodically.
- (2) A planning obligation may—
  - (a) be unconditional or subject to conditions;
  - (b) impose any restriction or requirement mentioned in subsection (1)(a) to (c) either indefinitely or for such period or periods as may be specified; and
  - (c) 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 obligation is entered into and, if it requires the payment of periodical sums, require them to be paid indefinitely or for a specified period.
- (3) Subject to subsection (4) a planning obligation is enforceable by the authority identified in accordance with subsection (9)(d)—
  - (a) against the person entering into the obligation; and
  - (b) against any person deriving title from that person.
- (4) The instrument by which a planning obligation is entered into may provide that a person shall not be bound by the obligation in respect of any period during which he no longer has an interest in the land.
- (5) A restriction or requirement imposed under a planning obligation is enforceable by injunction.
- (6) Without prejudice to subsection (5), if there is a breach of a requirement in a planning obligation to carry out any operations in, on, under or over the land to which the obligation relates, the authority by whom the obligation is enforceable may—
  - (a) enter the land and carry out the operations; and
  - (b) recover from the person or persons against whom the obligation is enforceable any expenses reasonably incurred by them in doing so.
- (7) Before an authority exercise their power under subsection (6)(a) they shall give not less than twenty-one days’ notice of their intention to do so to any person against whom the planning obligation is enforceable.



- (8) Any person who wilfully obstructs a person acting in the exercise of a power under subsection (6)(a) shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.
- (9) A planning obligation may not be entered into except by an instrument executed as a deed which—
  - (a) states that the obligation is a planning obligation for the purposes of this section;
  - (b) identifies the land in which the person entering into the obligation is interested;
  - (c) identifies the person entering into the obligation and states what his interest in the land is; and
  - (d) identifies the local planning authority by whom the obligation is enforceable.
- (10) A copy of any such instrument shall be given to the authority so identified.
- (11) A planning obligation shall be a local land charge and for the purposes of the [1975 c. 76.] Local Land Charges Act 1975 the authority by whom the obligation is enforceable shall be treated as the originating authority as respects such a charge.
- (12) Regulations may provide for the charging on the land of—
  - (a) any sum or sums required to be paid under a planning obligation; and
  - (b) any expenses recoverable by a local planning authority under subsection (6)(b), and this section and sections 106A and 106B shall have effect subject to any such regulations.
- (13) In this section “specified” means specified in the instrument by which the planning obligation is entered into and in this section and section 106A “land” has the same meaning as in the [1975 c. 76.] Local Land Charges Act 1975.

# Figure 2

## Planning Act 2008, Part 11, Community Infrastructure Levy

### 223 Relationship with other powers

- (1) CIL regulations may include provision about how the following powers are to be used, or are not to be used –
  - (a) section 106 of TCPA 1990 (planning obligations), and
  - (b) section 278 of the Highways Act 1980 (c. 66) (execution of works).
- (2) CIL regulations may include provision about the exercise of any other power relating to planning or development.
- (3) The Secretary of State may give guidance to a charging or other authority about how a power relating to planning or development is to be exercised; and authorities must have regard to the guidance.
- (4) Provision may be made under subsection (1) or (2), and guidance may be given under subsection (3), only if the Secretary of State thinks it necessary or expedient for –
  - (a) complementing the main purpose of CIL regulations,
  - (b) enhancing the effectiveness, or increasing the use, of CIL regulations,
  - (c) preventing agreements, undertakings or other transactions from being used to undermine or circumvent CIL regulations,
  - (d) preventing agreements, undertakings or other transactions from being used to achieve a purpose that the Secretary of State thinks would better be achieved through the application of CIL regulations, or
  - (e) preventing or restricting the imposition of burdens, the making of agreements or the giving of undertakings, in addition to CIL.
- (5) CIL regulations may provide that a power to give guidance or directions may not be exercised –
  - (a) in relation to matters specified in the regulations,
  - (b) in cases or circumstances specified in the regulations,
  - (c) for a purpose specified in the regulations, or
  - (d) to an extent specified in the regulations.

# Figure 3

## Community Infrastructure Levy Regulations 2010, Part 11 Planning Obligations

### 122 Limitation on use of planning obligations

- (1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.
- (2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—
  - (a) necessary to make the development acceptable in planning terms;
  - (b) directly related to the development; and
  - (c) fairly and reasonably related in scale and kind to the development.
- (3) In this regulation—

“planning obligation” means a planning obligation under section 106 of TCPA 1990 and includes a proposed planning obligation; and

“relevant determination” means a determination made on or after 6th April 2010—

  - (a) under section 70, 76A or 77 of TCPA 1990 of an application for planning permission which is not an application to which section 73 of TCPA 1990 applies; or
  - (b) under section 79 of TCPA 1990 of an appeal where the application which gives rise to the appeal is not one to which section 73 of TCPA 1990 applies.

### 123 Further limitations on use of planning obligations

- (1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.
- (2) A planning obligation may not constitute a reason for granting planning permission for the development to the extent that the obligation provides for the funding or provision of relevant infrastructure.
- (3) A planning obligation (“obligation A”) may not constitute a reason for granting planning permission to the extent that—
  - (a) obligation A provides for the funding or provision of an infrastructure project or type of infrastructure; and
  - (b) five or more separate planning obligations that—
    - (i) relate to planning permissions granted for development within the area of the charging authority; and
    - (ii) which provide for the funding or provision of that project, or type of infrastructure, have been entered into before the date that obligation A was entered into.
- (4) In this regulation—

“charging authority” means the charging authority for the area in which the development will be situated;

“funding” in relation to the funding of infrastructure, means the provision of that infrastructure by way of funding;

“determination” means a determination—

- (a) under section 70, 76A or 77 of TCPA 1990 of an application for planning permission which is not an application to which section 73 of TCPA 1990 applies, or
- (b) under section 79 of TCPA 1990 of an appeal where the application which gives rise to the appeal is not one to which section 73 applies;

“planning obligation” means a planning obligation under section 106 of TCPA 1990 and includes a proposed planning obligation but does not include a planning obligation that relates to or is connected with the funding or provision of scheduled works within the meaning of Schedule 1 to the Crossrail Act 2008;

“relevant determination” means—

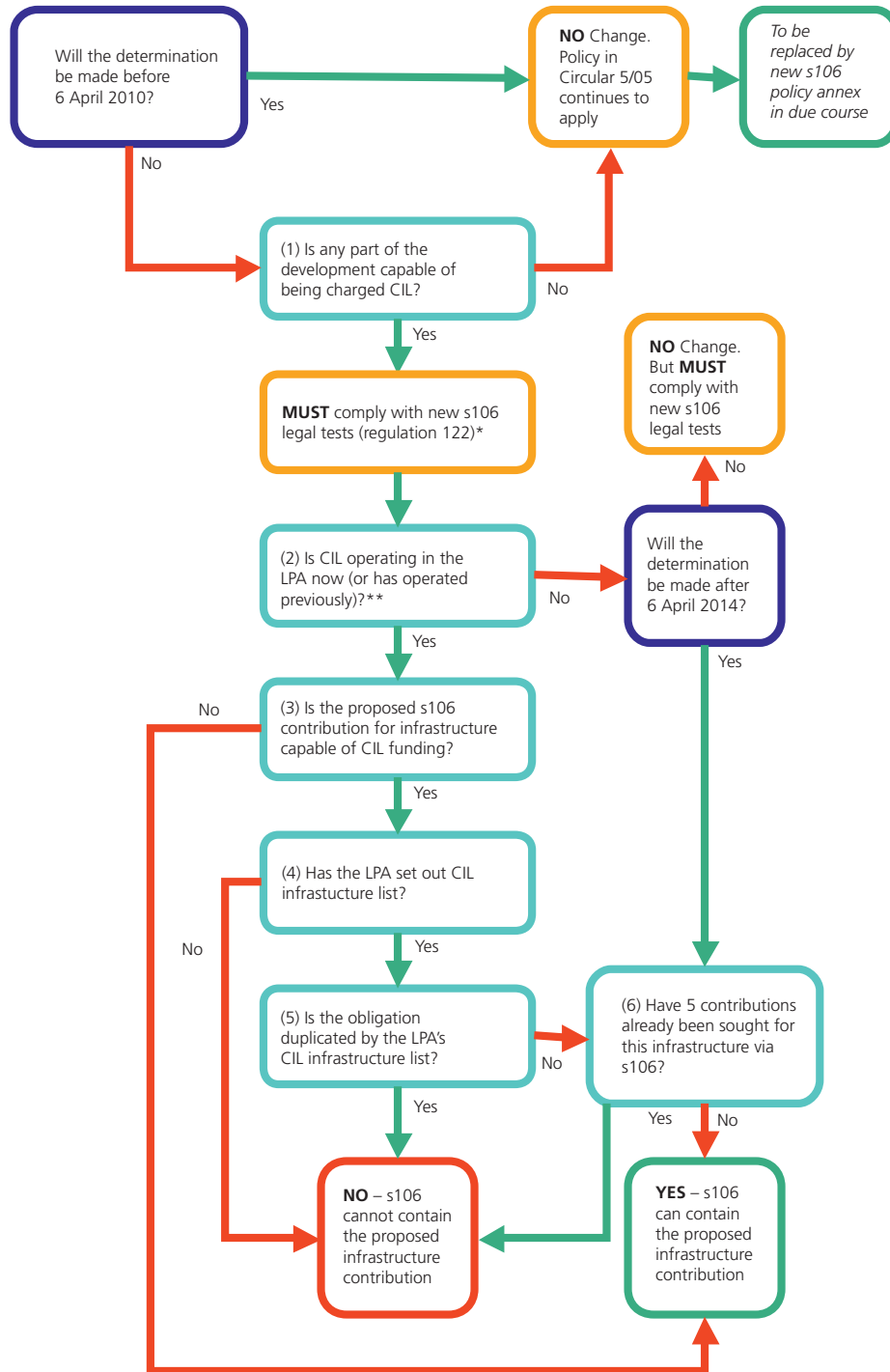
- (a) in relation to paragraph (2), a determination made on or after the date when the charging authority’s first charging schedule takes effect, and
- (b) in relation to paragraph (3), a determination made on or after 6th April 2014 or the date when the charging authority’s first charging schedule takes effect, whichever is earlier; and

“relevant infrastructure” means—

- (a) where a charging authority has published on its website a list of infrastructure projects or types of infrastructure that it intends will be, or may be, wholly or partly funded by CIL, those infrastructure projects or types of infrastructure, or
- (b) where no such list has been published, any infrastructure.

# Figure 4

## Planning obligations reform – decision tree



\* Contributions towards Crossrail are exempted from steps 2-6.

\*\* LPA = Local Planning Authority

# Part 2

## Draft policy Annex on planning obligations

### Introduction

- 2.1 This policy Annex concerns the use of planning obligations. Local planning authorities should be rigorous in ensuring that all obligations used are consistent with this policy.

### Application of this policy Annex

- 2.2 This policy Annex supplements the planning policy statement on development management and should be read in conjunction with it and its other policy annexes, and with other national policy, where relevant.
- 2.3 The policies in this policy Annex should be taken into account by local planning authorities in England in exercising their development management responsibilities, and they are material considerations which must be taken into account in development management decisions, where relevant.
- 2.4 In its final form, this document will replace Office of the Deputy Prime Minister Circular 5/05.

### Use of planning obligations powers

- 2.5 Planning obligations may only be imposed using the statutory powers available. The enabling power is set out in section 106 of the Town and Country Planning Act 1990 as substituted by the Planning and Compensation Act 1991 and as amended by Community Infrastructure Levy Regulations 2010, regulation 122 and 123.

## Use of planning obligations policy

### **PO1 Key principles for the use of planning obligations**

PO1.1 Planning obligations should be used to:

- (i) prescribe the nature of a development;
- (ii) compensate for loss or damage created by a development; or
- (iii) mitigate a development's impact.

PO1.2 The use of planning obligations should be governed by the fundamental principle that planning permission should not be bought or sold. Unacceptable development should not be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms. Similarly, planning obligations should never be used purely as a means of securing for the local community a share in the profits of development.

PO1.3 Where it is not feasible for the proposed development to meet all the requirements set out in local, regional and national planning policies and still be economically viable, decisions on the level of contributions should be based on negotiation with developers over the level of contribution that can be demonstrated as reasonable to be made whilst still allowing development to take place. It is for the local authority and other public sector agencies to decide what is to be the balance of contributions made by developers and by the public sector infrastructure providers in its area supported, for example, by local or central taxation. If, for example, a local authority wishes to encourage development, it may wish to provide the necessary infrastructure itself, in order to enable development to be acceptable in planning terms and therefore proceed, thereby contributing to the sustainability of the local area.

PO1.4 Local planning authorities should use and publish standard heads of terms, agreements or undertakings or model clauses.

PO1.5 In the event that contributions are made towards specific infrastructure provision but the infrastructure is not provided within an agreed timeframe, arrangements should be made within the section 106 agreement for unspent contributions to be returned to developers.

## **PO2 The three planning obligations tests**

PO2.1 Planning permission should only be granted subject to completion of a planning obligation where the obligation meets all of the following tests. A planning obligation should be:

### **(i) necessary to make the development acceptable in planning terms**

Planning obligations should be used to make acceptable development which would otherwise be unacceptable in planning terms in accordance with published local, regional or national planning policies.

### **(ii) directly related to the development; and**

Planning obligations should be so directly related to proposed developments that the development ought not to be permitted without them. There should be a functional or geographical link between the development and the item being provided as part of the agreement.

### **(iii) fairly and reasonably related in scale and kind to the development**

Planning obligations should be fairly and reasonably related in scale and kind to the proposed development. For example, developers may reasonably be expected to pay for or contribute to the cost of all, or that part of, additional infrastructure provision which would not have been necessary but for their development. The effect of the infrastructure investment may be to confer some wider benefit on the community but payments should be directly related in scale to the impact which the proposed development will make. Planning obligations should not be used solely to resolve existing deficiencies in infrastructure provision or to secure contributions to the achievement of wider planning objectives that are not necessary to allow consent to be given for a particular development. There should be a fair and reasonable relationship between what is lost, in terms of infrastructure or facilities removed as part of a proposed development, and what is to be offered to replace that loss. A reasonable obligation should at least seek to restore facilities, resources and amenities to a quality equivalent to that existing before the development.



### **PO3 Maintenance payments**

PO3.1 Where contributions are secured through planning obligations towards the provision of facilities which are predominantly for the benefit of the users of the associated development, local planning authorities should consider whether it may be appropriate for the developer to make provision for subsequent maintenance (for example, physical upkeep) over a given period of time or in perpetuity.

PO3.2 For all maintenance payments, section 106 agreements should set out the type of payments to be made, for example, regular payments or commuted sums, all with a clear audit trail of accountability.

PO3.3 Where an asset is intended for wider public use, the costs of subsequent maintenance and other recurrent expenditure associated with the developer's contributions should be borne by the body or authority in which the asset is to be vested and not through a planning obligation.

### **PO4 Relationship with conditions**

PO4.1 Where there is a choice between imposing conditions and entering into a planning obligation, conditions should be used.

PO4.2 The terms of conditions imposed on a planning permission should not be re-stated in a planning obligation, that is to say, an obligation should not be entered into which requires compliance with the conditions imposed on a planning permission.

### **PO5 Pooled contributions and standard charges**

PO5.1 Where the combined impact of a number of developments creates the need for infrastructure, it may be reasonable for the associated developers' cash contributions via planning obligations to be pooled, in order to allow the infrastructure to be secured in a fair and equitable way.

PO5.2 Where local planning authorities face a choice between the use of planning obligations and the Community Infrastructure Levy (CIL) for the collection of pooled contributions, CIL should be used. CIL is a simpler, fairer and more transparent instrument designed specifically for the collection of such contributions.

PO5.3 The only circumstances in which a local planning authority can seek pooled planning obligations are:

(i) where the developers contributions are towards infrastructure or services, that is not capable of being funded by CIL; or

(ii) in exceptional circumstances, developer contributions towards infrastructure that is capable of being funded by CIL, but that is not intended by the authority to be funded by CIL, from no more than five separate planning obligations.

PO5.4 Where local impact mitigation necessitated by the cumulative impact of a series of developments is provided by a local authority or other body before all the developments have come forward, the later developers should still be required to contribute the relevant proportion of the costs.

PO5.5 When pooled contributions are sought via planning obligations, local authorities should employ formulae and standard charges, as part of their framework for negotiating and securing planning obligations. However, where they propose to rely on standard charges and formulae local planning authorities should publish their levels in advance in a public document. The publication of information about standard charges should include information about any charges to be applied for preparing and completing the planning obligation agreement itself.

PO5.6 Standard charges and formulae should not be applied in blanket form regardless of actual impacts, but there should be a consistent approach to their application.

## **PO6 Planning framework**

PO6.1 The process of setting planning obligations policies should be conducted as openly, fairly and reasonably as possible.

PO6.2 Local planning authorities should include the matters which they will seek to address in planning obligations (and factors to be taken into account when considering the scale and form of contributions) in Development Plan Documents.

PO6.3 Policies applying the principles set out in Development Plan Documents (e.g. application to specific localities and likely amount of contributions) should be included in Supplementary Planning Documents including how or when such charges may be revised.

PO6.4 Where local planning authorities do not have local policies in place they should set out the implications for planning obligations in a Supplementary Planning Document, based upon policies in this Annex.

## **PO7 Transparency, reporting and implementation**

PO7.1 Members of the public should be given every reasonable assistance in locating and examining proposed and agreed planning obligations which are of interest to them.

- PO7.2 Local planning authorities should as a minimum, record on the Planning Register agreed heads of terms at the start of the application process when the application is received, followed by any significant changes to draft agreements. Where applications involving planning obligations are considered by a committee, agreed heads of terms for obligations should be included in committee papers and open to public inspection.
- PO7.3 In addition, to strengthen the information provided to local communities about how planning obligations have been delivered by developers, 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 received that remain unspent and their intended use.
- PO7.4 Agreed planning obligations should be implemented or enforced in an efficient and transparent way, to ensure that contributions are spent on their intended purpose and that the associated development contributes to the sustainability of the area. Local planning authorities should therefore monitor the delivery of agreed planning obligations.

## **PO8 Appeals, modifications and discharge**

- PO8.1 Where there is a choice, local planning authorities should seek the variation of obligations by agreement between the parties as opposed to using formal application and appeal procedures.

# Part 3

## About this consultation

- 3.1 This consultation document and consultation process have been planned to adhere to the code of practice on consultation issued by the Department for Business, Innovation and Skills and is in line with the seven consultation criteria, which are:
- Formal consultation should take place at a stage when there is scope to influence the policy outcome.
  - Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
  - Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
  - Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
  - Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
  - Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
  - Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.
- 3.2 Representative groups are asked to give a summary of the people and organisations they represent, and where relevant who else they have consulted in reaching their conclusions when they respond.
- 3.3 Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).
- 3.4 If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory code of practice with which public authorities must comply and which deals, amongst other things, with obligations

of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

- 3.5 The Department for Communities and Local Government will process your personal data in accordance with DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties. Individual responses will not be acknowledged unless specifically requested.
- 3.6 Your opinions are valuable to us. Thank you for taking the time to read this document and respond.
- 3.7 Are you satisfied that this consultation has followed these criteria? If not or you have any other observations about how we can improve the process please contact:

CLG Consultation Co-ordinator  
Zone 6/H10  
Eland House  
London  
SW1E 5DU

or by email to: [consultationcoordinator@communities.gsi.gov.uk](mailto:consultationcoordinator@communities.gsi.gov.uk)

# Part 4

## 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. **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](mailto: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:	
Position:	
Name of organisation (if applicable):	
Address:	
Email Address:	
Telephone number:	

#### (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

**(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

## (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)?**

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

### 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)?**

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

### 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)?**

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



#### **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).<sup>1, 2</sup>

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

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

#### **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)?**

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

<sup>1</sup> CLG (2009) Improving the use and discharge of planning conditions: Consultation (see: [www.communities.gov.uk/publications/planningandbuilding/improvingplanningconditions](http://www.communities.gov.uk/publications/planningandbuilding/improvingplanningconditions))

<sup>2</sup> CLG (2009) Development Management: Proactive Planning from Pre-Application to Delivery- Consultation (see: [www.communities.gov.uk/publications/planningandbuilding/developmentmanagementconsult](http://www.communities.gov.uk/publications/planningandbuilding/developmentmanagementconsult))

### 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)?**

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

**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?**

### 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)?**

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

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?**

### **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)?**

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

### **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?**

### **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.**

# Part 5

## Consultation stage impact assessment

Summary: Intervention & Options		
<b>Department /Agency:</b> CLG	<b>Title:</b> Impact Assessment of reform of use of planning obligations	
<b>Stage:</b> Consultation	<b>Version:</b> 1	<b>Date:</b> 25 March 2010
<b>Related Publications:</b> Final Impact Assessment of Community Infrastructure Levy; Circular 5/05: Planning Obligations		

### Available to view or download at:

[www.communities.gov.uk/planningandbuilding/planning/planningpolicyimplementation/planningobligations/](http://www.communities.gov.uk/planningandbuilding/planning/planningpolicyimplementation/planningobligations/)

**Contact for enquiries:** Natasha Trinidad

**Telephone:** 0303 444 1679

### What is the problem under consideration? Why is government intervention necessary?

Following the introduction of the Community Infrastructure Levy (CIL), there is significant opportunity for confusion about the respective purposes of planning obligations and CIL which could put at risk the effective take up and use of each instrument. In addition, there is a risk that the use of planning obligations could overlap with that of CIL, which could result in applicants unfairly being asked to contribute towards the same items twice. Furthermore, the Government considers that planning obligations are no longer a suitable basis for standard charges and more generalised pooled contributions in light of the introduction of CIL which was designed explicitly as a simpler, fairer, and more transparent instrument to fund such contributions.

### What are the policy objectives and the intended effects?

The Government's objectives are:

- To clarify the purposes of planning obligations in the light of the introduction of CIL.
- To prevent the opportunity for applicants to be asked to make a contribution towards the same item of infrastructure twice through local use of both planning obligations and CIL.
- To place standard tariff-style charges on a better statutory basis by limiting the use of planning obligations for these purposes in favour of the use of CIL.
- To revise the existing policy document, Circular 5/05, to contribute to a more strategic and streamlined national policy framework which clearly sets out the policies that should guide plan making and decision taking at the local level.

**What policy options have been considered? Please justify any preferred option.**

**Option 1** ('do nothing') is to continue with the current system of planning obligations for securing developer contributions, with no regard to the introduction of CIL, and not to streamline the existing Circular 5/05.

**Option 2** is to reform the use of planning obligations in light of the introduction of CIL, and to revise and streamline the Government's policy document, Circular 5/05, accordingly.

Option 2 is preferred, because it will clarify the purpose of planning obligations, ensure that use of planning obligations and CIL will be complementary and not overlap, and encourage the use of CIL for pooled or more general contributions as CIL is a simpler, fairer, more transparent instrument designed explicitly for such purposes.

**When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?**

As part of the review of the effectiveness of the CIL, a formal evaluation of changes made to the use of planning obligations will be held five years after the CIL regulations come into force. The Government and Welsh Ministers will be continuing to work closely with industry and local government to ensure CIL and the new policy on the use of planning obligations is implemented effectively. Evaluation will build on existing evidence from three 'Valuing Planning Obligations' surveys and information about the revenues generated through CIL.

**Ministerial Sign-off** For Consultation Stage Impact Assessment:

***I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.***

Signed by the responsible Minister:



A handwritten signature in black ink, appearing to read 'J. Healy', with a horizontal line underneath it.

**Date:** 18 March 2010

## Summary: Analysis & Evidence

**Policy Option: 2**

**Description: Reform use of planning obligations, and revise and streamline the Government's policy document, Circular 5/05, accordingly**

<b>COSTS</b>	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups'.
	<b>One-off</b> (Transition)	<b>Yrs</b>	
	£		
	<b>Average Annual Cost</b> (excluding one-off)		
	£		<b>Total Cost (PV)</b> £
Other <b>key non-monetised costs</b> by 'main affected groups'			
Local planning authorities operating an existing planning obligations tariff scheme may need to convert to the Community Infrastructure Levy (CIL) after a transitional period should they wish to continue seeking such contributions, and so incur new costs in establishing and operating a CIL.			

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups'
	<b>One-off</b>	<b>Yrs</b>	
	£		
	<b>Average Annual Benefit</b> (excluding one-off)		
	£		<b>Total Benefit (PV)</b> £
Other <b>key non-monetised benefits</b> by 'main affected groups'			
Planning obligations reform will provide greater certainty to developers, prevent burdens that are inconsistent with Government policy and also ensure that use of planning obligations and CIL in an area does not result in developers being charged twice for the same item of infrastructure.			

**Key Assumptions/Sensitivities/Risks** A risk to the effectiveness of the policy is a protracted downturn in land values, which may delay take up of CIL, meaning that scaling back planning obligations could in the short term result in reduced revenues for authorities to support development.

<b>Price Base Year</b>	<b>Time Period Years</b>	<b>Net Benefit Range (NPV)</b> £	<b>NET BENEFIT (NPV Best estimate)</b> £
------------------------	--------------------------	-------------------------------------	---

What is the geographic coverage of the policy/option?		England & Wales			
On what date will the policy be implemented?		CIL regulations will come into force on 6 April 2010, including provisions for reform of s106. The proposed policy Annex will be implemented in Autumn 2010.			
Which organisation(s) will enforce the policy?		LPAs			
What is the total annual cost of enforcement for these organisations?		£ N/A			
Does enforcement comply with Hampton principles?		Yes			
Will implementation go beyond minimum EU requirements?		N/A			
What is the value of the proposed offsetting measure per year?		£ N/A			
What is the value of changes in greenhouse gas emissions?		£ N/A			
Will the proposal have a significant impact on competition?		No			
Annual cost (£-£) per organisation (excluding one-off)		Micro	Small	Medium	Large
Are any of these organisations exempt?		No	No	No	No
<b>Impact on Admin Burdens Baseline</b> (2005 Prices) (Increase – Decrease)					
Increase of £		Decrease of £		<b>Net Impact £</b>	
Key:	<b>Annual costs and benefits: Constant Prices</b>		<b>(Net) Present Value</b>		

## Evidence Base (for summary sheets)

### Background

Planning obligations (also known as section 106 agreements – of the Town and Country Planning Act 1990) are private agreements made between local authorities and developers and can be attached to a planning permission to make acceptable development which would otherwise be unacceptable in planning terms.

Such obligations can prescribe the nature of development (for example, requiring a given portion of housing is affordable), compensate for loss or damage created by a development (for example, loss of open space), or mitigate a development's impact (for example, through increased public transport provision). The Government's policy, set out in Circular 5/05,<sup>3</sup> requires amongst other factors, that planning obligations are only sought where they meet all of the following tests:

- (i) relevant to planning;
- (ii) necessary to make the proposed development acceptable in planning terms;
- (iii) directly related to the proposed development;
- (iv) fairly and reasonably related in scale and kind to the proposed development; and
- (v) reasonable in all other respects.

The current system of planning obligations, however, may be used for purposes wider than their original intentions to mitigate development specific impact facilitating the granting of planning permission, which can place unfair burdens upon developers. Concerns have also been raised about inconsistency in the use of planning obligations between different local authorities, a lack of transparency and of accountability in ensuring that contributions are used for the purposes for which they are sought and that agreements can sometimes take too long to negotiate, often involving high legal costs, which can frustrate or delay development.

Through the introduction of the Community Infrastructure Levy (CIL) the Government has created a new simpler, fairer, and more transparent system designed explicitly for the collection of standardised more general developer contributions to support the development of areas.

Reform of planning obligations is required to clarify the purpose of planning obligations and particularly in light of the introduction of CIL ensure that purposes of each instrument does not overlap as this could undermine their use and effectiveness and create the opportunity whereby an applicant could be charged twice for the same infrastructure through use of both planning obligations and CIL in an area.

<sup>3</sup> ODPM (2005) Circular 05/05: Planning Obligations (see: [www.communities.gov.uk/publications/planningandbuilding/circularplanningobligations](http://www.communities.gov.uk/publications/planningandbuilding/circularplanningobligations))



Through the Final CIL Regulations 2010 the Government has introduced new restrictions upon how planning obligations can be used – these are detailed below.

This reform of the planning obligations regime responds to recommendations of the Barker Review of Housing Supply, which called for a scale back of planning obligations to cover direct impacts and mitigation along with affordable housing; and more recently the recommendations of the Killian Pretty Review, which reaffirmed the call to scale back the use of planning obligations.

The Government committed in the Planning White Paper 2007 to significantly streamline the planning policy framework to achieve a more strategic, clear and focussed framework. The Killian Pretty review of the development management process reinforced the need to review the planning framework and recommended that it should be more user-friendly. Circular 5/05 currently contains a mixture of policy, legal commentary and guidance. The proposed new document will be streamlined to focus solely on policy, and will be organised around the key planning processes of plan making and development management.

The costs and benefits of changes to the use of planning obligations brought about by CIL Regulations 2010 have been set out as part of the CIL Final Impact Assessment,<sup>4</sup> which was published on 10 February 2010. This Impact Assessment provides more detail of the policy and its impacts.

## Rationale for intervention

The CIL Regulations 2010 introduced a number of changes to how planning obligations may be used. Intervention is required to ensure that planning obligations are appropriately used and that their continued use does not undermine the take up and use of CIL. In light of these changes a new policy document on the use of planning obligations is required to articulate these reforms and update the existing policy contained in Circular 5/05.

## Objectives

There are four key objectives

- To clarify the purposes of planning obligations in light of the introduction of CIL.
- To prevent the opportunity for applicants to be asked to make a contribution towards the same item of infrastructure twice through local use of both planning obligations and CIL.
- To place standard tariff-style charges on a better statutory basis by limiting the use of planning obligations for these purposes in favour of the use of CIL.

<sup>4</sup> CLG (2010) Final CIL Impact Assessment (see: [www.communities.gov.uk/publications/planningandbuilding/infrastructurelevyfinal](http://www.communities.gov.uk/publications/planningandbuilding/infrastructurelevyfinal))

- To revise the Government’s existing policy document, Circular 5/05, to contribute to a more strategic and streamlined national policy framework which clearly sets out the policies that should guide plan making and decision taking at the local level.

## Description of the proposal (Option 2)

### **(a) Reforming the use of planning obligations**

Planning obligations are reformed as part of the package of CIL regulations in three respects:

- (i) putting the Circular 5/05 tests on a statutory basis for developments which are capable of being charged CIL;
- (ii) ensuring the local use of CIL and planning obligations does not overlap; and
- (iii) limiting pooled contributions towards infrastructure which may be funded by CIL.

### ***(i) Making the Circular 5/05 tests statutory for CIL development***

The CIL regulations place into law for the first time the Government’s policy tests on the use of planning obligations. From 6 April 2010 it will be unlawful for a planning obligation to be taken into account when determining a planning application for a development, or any part of a development, that is capable of being charged CIL if the obligation does not meet all of the following tests:

- (a) necessary to make the development acceptable in planning terms;
- (b) directly related to the development; and
- (c) fairly and reasonably related in scale and kind to the development.

Developments which are capable of being charged CIL includes most buildings that people normally use. Such development is considered capable of being charged CIL whether there is a local CIL in operation or not. Buildings into which people do not normally go, and buildings into which people go only intermittently, for example, for the purpose of inspecting or maintaining fixed plant or machinery, will not be liable for CIL charges. For developments that are not capable of being charged CIL, the policy tests in Circular 5/05, along with the other policy therein, continues to apply, until it is replaced by the proposed new policy document.

The statutory tests are intended to clarify the purpose of planning obligations in light of CIL, improve the effectiveness of their use and negotiation and provide a stronger basis to dispute planning obligations policies, or practice, that breach these criteria. This seeks to reinforce the purpose of planning obligations in seeking only essential local contributions

towards the granting of planning permission, rather than more general contributions which are better suited to use of CIL.

***(ii) Ensuring the local use of CIL and planning obligations does not overlap***

Upon the local adoption of CIL, the local use of planning obligations will be restricted in relation to the intended use of local CIL monies. Where a charging authority sets out that it intends to fund an item of infrastructure via CIL then that authority can not seek a planning obligation contribution towards the same item of infrastructure. This is to ensure that individual developments are not charged for the same items through use of both planning obligations and CIL and prevents any opportunity for 'double charging'.

CIL monies may only be spent on a given range of infrastructure. The CIL regulations provide a wide definition of the types of infrastructure that can be funded by CIL, including roads and other transport facilities, flood defences, schools and other educational facilities, medical facilities, sporting and recreational facilities, and open spaces. It is these types of infrastructure to which restrictions to use of planning obligations apply in order to avoid the opportunity for double charging.

Infrastructure or services that are not capable of being funded by CIL include other types of infrastructure, such as affordable housing, or other services and as CIL infrastructure may only be funded by capital receipts, revenue payments towards any infrastructure items, such as maintenance payments, are not able to be funded through CIL receipts. Use of planning obligation contributions for services or infrastructure which fall outside of CIL infrastructure will remain unaffected by this particular reform as a charging authority could not seek to use CIL monies for such purposes and therefore there could be no risk of double charging. This regulation ensures that the purposes of CIL and planning obligations contributions in an area remain distinct.

A charging authority should set out its intentions for how CIL monies will be spent on the authority's website. If a charging authority does not set out its intentions for use of CIL monies then this would be taken to mean that the authority was intending to use CIL monies for any type of CIL infrastructure, and consequently that authority could not seek a planning obligation contribution towards any such infrastructure.

***(iii) Limiting pooled contributions towards CIL infrastructure***

The way in which pooled contributions may be sought via planning obligations must be determined based upon whether the contribution is intended towards (a) infrastructure that is capable of being funded by CIL, or (b) items that are not capable of being funded by CIL.

From 6 April 2014 and locally on the date that a charging authority's first charging schedule takes effect, whichever is earlier, local planning authorities will no longer be able to seek more than five individual planning obligation contributions towards infrastructure that is capable of being funded by CIL. Local planning authorities should not seek to define

individual CIL infrastructure items by breaking them into smaller units or component parts for the purpose of circumventing this policy. For infrastructure that is not capable of being funded by CIL, local planning authorities are not restricted in terms of the numbers of obligations that may be pooled.

### *Affordable housing*

Developer contributions towards affordable housing will continue to be made through planning obligations. Planning obligations enable affordable housing contributions to be tailored to the particular circumstances of the site, and crucially, enable affordable housing to be delivered on-site, in support of the policy of mixed communities. The Government considers that affordable housing is a legitimate planning requirement, which will remain within the scope of the new statutory tests applying to planning obligations.

## **(b) Streamlining policy on planning obligations**

In planning, streamlining is the process of separating policy from guidance, organising policy material around the key planning processes (plan making and decision taking), and removing policy duplication. The aim is a strategic and user-friendly planning framework. Circular 5/05 is the Government's current policy document on the use of planning obligations. This document contains a mixture of policy, legal commentary and guidance. The proposed new document is focussed solely on policy. The consultation will seek the views of stakeholders about what new guidance on the use of planning obligations may be required.

## Cost benefit analysis – Option 2

### **(a) Reforming the use of planning obligations**

#### ***Impact on revenues***

The change in revenues as a result of the reform may be regarded as having zero net benefit – revenues are a transfer from developers (who pay higher costs for development) to local authorities (who receive additional funding to support development).

The CIL Final Impact Assessment estimated that potentially 65-78 per cent of LAs would implement a CIL in their area, in 2016 – and that additional revenues, following the introduction of CIL and the scaling back of planning obligations, would be about £550-850m. Modelling took account of the impact on local viability of the cost to developers of making contributions towards items other than affordable housing from planning obligations. Research commissioned by CLG estimates that the value of these planning obligations was about £1.5bn in 2005-06.<sup>5</sup> This figure was then up-rated to reflect long-run house price inflation, and reduced by 75 per cent, as a proxy for the effect of scaling back planning obligations.

<sup>5</sup> *Valuing Planning Obligations in England: Update Study for 2005-06*, Sheffield University, 2008. (see: [www.communities.gov.uk/publications/planningandbuilding/obligationsupdatestudy](http://www.communities.gov.uk/publications/planningandbuilding/obligationsupdatestudy))

In practice, the scaling back of planning obligations will have a number of additional effects on revenues. Firstly, some local authorities will be incentivised to take up CIL who would otherwise not have done so. Secondly, some local authorities will be able to generate higher revenues from CIL by charging a higher rate than the £5,000 or £10,000 per dwelling assumed in the Impact Assessment. Thirdly, the introduction of CIL alongside the scaling back of planning obligations will provide developers with more upfront certainty about the size of developer contributions, and this should unlock additional development, generating additional revenue from both planning obligations and CIL. The revenue modelling in the CIL Final Impact Assessment does not capture all of these effects, because of data limitations and inherent uncertainties. In practice, the situation in each local authority is different – we did not estimate the precise mix of planning obligations and CIL revenues.

### **Benefits**

Reform of planning obligations, alongside the introduction of CIL, should encourage authorities to take up a CIL in their area. CIL is an instrument that has been expressly designed to seek general developer contributions, as opposed to specific contributions to mitigate development impact which is the role of planning obligations. CIL has many benefits over planning obligations with respect to such standard contributions, including greater transparency, fairness, simplicity and predictability for developers. Furthermore, local planning authorities have greater flexibility in terms of how they use contributions collected via CIL as opposed to planning obligation contributions which must be used directly in relation to a planning impact of a specific development.

#### *Greater certainty for developers on use of planning obligations*

The new statutory tests for use of planning obligations in relation to development that is capable of being charged CIL will provide a much stronger basis to dispute any policies or practice that breach these criteria. As a result, the opportunity for abuse of the planning obligations regime in terms of seeking contributions that do not accord with the Government's policies should be reduced. This should provide greater clarity and predictability on what contributions may be sought by local authorities from applicants to make their proposed developments acceptable in planning terms.

#### *Fairer and reduced burdens on developers*

Only 14 per cent of residential planning permissions and 7 per cent of those for offices had planning obligations attached to them, and the majority of these contributions are skewed towards major development sites.<sup>6</sup> Reaffirming the purpose of planning obligations should reduce the more general contributions, better and more fairly sought via CIL, that are being provided by developers on major development sites.

<sup>6</sup> *Valuing Planning Obligations in England: Update Study for 2007-08*, Sheffield University, 2010. (see: [www.communities.gov.uk/planningandbuilding/planning/planningpolicyimplementation/planningobligations/](http://www.communities.gov.uk/planningandbuilding/planning/planningpolicyimplementation/planningobligations/))

Government policy on the use of planning obligations, as set out in Circular 5/05, is capable of being a material consideration, but is not binding upon local planning authorities. With the proposed reforms, it will be unlawful for contributions to be sought from applicants in relation to development capable of being charged CIL that is not consistent with Government policies, which could reduce such burdens on developers. The CIL Final Impact Assessment assumed that, following the introduction of CIL and the accompanying reform of the use of planning obligations, there will be a neutral effect overall on the administrative burdens for developers.

A further benefit for developers is that they can not be asked to make a contribution towards an item of infrastructure via planning obligations that the local planning authority is also intending to fund through a local CIL. This prevents the opportunity to place an unreasonable double burden upon developers and reduces the scope for lengthier negotiation of planning obligations that would surely arise if the same items of infrastructure were being sought through both instruments.

## **Costs**

### *Loss of some wider benefits secured by planning obligations*

Some local planning authorities may have operated planning obligations policies and practice which disregarded the Government's policy tests in Circular 5/05 with the intention of securing wider benefits for the community, unconnected to mitigating a specific planning impact. Such contributions concerning developments capable of being charged CIL will be unlawful as a result of these reforms. This could result in a loss of funding for infrastructure or services that were previously reliant on such contributions. However, we envisage that CIL will cover such generalised contributions in the future.

### *Existing tariff schemes may need to convert to CIL*

Local authorities with existing planning obligations tariff schemes seeking contributions towards items that could be funded by CIL will be prevented from continuing such a scheme after a transitional period of four years (unless they adopt CIL prior to that point). This will mean that should an authority wish to continue seeking such contributions after this point then they would need to introduce a local CIL. Research indicates that currently around 12 per cent of local planning authorities in England operate a planning obligation tariff in their areas. There will be some initial set-up costs for those authorities that choose to introduce a CIL and ongoing costs associated with its operation. These costs are discussed in more detail in the CIL Final Impact Assessment.

## **(b) Streamlining policy on planning obligations**

It has not been possible to robustly quantify the benefits and costs of streamlining policy given the inherent difficulties of assessing the impact of changes in the way that policy is structured and presented. However, analysis for the Killian Pretty Review provides some context for what the benefits of streamlining could look like if they were implemented across the planning system as a whole.

The Killian Pretty review considered that if Government overhauled and simplified the national policy framework and the secondary legislation for the process of planning applications, this would enable faster and more effective handling of applications by reducing the inherent complexity in the process. They estimated that this complexity costs applicants a total of £750m per year in consultants and legal fees, and that a 10 per cent reduction could save applicants £75m per year and local authorities £30m per year.

### **Benefits**

*Practitioners are clear about what is expected of them, and on which matters they have discretion.*

Separating policy from guidance enables policy documents to be short and focused on policy requirements only. The benefit for users is that the outcomes they should be working towards are clear, as are the policy principles that they are expected to follow to deliver these objectives. As guidance is set out separately from policy, this indicates that there is discretion in the way in which users (primarily local authorities) can deliver the outcomes and policy principles. Being clear where there is discretion and flexibility encourages local authorities to consider what is best for their local circumstances, by using or adapting the guidance as they see fit, or developing their own approach.

### *Resource and time savings*

Restructuring the policy documents with key users in mind has an important 'reading and complying benefit' for many users – they don't have to read the whole policy document to ensure they have not missed a crucial instruction, but can dip in and out of the document as necessary. This translates into resource savings for local authorities and applicants for planning permission, speedier plans and decisions, and better applications for development, which have a greater chance of success (and hence lead to fewer planning appeals).

### **Costs**

#### *Familiarisation with existing policy*

There are likely to be some familiarisation costs for local authorities, regions and developers using the streamlined policy document. However, we expect these costs to be minimal given that the five tests approach remains the same. Any costs should be quickly offset by the savings in compliance costs derived from presenting Government planning policy in a streamlined way, as suggested by the evidence from the Killian Pretty review.



## Specific impact tests

### **Competition assessment**

We do not anticipate this policy proposal having an adverse impact upon fair and open business competition. The increased emphasis on the clarity of purpose for use of planning obligations is likely to have a beneficial impact on competition through reducing existing distortions which may be regarded as rewarding developers' ability to negotiate.

### **Small firms' impact test**

There is no anticipated adverse impact upon small firms. Rather, the proposals should reduce the burdens placed upon all developers through the use of planning obligations. The role of planning obligations becomes more clearly defined in terms of the need to address specific impact caused by development rather than more general contributions for the benefit of the area.

### **Legal aid impact test**

There is no anticipated impact upon legal aid.

### **Sustainable development, carbon assessment, other environment**

We do not anticipate an adverse impact on sustainable development, carbon emissions or other environmental matters. The proposals will help to continue to deliver sustainable development by focussing the role of planning obligations upon the direct impact mitigation of proposed developments.

### **Health impact assessment**

There are no anticipated direct impacts for health.

### **Race, disability and gender equality**

There is no anticipated impact on race, disability and gender equality.

### **Human rights**

These proposals are not expected to impact negatively on human rights.

### **Rural proofing**

These proposals apply to local planning authorities and applicants in both urban and rural areas. It is not anticipated that there would be negative impacts in rural areas. Improving transparency in terms of how developer contributions are made and used may improve public attitudes to development and tackle opposition to development, particularly in rural areas, where there can be significant opposition to new development.



## Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

**Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.**

Type of testing undertaken	Results in Evidence Base?	Results annexed?
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

ISBN: 978-1-4098-2358-2

ISBN 978-1-4098-2358-2



9 781409 823582