ANNEX B

Planning Obligations

B1. **This guidance gives advice on the proper use of planning obligations** made under section 106 of the Town and Country Planning Act 1990 (as substituted by section 12 of the Planning and Compensation Act 1991) and of similar obligations under other powers including local legislation. It sets out the policies to which the Secretary of State and the Planning Inspectorate will have regard in determining applications or appeals and which local planning authorities should also take into account when considering planning applications and drafting development plan policies.

GENERAL POLICY

B2. Properly used, planning obligations may enhance the quality of development and enable proposals to go ahead which might otherwise be refused. They should, however, be relevant to planning and directly related to the proposed development if they are to influence a decision on a planning application. In addition, they should only be sought where they are ***necessary*** to make a proposal acceptable in land-use planning terms. When used in this way, they can be key elements in the implementation of planning policies in an area. For example, planning obligations may involve transport-related matters (eg pedestrianisation, street furniture and lighting, pavement and road surfaces – design and materials, and cycle ways). Planning obligations may relate to matters other than those covered by a planning permission, provided that there is a direct relationship between the planning obligation and the planning permission. But they should not be sought where this connection does not exist or is considered too remote. Planning obligations thus have a useful role to play in the planning system. **The tests to apply for their use are that they should be necessary, relevant to planning, directly related to the proposed development, fairly and reasonably related in scale and kind to the proposed development and reasonable in all other respects.**

B3. **Acceptable development should never be refused because an applicant is unwilling or unable to offer benefits. Unacceptable development should never be permitted because of unnecessary or unrelated benefits offered by the applicant.** Those benefits or the part of those benefits which go beyond what is necessary should not affect the outcome of a planning decision. Local planning authorities should not seek such benefits and should not allow themselves to be improperly influenced by them. Developers should not attempt to overcome valid objections to their proposals by offering extra inducements – ie unrelated inducements intended to satisfy objectors, influence the planning decision, or have wider development implications.

B4. **The Secretary of State considers that local planning authorities and developers should place more emphasis on the overall quality of a development proposal than on the number and nature (or value) of planning benefits they can obtain or offer.** Planning obligations – ***relevant to planning*** – may provide an added means of ensuring high quality development. But good quality is an integral part of development and should be at the heart of all planning; the provision of add-on benefits should not be regarded as an acceptable alternative to such an integrated approach. The offer of an obligation which goes beyond the guidance set out in this Annex will not necessarily be unlawful. But it should be given very little weight in the determination of an application. If more is offered than is necessary, the benefits or the parts of those benefits which are unnecessary should

not be allowed to affect the decision. This general policy, and the advice in the paragraphs which follow, apply equally to agreements and to unilateral undertakings provided – at appeal or otherwise – by developers.

UNILATERAL UNDERTAKINGS

B5. **It is reasonable to expect developers and local planning authorities to try to resolve any planning objections the authority may have to the development proposal by agreement,** in accordance with this guidance. Where a developer considers that negotiations are being unnecessarily protracted or that unreasonable demands are being made, he may wish to enter into a planning obligation by making a unilateral undertaking. Unilateral undertakings, like other planning obligations, are usually drafted so that they come into effect at the time when planning permission is granted and provide that unless and until the developer implements the permission (by carrying out a material operation as defined in section 56(4) of the 1990 Act), he is under no obligation to comply with the relevant covenants.

B6. **The use of unilateral undertakings is therefore expected to be principally, but not solely, at appeals,** where there are planning objections which only a planning obligation can resolve, but the parties cannot reach agreement. Where a developer provides or offers an undertaking at appeal, it will be referred to the local planning authority to seek their views. Such an undertaking should be in accordance with this guidance, as should unilateral undertakings or offers to enter into undertakings made in other circumstances. Undertakings should be relevant to planning and directly related to the needs created by the development proposal concerned.

REASONABLE BENEFITS

B7. **Planning obligations have a positive role to play in the planning system. Used properly, they can remedy genuine planning problems and enhance the quality of development.** They can provide a means of reconciling the aims and interests of developers with the need to safeguard the local environment or to meet the costs imposed as a result of development – eg the full cost of essential community facilities required as a direct result of a proposed development. So, for example, where development will create a need for extra facilities – eg new access roads, bus shelters, open spaces or measures to safeguard the environment – it may be reasonable for developers to meet or contribute towards the cost of providing such facilities. But local planning authorities should only seek to negotiate with developers to provide these facilities through planning obligations if it would be wrong on land-use planning grounds to grant planning permission without them. What this means in practice will depend on the circumstances of each case.

B8. The following paragraphs give a **general indication of what might be reasonable.** They give some examples of the circumstances in which certain types of benefit can reasonably be sought or taken into account in the determination of applications for planning permission. They are not intended as an exhaustive list of what may be acceptable in all cases. Establishing the relationship between a particular planning benefit and an individual development must be a matter of planning judgement, exercised in the light of local circumstances, rather than an issue for detailed national prescription.

B9. **In general, it will be reasonable to seek, or take account of, a planning obligation if what is sought or offered:**

(i) is needed from a practical point of view to enable the development to go ahead and, in the case of a financial payment, will meet or contribute towards the cost of providing such necessary facilities in the near future (planning obligations may be drafted so that they include a covenant by the local planning authority to the effect that a sum or sums paid by the developer to the authority for the purpose of meeting or contributing towards the costs of providing such facilities shall be repaid to the developer on or by a specified date if they have not been used for that purpose); or,

(ii) is necessary from a planning point of view and is so ***directly related to the proposed development*** and to the use of land after its completion that the development ought not to be permitted without it.

In other words, where a proposed development would, if implemented, create a need for particular facilities or would have a damaging impact on the environment or local amenity or would adversely affect national or local policies, and these matters cannot be satisfactorily resolved through the use of planning conditions, it will usually be reasonable for planning obligations to be sought or offered to overcome these difficulties. Local planning authorities are encouraged to work together in seeking appropriate arrangements.

B10. Some examples of such arrangements are: offers to provide or contribute towards new access roads, improved junction layouts or extra car parking facilities. **In some circumstances, on sites proposed for major development inadequately served by modes other than the private car, to improve accessibility the provision of contributions may be appropriate towards, eg new/improved rail/bus stations or facilities, park-and-ride schemes, improved bus services/shelters and other capital items, widened access, turning spaces, and improved measures for cyclists/pedestrians (in line with PPG 13 aims).** It is more likely that the need for contributions – where justified in accordance with the policy objectives set out in this Circular – will apply to locations away from town centres which need to be made more accessible, than to town centres themselves. Similarly, the provision of community facilities, eg reasonable amounts of small areas of open space, social, educational, recreational or sporting facilities, may be acceptable, provided that such facilities are directly related to the development proposal, the need for them arises from its implementation, and they are ***related in scale and kind*** (see paragraph B12). There is also the issue of timing of the replacement provision. New replacement sports pitches can take up to 2 years before they are available for use. Developers should recognise the need to provide a replacement that is ready and available for use at the time of loss rather than at some unknown point in the future. In respect of substitute areas of eg rights of way, open space, open access land, the priority should be to secure the most appropriate – not the easiest – substitute provision.

B11. Further **examples of appropriate planning obligations might include** arrangements:

(i) to ensure an acceptable balance of uses in a mixed-use development (although in most cases the layout and phasing of such proposals will be more appropriately addressed through the use of planning conditions; see paragraph B20 below).

(ii) to secure the inclusion of an element of eg affordable housing or special needs housing in a larger residential or mixed-use development (see separate advice in DoE Circular 13/96 Planning and Affordable Housing).

(iii) to offset (through substitution, replacement or regeneration) the loss of or impact on a resource present on a site or nearby eg the loss of a wetland habitat on a site offset by opening up a culverted stream or river, or the impact on a canal of an adjacent housing development.

(iv) to protect or reduce harm to protected sites or species, acknowledged to be of importance[2] (here also, it may be more appropriate to address this matter through the use of planning conditions).

Where it is necessary, **planning obligations may also be used to offset the loss of or impact on any resource present on the site prior to development.** For example, where a development site includes an existing open space or woodland which will be lost as a result of the proposal, it may be acceptable to seek agreement from the developer to provide a replacement or alternative facility where necessary and reasonable either on another part of the site or on other land over which he has control. Depending on local circumstances, it may not be essential to provide an exact substitute; so, for example, a wooded walkway may in some cases be an acceptable replacement for a green space. However, there should be some relationship between what is lost and what is to be offered: for example, an indoor sports centre will not generally be an acceptable replacement for open parkland.

B12. If a planning obligation is in line with the guidance set out in the preceding paragraphs, a further test has to be applied. This is whether **the extent of what is sought or offered is fairly and reasonably related in scale and kind to the proposed development, *as well as being reasonable in all other respects*.** For example, a reasonable obligation would seek to restore facilities, resources and amenities to a quality equivalent to that existing before the development. Developers may reasonably be expected to pay for or contribute to the cost of infrastructure which would not have been necessary but for their development. The effect of such infrastructure investment may be to confer some wider benefit but payments should be directly related in scale to the benefit which the proposed development will derive from the facilities to be provided. **Developers should not be expected to pay for facilities which are needed solely in order to resolve existing deficiencies nor should attempts be made to extract excessive contributions to infrastructure costs from developers.** It might on occasions be considered acceptable for an obligation to be sought where it would overcome an existing constraint which is materially exacerbated by the proposal. However, developers should not be asked, for example, to fund local road improvements unless the need for these improvements arises mainly from the proposed development. In addition, situations may arise where an infrastructure problem exists prior to the submission of an application for planning permission. Although the need to improve, upgrade or replace such infrastructure does not arise directly from the proposed development, it would clearly be inappropriate to grant planning permission for a development which would exacerbate a situation which is already unsatisfactory. However, developers may reach agreement with a local planning authority or an infrastructure undertaker to bring forward in time a project which is already programmed but is some years from implementation.

[2] The Department welcomes the initiatives taken by some developers in creating nature reserves, planting trees, establishing wildlife ponds and providing other nature conservation benefits. This echoes the Government's view in "This Common Inheritance" (Cm. 1200) that local authorities and developers should work together in the interests of preserving the natural environment. Planning policy guidance on the use of conditions and planning obligations in the interests of nature conservation is set out in PPG9 (Nature Conservation) (England only) see in particular paragraph C4.

B13. **In some cases**, particularly where major redevelopment is proposed for a large area, it may also be **reasonable for a number of developers to contribute jointly to an improved facility** which will be of benefit to all of them and to the community at large. But they should only be expected to do so if their proposals have created some need for the facility, and their level of contribution would have to be fairly and reasonably related to the level of demand created by their development. **Planning obligations should never be used as a means of securing for the local community a share in the profits of development ie as a means of securing a "betterment levy".** Planning authorities should, however, be aware of the financial consequences for developers of entering into an agreement. For example, an agreement which requires the payment of substantial sums of money before the development gets underway could prejudice the viability of a project. In such circumstances phasing of payments in relation to the phasing of development should be considered.

B14. **The costs of subsequent maintenance and other recurrent expenditure** should normally be borne by the body or authority in which the asset is to be vested. Payments should be time limited and not be required in perpetuity by planning obligations. As a general rule, the planning authority should not attempt to impose commuted maintenance sums when considering the planning aspects of the development. **Exceptions** may be made, **for example:**

- where additional highway works are an essential pre-requisite to the granting of planning permission and an agreement is entered into under section 278 of the Highways Act 1980 (which specifically provides for maintenance payments); or,
- in the case of funding for public transport – particularly if this will assist the achievement of sustainable development, and including the possibility of a contribution to revenue support of services – but for a limited period in the short term only and with a maximum cost.
- in the case of small areas of open space, recreational facilities, children's play space, woodland, or landscaping principally of benefit to the development itself rather than to the wider public.

B15. **Authorities should be particularly careful to guard against attempting to secure a list or range of desirable benefits from developers,** even if they consider such benefits to be related in some way to the proposed development. Highway authorities, in particular, should be certain that there is a specific and direct connection before suggesting that local planning authorities need to seek contributions towards sustainable transport provision. Authorities should bear in mind that attempts to secure additional benefits may be counter-productive: if they seek more than is justified, they may frustrate worthwhile development proposals or put at risk their plans for their areas.

DEVELOPMENT PLAN POLICIES

B16. **Plans can, and should, set out the matters which must be addressed** in order for development to proceed. This lays the basis for justifying any planning obligations which may be sought ie the development plans form an important framework into which a planning obligation should fit, and help to avoid future uncertainty. The broader opportunities for considering a strategy and integrated approach towards planning obligations should be considered by local planning authorities. For instance, where a local planning authority is likely to seek planning obligations in connection with a particular type of development or in relation to specific development sites, they should make this

clear by setting it out in policies in their local plan or in Part II of their unitary development plan (see paragraph 5.25 of PPG12 (Development Plans and Regional Planning Guidance) (England only).) Such policies should be justified by reference to the guidance outlined in this Annex. By including policies in development plans about the circumstances in which planning obligations would be sought there is an opportunity for the local community and the development industry to comment. **However, the existence of plan policies does not preclude negotiation on proper and appropriate planning obligations on their merits in relation to individual planning proposals.** It is useful for local people and developers to have some indication of what might be expected but, since planning obligations should be directly related to individual proposals if they are to be given any weight, it is not acceptable to set out precise requirements or to impose rigid formulae. **Where local planning authorities attempt to go beyond this guidance, the Secretary of State is likely to object to their draft policies.**

B17. **Policies concerning planning obligations in development plans should not be unduly prescriptive but should address land use planning matters first and foremost rather than eg funding or other financial matters. Examples** of development plan policies which are likely to be **unacceptable** to the Secretary of State, however, include those which:

(i) fail to take account of the advice in this Circular;

(ii) seek benefits which are not directly related to a particular development proposal. For example, it could be unacceptable for a local planning authority to seek provision of cycle routes or children's playgrounds in relation to proposals for sheltered housing for the elderly;

(iii) are based on a blanket formulation. This may not take proper account of whether the contribution is fairly and reasonably related to the development proposed. For example, it would be unacceptable to seek to ensure that all housing developments of more than thirty dwellings provide children's play areas since some of them may not be suitable for family homes;

(iv) seek contributions to a general fund to be used to finance a number of facilities or a specific facility, unless such facilities would be directly related to individual development proposals;

(v) seek from developers the cost of resolving existing problems unless the proposed development would materially exacerbate the situation (see paragraphs B10 and B12 above);

(vi) allocate precise costs in advance. It is not feasible for local planning authorities to spell out detailed requirements (such as £X per unit or Y% of overall costs) since it is impossible to know exactly what is involved until an individual development proposal has been made. For similar reasons, it is not acceptable for local planning authorities to seek to secure a percentage of enhanced land value;[3]

(vii) seek to secure maintenance payments other than in special circumstances (see paragraph B14 above).

[3] In *R v South Northamptonshire DC and others ex parte Crest Homes plc [1994] 3 PLR 47; [1995] J.P.L. 200;* the Court of Appeal considered a series of planning obligations which included a formula based on the enhanced value of the land. On the facts of the case, the planning obligations were held to be lawful, but this should not be interpreted as providing a justification for similar arrangements in other circumstances. As Lord Justice Henry explained, the facts of the case were crucial "because they legitimise a formula which, if used in other factual contexts, could be struck down as an unauthorised local development land tax" ([1994] 3 PLR 47 at page 61D).

B18. **Local planning authorities should also bear in mind that development plan policies do not provide a guarantee that attempts to secure extra planning benefits will always be successful:** whether obligations are sought, negotiated or offered, their relevance to a planning decision will always depend on the circumstances of the individual application.

PUBLIC INVOLVEMENT

B19. Local planning authorities are reminded that as far as is practicable, the planning system must be seen to operate in the public interest. There is an obvious and legitimate interest in planning obligations; **the process of negotiating planning obligations should therefore be conducted as openly, fairly and reasonably as possible.** Planning obligations must be registered as local land charges. There is an obvious and legitimate public interest in planning obligations being publicly available. Members of the public should be given every assistance in locating and examining planning obligations which are of interest to them. As a minimum, planning obligations and related correspondence should be listed as background papers to the committee report relating to the development proposal concerned (see section 100D of the Local Government Act 1972). Authorities would need a very strong case either to exclude the press and public when discussing a planning obligation or to determine that connected correspondence should be kept from public view. Only in very exceptional cases should local planning authorities agree to the imposition of a duty of confidentiality in respect of planning obligations. Authorities should note that section 100I of the 1972 Act confers order-making powers on the Secretary of State, which enable the categories of exemption from the access to information provisions to be changed.

USE OF PLANNING CONDITIONS

B20. It is important to recognise that **if there is a choice between imposing conditions and entering into a planning obligation, the imposition of a condition which satisfies the policy tests of DoE Circular 11/95 is preferable** because it enables a developer to appeal to the Secretary of State. 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. Such obligations entail unnecessary duplication and could frustrate a developer's right of appeal.

B21. Local planning authorities are reminded that they should not use a planning obligation as a means of securing developers' agreement to follow policies or practices that would be unlawful for the authorities themselves.

B22. In the interests of speed, and if both parties agree, the first draft of an agreement creating a planning obligation may be prepared by the developer's solicitor or by a solicitor approved by the local planning authority whose fees are met by the developer.

B23. **It is not expected that a local planning authority would dispose of land or other assets – or give any other consideration – under the terms of a planning obligation made in accordance with the guidance in this Circular.** Any payment made by the developer in line with this guidance ought to be a contribution towards costs which the local authority will incur in relation to the development. In these circumstances, a planning obligation should not therefore amount to a credit arrangement within the meaning of Part IV of the Local Government and Housing Act 1989, nor should the authority have obtained

anything which would be a capital receipt as defined by Part IV. The authority should not, therefore, be required to set aside part of any such receipts as provision for credit liabilities.

MINERAL DEVELOPMENTS

B24. While the same guiding principles apply, it should be noted in connection with **mineral developments** that special considerations also apply to the use of planning obligations and to the imposition of conditions. These are set out in MPG2 and DoE Circular 25/85.

PERSONS INTERESTED IN LAND

B25. Attention is drawn to the statutory requirement that a developer must be a person interested in land in the area of a local planning authority before he can enter into a planning obligation. Before accepting that a planning obligation resolves planning objections to a proposed development, authorities should take care to ensure that all those who might need to be directly involved in complying with its provisions (eg all those interested in the land including tenants and mortgagees and also guarantors etc) have entered into it. At an appeal, the Inspector may seek evidence of title if it has not been demonstrated that the developer has the requisite interest. Where a trunk road is involved, the developer will also need the agreement of the relevant highway authorities and any necessary highway orders.

TRANSFER OF INTERESTS IN LAND

B26. **Planning obligations should not include the transfer of interests in land or positively worded requirements for such transfers.** Other statutory powers provide authority for the transfer of interests in land. For example, the imposition of positively worded requirements for the transfer of interests in land can be included in an option agreement made under section 120 of the Local Government Act 1972 and any other necessary powers such as section 16 of the Greater London (General Powers) Act 1974. The actual transfer of an interest in land should also be included in a instrument separate from planning obligations. In some cases, it may be appropriate to include a negatively worded requirement in a planning obligation, which restricts the use or development of land until the transfer of ownership has taken effect.

CONCLUSION

B27. **The Secretary of State will deal with each planning application which comes before him on its merits, but he is unlikely to attach weight to demands by a local planning authority – or offers by a developer – which go beyond this guidance.** If a local planning authority seeks unreasonable planning obligations in connection with a grant of planning permission it is open to the applicant to refuse to enter into them; he has the right of appeal to the Secretary of State against a refusal of permission or the imposition of a condition, or the failure to determine the application. Such appeals will be considered in accordance with the advice given in this Circular. Where an appeal has arisen because of what seems to the Secretary of State to be an unreasonable requirement on the part of the local planning authority, and a public local inquiry has been held, he will consider sympathetically any application which may be made to him for an award of costs.

Similarly, where an appellant has refused to meet a reasonable requirement by the local planning authority, applications for an award of cost against the former will also be sympathetically considered.

B28. **The Secretary of State therefore expects local planning authorities and developers to adhere to the guidance set out in this Circular. They are reminded that the Courts have held that Government policies are themselves material considerations to be taken into account when planning decisions are made.** They will also wish to bear in mind that the Secretary of State has the power to intervene in the operation of the planning system (ie to call in or direct the modification of development plans, to call in planning applications for his own decision, to revoke or modify planning permissions, or to discontinue land uses). The Secretary of State will give serious consideration to the exercise of his powers to intervene whenever he believes that the policies set out in this Circular are being ignored or misapplied.

B29. In addition, **developers have a right to appeal to the Secretary of State if local planning authorities decide that a planning obligation shall continue to have effect without modification** (or fail to determine an application for their modification or discharge within the prescribed period) after five years beginning with the date on which they were entered into by the relevant parties. (See Annex C to this Circular for further details.) The Secretary of State will have regard to the policies explained in this Circular when determining such appeals.