

# **EAST AYRSHIRE COUNCIL**

**CABINET: 22 APRIL 2009**

## **REVISION OF CIRCULAR 12/1996: PLANNING AGREEMENTS**

### **Report by Depute Chief Executive / Executive Director of Corporate Support**

#### **1. PURPOSE OF REPORT**

- 1.1 To advise the Cabinet, obtain the Cabinet's views and to seek the homologation of a draft Council response already sent to the Scottish Government on a revised Scottish Government publication entitled 'Revision of Circular 12/1996: Planning Agreements, Consultation Paper' which was issued for consultation in December 2008.

#### **2. BACKGROUND INFORMATION**

- 2.1 The Scottish Government has produced a consultation paper on the Revision of Circular 12/1996: Planning Agreements (referred to in this report as 'draft circular') which focuses on making improvements to the current system of planning agreements as set out in Section 75 of the Town and Country Planning (Scotland) Act 1997. When the relevant parts of the Planning etc (Scotland) Act 2006 come into force it will introduce changes to the planning agreement process and further guidance will be prepared to support the introduction of the provisions of the 2006 Act as appropriate. However, the Scottish Government's underlying policy and approach to planning agreements will remain largely as set out in the draft Revision of Circular 12/1996. The First Minister has postponed a previously planned wider review of Planning Obligations under the Planning etc. (Scotland) Act 2006 in order to avoid additional burdens on the development industry during the current period of economic uncertainty.
- 2.2 The draft circular provides guidance on the circumstances in which planning agreements should be used and on how they can best be effectively concluded, the Scottish Government being concerned that the time taken to conclude of planning agreements could possibly act as a disincentive to development by slowing up the planning process. The draft Circular is intended to promote greater efficiency. Responses to the document were sought by 10 April 2009. A copy of this report was sent to the Scottish Government within this timescale and it is now requested that Cabinet homologate this draft response.
- 2.3 It should be noted that the term 'planning agreements' as referred to in the draft circular covers all types of Section 75 Agreements which are entered into as part of the planning application process. The Council's Developer Contributions Strategy and list of projects which was approved by Cabinet on 17 December 2008 is linked to this process as developers of housing sites may require to enter into Section 75 agreements relating to the contribution of funds towards those projects approved by Cabinet. In addition to this, a Section 75 agreement may also be required for those

developers who, as part of their housing developments, are required to provide an element of affordable housing and other examples include roads improvements, traffic calming, sewer upgrades and SUDS schemes.

### **3. THE USE OF PLANNING AGREEMENTS: SCOPE AND LIMITATIONS**

- 3.1 It is stated in the draft circular that planning agreements can have a useful role to play in the development management process where they can be used to overcome obstacles to the grant of planning permission. This means that developments can be permitted, enhanced and potentially negative impacts mitigated. The Scottish Government is, however, clear that planning agreements should always be between willing parties and that it is not acceptable for a developer to be required to enter into a planning agreement.
- 3.2 Concerns have been raised with the Scottish Government about the extent of planning agreement usage and the levels of contributions being sought by planning authorities. It is stated that planning agreements must have a relevant planning purpose and must always be related and proportionate in scale and kind to the development in question.
- 3.3 As with the existing Circular 12/1996, the draft circular sets out a number of policy tests stating that planning agreements should only be sought where they meet all of the following tests:
- Where they are necessary to make the proposed development acceptable in planning terms;
  - Where they serve a planning purpose and be relevant to the published development plan of the authority;
  - Where they directly relate to the proposed development;
  - Where they fairly and reasonably relate in scale and kind to the proposed development; and
  - Where they are reasonable in all other aspects.
- 3.4 The draft circular introduces a 'sequential test of necessity' for planning agreements as the Scottish Government is of the opinion that there are only limited circumstances in which a planning agreement may be justified and that planning authorities should investigate other methods of restriction or regulation before opting for a Section 75 Agreement. The planning authority should, with the developer, consider the following options in sequence:
- i) The use of a planning condition. This is quick and inexpensive and should be used wherever possible.
  - ii) The use of a legal agreement under a different statute such as Section 69 of the Local Government (Scotland) Act 1973. Under this Act, local authorities can "do anything.....which is calculated to facilitate, or is conducive or incidental to, the discharge of their functions". This allows agreements to be made which include the payment of money or transfer of assets to a local authority.

- iii) The use of a planning agreement under Section 75 of the Town and Country Planning (Scotland) Act. Planning authorities should only seek to use this form of agreement where successors in title must be bound by the required obligation. An example of this is where phased contributions may be required. Otherwise, consideration of alternative means of securing the required obligation should be considered and if necessary, options i) and ii) revisited.

#### **4. DEVELOPMENT PLAN LED APPROACH**

- 4.1 A key objective of the Scottish Government is to improve the speed, efficiency and transparency of the process of preparing and agreeing planning agreements. One notable difference between this draft circular and the existing Circular 12/1996 is that there is a stronger emphasis on the role of development plans in setting out a clear understanding of infrastructure requirements and, from that, policy on planning agreements and that the early identification of expected contributions in Supplementary Guidance should follow.
- 4.2 Under the development plan led approach advocated in the draft circular, it is stated that the local (development) plan should be the point at which consideration begins of the potential need for, and use of, planning agreements. The adoption of formal policies and associated supplementary guidance on the use of planning agreements is strongly encouraged as this gives the local community and development industry the opportunity to become involved in the process and provides early clarification on expected levels of contributions that may be sought from developers. It is, however, recognised that development plans cannot anticipate every situation where a need for a planning agreement will arise and that when the need for an agreement materialises during the planning application process, planning authorities should assess this against the guidance contained in the Circular.
- 4.3 In drafting development plan policies, the broad principles including the items for which contributions will be sought and the occasions when they will be sought should be set out in the local (development) plan and be subject to scrutiny or examination. Methodologies and exact levels of contributions should be included in supplementary guidance and should reflect the guidance set out in the draft circular.

#### **5. PLANNING AGREEMENTS AND DEVELOPMENT MANAGEMENT**

- 5.1 The guidance relating to Development Management in the draft circular is similar to that contained in the existing Circular 12/1996 in that emphasis is placed on reducing delays to the granting of planning consent by ensuring that all parties can proceed as quickly as possible towards resolution of heads of terms to be included in an agreement. It is stated that this should occur during pre-application discussion or, at the latest, in parallel with the planning application so that the heads of terms are already a matter of record should an appeal be lodged.
- 5.2 Once it has been decided that a planning agreement is required, negotiation on the proposed heads of terms should proceed quickly, taking account of the infrastructure

requirements identified in the development plan or associated supplementary guidance and the particular circumstances of the proposal.

- 5.3 The draft circular states that applicants must be advised as soon as possible that the planning authority is minded to grant planning permission subject to both parties concluding a planning agreement. Planning agreements should contain only those matters that are justified when considered against the tests set out in the draft circular and agreements should be restricted to specific purposes. It is not considered appropriate to include all other matters such as those conditions attached to the associated planning permission.

## **6. EAST AYRSHIRE COUNCIL RESPONSE**

- 6.1 There are few major changes from the existing Circular 12/1996 to the draft circular. Greater emphasis is, however, placed on efficiency, contributions being reasonable and proportionate to the development and local authorities taking a development plan led approach with regard to planning agreements. The Council supports this and is indeed already undertaking a development plan led approach by including policies on Section 75 Agreements, developer contributions and affordable housing in the Alteration to the East Ayrshire Local Plan and by producing Supplementary Planning Guidance (SPG) on Developer Contributions and Affordable Housing. This SPG will ensure that contributions are reasonable and proportionate to the development.
- 6.2 It is considered that there is a potential conflict in local authorities trying to meet all aspects of the guidance. Paragraph 8 of the draft circular states that “it is not acceptable for a developer to be required to enter into a planning agreement” and that planning agreements should always be between willing parties. The draft circular then states in paragraph 23 that the formulation of formal policies and associated SPGs on the use of planning agreements is strongly encouraged and that these should clarify early the expected levels of contributions that will be sought from developers. In order for developers to comply with the provisions of such local plan policies on developer contributions and affordable housing, it may indeed be interpreted as a requirement of the Council that a Section 75 planning agreement is entered into and if the developer is not willing to do this, the proposal could be viewed as being contrary to the local plan. It is suggested that this potential conflict should be taken into account in the text of the final version of this revision to Circular 12/1996.
- 6.3 Whilst the current period of economic uncertainty is referred to in the introduction to the consultation paper, there is little or no mention made of it in the draft circular itself. Private developers are indicating at meetings and seminars that they are no longer in a position to front fund infrastructure. There is a widespread view that the days of developers providing infrastructure in advance of the development taking place are over and that alternative funding solutions should be investigated which could potentially involve the private and public sectors working together. It is considered that this draft revision to Circular 12/1996 should recognise the wider issue of the current economic downturn, as when the economy does recover, the lending practices of banks is unlikely to revert to those that were previously in operation.

- 6.4 With regard to development management, it is quite often the case that the Council is not in a position to advise applicants that it is minded to grant planning permission until very close to the decision date. It may therefore be difficult to encourage developers to involve their legal representatives so early in the application process especially when there is a risk that the application may not be granted. It is also pointed out that many issues requiring inclusion in a planning agreement do not arise until the latter stages of the planning application assessment process. Planning authorities may therefore be unable to properly undertake the approach contained in the draft circular.

## **7 FINANCIAL IMPLICATIONS**

- 7.1 There are no financial implications arising directly from this report. The ability of the Council to gather in developer contributions in accord with the Alteration to the East Ayrshire Local Plan, finalised draft with modifications may, however, be compromised.

## **8 LEGAL IMPLICATIONS**

- 8.1 There are legal implications for the Council as a direct result of the Revision to Circular 12/1996, Consultation Paper. They involve greater consideration of the requirement for a planning or legal agreement as opposed to planning conditions at an earlier stage.

## **9 POLICY IMPLICATIONS**

- 9.1 There are no policy implications arising directly from this report. The Council has already adopted the general development plan led approach advocated in the consultation paper within the Alteration to the East Ayrshire Local Plan.

## **10 COMMUNITY PLAN IMPLICATIONS**

- 10.1 There are no community plan implications arising directly from this report.

## **11 RISK MANAGEMENT IMPLICATIONS**

- 11.1 There are no risk management implications arising directly from this report.

## **12 RECOMMENDATIONS**

- 12.1 **It is recommended that the Committee agrees:**

- (i) to note the contents of this report; and**
- (ii) to authorise the Depute Chief Executive/Executive Director of Corporate Support to confirm to the Scottish Government that the draft response already sent represents the views of the Council on the Draft Revision to Circular 12/1996 – Planning Agreements.**

**Elizabeth Morton**  
**Depute Chief Executive / Executive Director of Corporate Support**

25 March 2009 (EF/SA)  
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**LIST OF BACKGROUND PAPERS**

- (i) Circular 12/1996: Planning Agreements, April 1996**
- (ii) Revision of Circular 12/1996: Planning Agreements Consultation Paper, December 2008**

For further information on the contents of this report contact Emma Fyvie, Senior Planning Officer on 01563 576756.

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