



PLANNING OBLIGATIONS ANNUAL REPORT – 2023/2024

Report by Chief Officer Place

1 PURPOSE OF REPORT

- 1.1 The Planning (Scotland) Act 2019 requires local planning authorities to publish annual details of planning obligations that have been secured. Section 36(5) sets out what the report is to cover, including:
- (a) the number of planning obligations that are –
 - a. entered into in that year;
 - b. entered into in a previous year and not yet expired; and
 - c. entered into in a previous year and not complied with.
 - (b) the development to which each planning obligations relates, and
 - (c) the name of the person that has entered into the planning obligation.
- 1.2 Whilst these provisions have yet to come into force, the Planning Service has been reporting on these matters to elected members for a number of years and also placing completed planning obligations on its publicly accessible planning application casefile system thereby publishing the information set out in The Planning (Scotland) Act 2019. The purpose of this report is to provide details of:
- a) The framework in which planning obligations secure developer contributions and the governance behind their spend;
 - b) The planning obligations secured by the Council in the financial year of 2023/2024; and
 - c) The value of contributions paid to the Council in the financial year of 2023/2024.
- 1.3 This report fulfils the planning authority's duty under Section 36(5) of the Planning (Scotland) Act in anticipation of it coming into force. Data for the number of planning obligations that are entered into in a previous year and not yet expired or not complied with shall be reported in subsequent years following secondary legislation that brings Section 36(5) into force (anticipated to be 2024/25).

2 BACKGROUND

- 2.1 Midlothian Council as the local planning authority has a legal responsibility to determine planning applications in accordance with the development plan, unless material planning considerations indicate otherwise. In determining a planning application, the planning authority can use planning conditions and/or a planning obligation to mitigate the impacts of development. The impacts can either arise from the development itself or cumulatively with other developments. Where off-site mitigation is required, such as a transport intervention or an increase in education capacity, a planning obligation is the most appropriate method of mitigation. They can also be used to secure in-kind contributions towards affordable housing. Mitigating these impacts is necessary to align a proposal with the protective policies of the development plan and make it acceptable in land use planning terms.
- 2.2 The use of planning obligations to secure developer contributions, transfer land, restrict uses of land or require physical works, is governed by:
- Legislation;
 - Scottish Government guidance;
 - case law;
 - planning policy; and
 - good practice and procedures.
- 2.3 The purpose of this report is to focus on the use of planning obligations to secure financial contributions. Planning obligations are also referred to as a legal agreement or a section 75 agreement. A legal agreement is registered against the heritable title of the land subject to the planning permission to which it is associated.

3 THE PLANNING OBLIGATIONS FRAMEWORK

The Legal Framework

Section 75 of Town and Country Planning (Scotland) Act

- 3.1 Section 75 of the Town and Country Planning (Scotland) Act 1997, as amended by the Planning etc. (Scotland) Act 2006 and the Planning (Scotland) Act 2019 (hereafter referred to as the Act) provides a legal mechanism whereby developers can address the impact of their development on the local community through the provision of a financial contribution towards infrastructure, which in turn makes the development acceptable in planning terms. Because of this mechanism, planning obligations are often referred to as section 75 agreements. The purpose of this provision is to restrict or regulate the development or use of land, or to require the payment of a specified sum of money. A lawful planning obligation is one that actively manages development and must be based on a clear and measurable impact of development.

Section 69 of the Local Government (Scotland) Act 1973

- 3.2 Alternatively, an applicant for planning permission can make a one-off financial contribution under Section 69 of the Local Government (Scotland) Act 1973 towards infrastructure costs required to mitigate the impact of a proposed development. This mechanism is typically used where the Council is applicant, because the Council cannot enter into a section 75 agreement with itself, or where smaller sums of money are paid in a one off payment.

Modification and Discharge of Planning Obligations

- 3.3 Section 75A of the Act provides a mechanism to the landowner/ developer to review or modify a planning obligation. An applicant wishing to modify or discharge a planning obligation must formally apply to do so. Section 75B of the Act provides a right of appeal against the authority's decision on an application made under Section 75A of the Act. An appeal is made to the Department of Planning and Environment Appeals (DPEA) on behalf of Scottish Ministers in the event of the refusal of such an application. An applicant wishing to modify or discharge a planning obligation must formally apply to do so.
- 3.4 Midlothian Council should not consider any proposed amendments to an agreement without a formal application following the requirements set out in *The Town and Country Planning (Modification and Discharge of Planning Obligations) (Scotland) Regulations 2010*.
- 3.5 The right to apply to modify a planning obligation is open to the applicant, but not the Council as the determining authority – if the Council wish to change an agreement it must seek the agreement of the applicant and then they must apply to modify the agreement. Applications received are given a planning application reference number with the suffix /LA.

Scottish Government Guidance - Circular 03/2012: Planning Obligations and Good Neighbour Agreements

- 3.6 Circular 3/2012: Planning Obligations and Good Neighbour Agreements sets out Scottish Government guidance on planning obligations and good neighbour agreements. The advice and guidance outlined in the circular provides a framework for preparing planning policies and supplementary guidance. In seeking and drafting an agreement, the circular sets out five tests for consideration if in determining if an obligation is required and the content of that obligation if it is determined to be appropriate. The tests are:
- necessary to make the proposed development acceptable in planning terms;
 - serve a planning purpose and, where it is possible to identify infrastructure provision requirements in advance, should relate to development plans;

- relate to the proposed development either as a direct consequence of the development or arising from the cumulative impact of development in the area;
- fairly and reasonably relate in scale and kind to the proposed development; and
- be reasonable in all other respects

The purpose of these tests is to ensure a planning obligation regulates or restricts development in a way that serves the proper management of development. These tests ensure that an obligation is lawful in terms of Section 75 of the Act. The detailed guidance on the application of these tests to an obligation is reproduced from the Circular, attached to this report Appendix A.

Case Law

- 3.7 The implementation and interpretation of the legislation and the Scottish Government guidance has been refined in response to legal challenge and appeals – key decisions in this regard is referred to as case law. The most significant decisions are as follows:
- 3.8 In Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Co Ltd [2017]; the Supreme Court confirmed the Court of Session’s earlier decision to quash the Aberdeen City and Shire Supplementary Planning Guidance on developer contributions. This was because the connection between the sites making financial contributions and the infrastructure that was being contributed towards was too trivial and was contrary to the tests set out in Circular 03/2012. It was considered not appropriate for developers to pay into a ‘general pot’ (in this case towards transportation infrastructure) – there has to be a clear link between the proposed development and a consequential need to deliver a specific piece of infrastructure.
- 3.9 In *R (on the application of Wright) v Resilient Energy Severndale Ltd & Anor [2019]*; the Supreme Court confirmed earlier decisions by the High Court and Court of Appeal to quash a planning permission granted by Forest of Dean District Council for a wind turbine. The Council in granting planning permission for the turbine had taken into account the developers offer to make a financial contribution to the local community. The Supreme Court in making their judgement commented:
- “Resilient Severndale required planning permission for the carrying out of “development” of the land in question, as that term is defined in section 55(1) of the 1990 Act. The community benefits to be provided by Resilient Severndale did not affect the use of the land. “Instead, they were proffered as a general inducement to the Council to grant planning permission and constituted a method of seeking to buy the permission sought, in breach of the principle that planning permission cannot be bought or sold”*

- 3.10 In *R v South Holland DC ex parte Lincoln Co-operative Society* (2001); a developer had offered the local planning authority £100,000 to redress the harmful effect of granting planning permission for a supermarket. The development was contrary to the development plan and a previous application for permission for the same development without any S106 (English version of S75) offer accompanying it had been earlier refused. Quashing the grant of planning permission, the High Court held that although the planning obligation was one, which the local authority was entitled to take into account, it was at the very lower end of materiality; but that the weight to be given to it was entirely a matter for the decision maker. However there had been no evaluation of what could be achieved with that sum; and the decision was so much against the weight of the material before the authority that the only conclusion to be drawn was that the decision was obviously wrong. There were also no rational grounds for believing that the sum of £100,000 could significantly redress the harm envisaged by the development let alone outweigh it. The decision was such that no reasonable authority could have taken it.

Planning Policy

- 3.11 There is a legal requirement to determine planning applications, including any associated planning obligation, in accordance with the development plan, unless material planning considerations indicate otherwise.
- 3.12 The development plan comprises the National Planning Framework No.4, February 2023 (NPF4) and the Midlothian Local Development Plan 2017 (MLDP). Legislation states that, in the event of conflict or incompatibility between the two plans, whichever is the latter shall prevail (section 24(3) of the Act).
- 3.13 NPF4 Policy 18: Infrastructure First aims to encourage, promote and facilitate an infrastructure first approach to land use planning. Infrastructure provision is at the heart of placemaking, development planning and development management decisions. Infrastructure needs must be clearly understood and integrated early in the development process. Policy 18 supports developments that contribute to infrastructure in line with that identified in local development plans and their delivery programmes. The impacts of development should be mitigated, and proposals should only be supported where this mitigation is appropriately secured. The use of planning obligations, conditions and other legal agreements must be used in accord with the relevant tests. NPF4 Policy 18 adopts the same tests as Circular 3/2012 set out in Appendix A of this report.
- 3.14 Policies *IMP1: New Development* and *IMP2: Essential Infrastructure Required to Enable New Development to Take Place* of the MLDP require the developer to deliver, or contribute to, the required infrastructure to mitigate the impact of the development. Separately

policy *DEV3: Affordable and Specialist Housing* provides the basis for the Council to secure affordable housing provision.

- 3.15 The above stated policies and the settlement statements within the MLDP specifically set out the topic areas for developer contributions connected to each allocated site from the following range of matters:
- Education provision;
 - Transport infrastructure (including towards Borders Rail, the A7 urbanisation scheme, Sheriffhall Roundabout upgrade and the A701 realignment and A702 spur);
 - Affordable housing provision (which could include a financial contribution);
 - Community facilities;
 - Sport and leisure facilities;
 - Town centre improvements;
 - Open space and play provision/upgrades
- 3.16 The requirements set out in the MLDP are to mitigate the consequential impact of the allocated development and are associated with capital expenditure, not ongoing revenue costs (which in theory, are covered by increased revenue indirectly arising from the development).
- 3.17 The planning authority has commenced the preparation of a new local development plan (MLDP2) to respond to NPF4. This will replace the 2017 MLDP and associated supplementary guidance. MLDP2 shall include policies that identify the infrastructure requirements to support the new development strategy and the measures required to mitigate its cumulative impact. It will also provide a framework to assess the impact individual development proposals have on infrastructure. MLDP2 will replace the Developer Contributions (2012) Supplementary Planning Guidance and Affordable Housing (2016) Supplementary Planning Guidance.
- 3.18 It is important to appreciate the role of planning policy in relation to planning obligations. Whilst it is necessary for planning policy to identify cumulative impacts and the mitigation required across a development strategy, this must be backed up by robust and transparent evidence. It is not enough to draft policy that requires financial contributions to certain items. For a planning obligation to be lawful, there must be a clear connection between the impact of development and the mitigation by way of a financial or in-kind contribution.

Good Practice and Procedures

The Negotiation of Planning Obligations

- 3.19 Development plan policies and the Circular tests form the basis for a planning obligation. If the Council has determined that it is 'minded to grant planning permission' on the basis that it is only acceptable if

provision is made towards essential infrastructure, then a planning obligation will be required. Officers prepare Head of Terms, essentially a framework document that sets out the value of the contributions sought, what the contributions are to be utilised towards and triggers for payments and the delivery of affordable housing. There is usually a degree of negotiation between the Council and the prospective developer over the Heads of Terms – planning obligations are legal agreements to be signed by both parties, not imposed requirements as in the case of planning conditions. The agreed Heads of Terms then forms the basis for solicitors representing both parties to prepare a formal legal agreement, which has to be signed by all parties and received by Registers of Scotland before the planning permission can be issued. The Councils Head of Terms are currently negotiated by the Planning Service and signed off by the Executive Director Place.

- 3.20 A Section 69 agreement follows a similar process, except a Section 69 agreement is generally less complex because it secures a one off, upfront payment to the Council. It is typically used for small scale developments or Council developments and does not require registration with Registers of Scotland.

Midlothian Council's Own Developments

- 3.21 The Council itself is one of the largest house builders in Midlothian delivering social housing. Developer contributions are secured as with private developments, however the Council cannot enter into a legal agreement with itself. Nonetheless, Head of Terms are agreed in the same way as other planning obligations. The Heads of Terms then provide for the transfer of monies from the Housing Revenue Account (HRA) to the General Fund to provide for the delivery of identified infrastructure. In the interests of equity, consistency, transparency and the Council's fiduciary responsibility as a public authority it is important that it treats itself in the same way as it would a private developer.

Monitoring of Obligations

- 3.22 The Council has been proactively monitoring agreements since 2015. Monitoring activity principally involves checking whether a development has commenced and thereafter checking completion certificates issued by the Council as Building Standards Authority. Usually, the trigger for contribution payments is on the completion of a set number of dwellings, completion of a building (in the case of commercial development). Once a payment trigger has been identified as being reached the Council's finance team issue an invoice to the developer for the payment of the contribution. The agreements provide for the payment of late interest at 8% above the Bank of England base rate. Whilst there is a good professional working relationship between house builders and officers of the Council which generally results in timely payments of the correct amounts due, on a number of occasions in recent years late payment interest has been charged and secured in

respect of payments that were materially late. For the most part, the major house builders operating in Midlothian now proactively advise the Council when a payment trigger is approaching which is welcome and helpful.

- 3.23 Monitoring reports are presented to the Council's Capital Plan and Asset Management Board. These reports identify obligations gathered for specific projects, how much is awaiting allocation and what the time limits are for allocation of each contribution. This process mitigates the risk that the monies are not spent in time and are reimbursed.

Modification of Planning Obligations

- 3.24 Once an agreement has been completed and planning permission issued it is then open to a developer to apply to modify or discharge provisions within the agreement. Modifications/variations are not uncommon and the reasons for them can include; adjustments to the trigger points for payments, providing for new planning permissions for the same site to be bound by the agreement, addressing changes in circumstance such as known costs for infrastructure and changing how an element of infrastructure is to be provided. It will also sometimes be the case that a developer will seek to modify or discharge an obligation on the basis that what is provided for is (in their view) unnecessary and or does not meet the tests set out in Circular 03/2012. The Council is required to consider what is proposed against the Circular tests, it cannot simply take the position that a developer originally agreed to pay a contribution at the time of the original agreement being drafted and therefore that position must be maintained.
- 3.25 The grant of a planning permission is often dependent upon the agreement of a planning obligation. A developer will sometimes agree to planning obligation provisions that they have reservations about but enables the agreement to be completed and the planning permission secured. This avoids the uncertainty and delay of pursuing a planning appeal when the Council has resolved to support the scheme itself. The developer then has the opportunity to seek to modify the elements of the planning obligation that they have issue with, whilst having the benefit of the planning permission. In the event that the modification of a planning obligation is refused the right of appeal is to the Scottish Ministers. A developer taking such steps is operating entirely legitimately and the Council needs to be able to substantiate the requirement and basis for an obligation.
- 3.26 A case study to note - Aberdeenshire Council required that the granting of planning permission for wind turbines was subject to a planning obligation to secure a financial contribution towards affordable housing. In due course the developer applied to modify the agreement on the basis that this requirement failed to meet the Circular tests - a financial contribution towards affordable housing having no relationship to the acceptability of a wind turbine. Aberdeenshire duly refused the

modification on the basis that the developer had agreed to make the contribution originally and it accorded with the Council's policy (in the Council's view). At the subsequent appeal the Scottish Ministers concluded that the developer had originally agreed to the contribution was in essence not relevant, secondly there did not appear to be such a policy as referenced by Aberdeenshire and furthermore there was no relationship between the acceptability or not of the wind turbines and an affordable housing commuted sum. The appeal was allowed and in addition expenses awarded against that Council for acting unreasonably.

Planning Applications, Decision Making and Planning Obligations

- 3.27 The Council must be prepared to justify its requirements for planning obligations at all stages of the process. The mitigation of an impact must be clearly evidenced and transparent to all parties. It must be based on reasoned assumptions that are replicable by other parties who wish to corroborate the evidence. The Council must avoid securing financial contributions that do not meet the policy tests of NPF4 Policy 18. At the same time, the Council must protect its liability and ensure that the cost of additional infrastructure arising from new development are borne by the increase in land value that comes from the grant of planning permission, not the public purse. To maintain this balance requires close monitoring of progress of developments across the county. It also requires corporate partnership with services responsible for infrastructure delivery, and an ongoing process of appraisal and re-appraisal of projects to mitigate development impact.

Planning Obligations – a potential perspective from local communities

- 3.28 It is not an uncommon complaint from local communities that the local planning authority does not secure sufficient contributions towards infrastructure and the Council should negotiate harder with developers. The Council however cannot demand a wish list of contributions (unless substantiated by development plan policy) from developers. Furthermore, negotiations take place in the context of development plan policies and the circular and those would form an important context for any appeal to the Scottish Ministers. Whilst negotiations do need to be approached in a professional and robust manner an overly hard-line approach by a Council may result in an appeal and reduced contributions compared to that, which could have been agreed between the applicant and the Council.
- 3.29 Whilst there may sometimes be the potential for contemplating a particularly positive outcome having been achieved in negotiations, that needs to be considered in the context that a modification and appeal may follow. It is also worth bearing in mind that decisions by public authorities are potentially subject to judicial review by the Courts and the Council needs to be mindful of this both when seeking or indeed *not* seeking planning obligations. Each individual component and

quantum of contribution also needs to be justified rather than an overall amount agreed and then divided up and distributed amongst pieces of infrastructure.

- 3.30 One of the common misconceptions around planning obligations is the idea of “planning gain”. Implicit in this phrase is the idea of development as a bad thing. The planning system considers the investment in our communities from new development to be implicitly positive and does not need compensation for it to be acceptable. This can often conflict with the negative feelings towards change to local environments experienced by communities subject to new development. Local communities can often strongly feel that punitive taxation of developers, or compensation for the community is warranted out of the process.
- 3.31 The planning service will only require an applicant to pay for capital expenditure necessary to expand the services the Council are responsible for to accommodate the development. Officers are mindful of the applicant’s right of appeal to Scottish Ministers and, ultimately, the courts. If the obligations secured by legal agreements are in excess of what is required to mitigate the impact of development, then the excess will need to be returned to the applicant. There is a risk that the spend of financial contributions for purposes not strictly related to the impact of development could need to be paid back from other revenue sources.

Planning Obligations – a potential perspective from Developers

- 3.32 It is not wholly uncommon for developers to complain that obligation requirements are unfair or would in their view render the development unviable. In general terms the development industry understands the need to mitigate the impact of development, but demand that this is evidenced by robust and clear justification.
- 3.33 Developers can sometimes raise an issue of viability as a justification to avoid a financial or in-kind contribution. This position requires to be evidenced and the Council will seek independent expert corroboration in such a case. If it is verified that there is a viability issue then the Council still has to weigh up whether the benefits of the development (if there are judged to be benefits) outweigh the dis-benefits to not securing the necessary contributions. This is particularly so in relation to education contributions because the Council has a statutory duty to provide schooling places. If a development gives rise to more pupils and does not fund new places, the Council will have to fund the places itself. A Council may also find itself open to challenge if it decides not to require contributions from developer A but does require them from developer B when the circumstances of the two cases are comparable.

Spending of Contributions in Midlothian

- 3.34 In terms of the spending of contributions, the vast majority of contributions are de facto self-selecting as to what they can be utilised towards, most notably education contributions and contributions towards the various elements of strategic transport infrastructure. There are however some areas; play/open space, community facilities and town centre improvements where there is potentially a degree of discretion in some instances as to what infrastructure might be delivered and by whom. Such contributions are as such the responsibility of relevant service areas within the Council. Proposed capital spending is required to be reported to the Council's Capital Plan and Asset Management Board (Chaired by the Executive Director Place) and if agreed by the board is reported to Council for decision. It is worth noting that the majority of contributions secured in planning obligations are subject to time expiry clauses, i.e. if the contribution is not expended or legally committed within a specified period from when it is paid (most usually 10 years) it has to be returned to the developer.
- 3.35 This highlights the importance of monitoring planning obligations. Contributions are also required to be spent in accordance with the provisions of the agreement. It is worth noting that particularly in relation to education infrastructure this Council has forward funded new schools and extensions that assists in timely delivery. The developer contributions when they arrive and are therefore in effect paying the Council back for infrastructure that has already been delivered. For example, the Council is still collecting contributions towards the additional capacity created in the new St David's RC High School, which opened in 2003.

4 PLANNING OBLIGATIONS ENTERED INTO IN 2023/2024

- 4.1 Appendix B attached to this report sets out the details of the planning obligations that were entered into in the last financial year (2023/2024). A total of £20,456,100.98 has been secured. Most payments will be indexed linked and as such will increase with inflation. The Council also secured the delivery of 509 affordable housing units through Section 75 agreements. The bulk of this figure is made up of large development plan allocations reaching agreements, including:

- Hs1: Newton Farm/ Wellington Farm - Cala Management Ltd
- Hs20: The Brae, Auchindinny - Bellway Homes
- H34, H35, H38 and H49: South of Mayfield and East of Newtongrange - Springfield Homes

5 PLANNING OBLIGATIONS PAYMENTS RECEIVED IN 2023/2024

- 5.1 Appendix C attached to this report sets out the details of the planning obligations that were received in the last financial year (2023/2024). A total of £7,778,585.52 has been recovered.

6 RECOMMENDATION

6.1 It is recommended that the Committee:

- i) notes the information set out in the report and attached appendices; and
- ii) receive an annual report setting out the level of developer contributions secured by planning obligations and the sum of developer contributions recovered within the reporting financial year.

Peter Arnsdorf
Planning, Sustainable Growth and Investment Manager

Date: 24 May 2024

Contact Person: Martin J Patrick – Lead Officer Planning Obligations (Acting Up)
martin.patrick@midlothian.gov.uk

Background Papers:

1. Planning obligations and their associated planning applications.
2. The Town and Country Planning (Scotland) Act 1997, as amended by the Planning etc. (Scotland) Act 2006 and The Planning (Scotland) Act 2019.
3. The Town and Country Planning (Modification and Discharge of Planning Obligations) (Scotland) Regulations 2010.
4. Circular 3/2012: Planning Obligations and Good Neighbour Agreements.
5. The development plan - National Planning Framework No.4 and the Midlothian Local Development Plan 2017.
6. The Planning case law referenced in the report.

Appendix A:

Five Tests of a Planning Obligation (from Circular 3/2012, November 2020 revision)

Necessity Test

Planning obligations or other legal agreements should not be used to require payments to resolve issues that could equally be resolved in another way. Where a planning permission cannot be granted without some restriction or regulation, and before deciding to seek a planning obligation, the planning authority should consider the following options in sequence:

- i) The use of a planning condition: Planning conditions are generally preferable to a planning or legal obligation, not least as they are likely to save time and money for all concerned.
- ii) The use of an alternative legal agreement: for example, an agreement made under a different statute, such as the Local Government (Scotland) Act 1973, the Countryside (Scotland) Act 1967, the Sewerage (Scotland) Act 1968, the Roads (Scotland) Act 1984 etc. A planning obligation is not necessary where the obligations for a landowner or developer may be implemented, for example, by a one-off payment towards the cost of infrastructure provision or the maintenance of open space. There should be a presumption that this option be used where contributions are being sought for community benefits, which, while desirable, do not directly serve a planning purpose. Such benefits might include, for example, provision of infrastructure, which is desirable but not essential. While it would be for a planning authority to satisfy itself that a legal agreement was required, a legal agreement made under other legislative powers would not necessarily be required to meet all the policy tests required of planning obligations.
- iii) The use of a planning obligation: Planning authorities should be clear that a planning obligation is only necessary where successors in title need to be bound by the required obligation, for example, where phased contributions to infrastructure are required.

Planning purpose Test

Planning authorities should satisfy themselves that an obligation is related to the use and development of land. This judgement should be rooted primarily in the development plan. This should enable potential developers to be aware when undertaking development appraisals and in designing their proposals of the:

- likelihood of a planning obligation being sought, and,
- likely financial requirements of that planning obligation.

Relationship to proposed development Test

Planning obligations must relate to the development being proposed. Where a proposed development would either; create a direct need for particular facilities, place additional requirements on infrastructure (cumulative impact)

or have a damaging impact on the environment or local amenity that cannot be resolved satisfactorily through the use of planning conditions or another form of legal agreement, a planning obligation could be used provided it would clearly overcome or mitigate those identified barriers to the grant of planning permission. There should be a clear link between the development and any mitigation offered as part of the developer's contribution. In addition, when determining whether a planning obligation is required, planning authorities should take account of the existence of any other agreements or conditions relating to infrastructure provision that already apply to the development.

Planning obligations should not be used to extract advantages, benefits or payments from landowners or developers, which are not directly related to the proposed development. The obligation should demonstrate that this test is met by specifying clearly the purpose for which any contribution is required, including the infrastructure to be provided.

In reaching decisions on applications for planning permission, planning authorities should attach no weight to offers made to undertake works, donate monies, or provide other incentives if these do not meet the tests contained in this circular for inclusion within an obligation. Planning authorities should also not be influenced by the absence of such offers. Authorities should bear in mind that obligations may be subsequently challenged either through an application to modify or discharge the obligation, on appeal against refusal to modify or discharge, or indeed in the Courts.

Scale and Kind Test

Planning obligations must be related in scale and kind to the proposed development. Developers may, for example, reasonably be expected to pay for, or otherwise contribute towards the provision of, infrastructure, which would not have been necessary but for the development. In assessing such contributions planning authorities may take into account the cumulative impact of a number of proposed developments, and use obligations to share costs proportionately. An effect of such infrastructure investment may be to confer some wider community benefit but contributions should always be proportionate to the scale of the proposed development. Attempts to extract excessive contributions towards the costs of infrastructure or to obtain extraneous benefits are unacceptable.

Planning obligations should not be used to resolve existing deficiencies in infrastructure provision or to secure contributions to the achievement of wider planning objectives, which are not strictly necessary to allow permission to be granted for the particular development. Situations may arise where an infrastructure problem exists prior to the submission of an application for planning permission. Where the need to improve, upgrade or replace that infrastructure does not arise directly from the proposed development then planning authorities should not seek to address this through a planning obligation. It is inappropriate to grant planning permission for a development which would demonstrably exacerbate a situation which was clearly already unsatisfactory.

Entering into an obligation can have financial consequences for developers and may make proposals uneconomic. Cash flow will also be affected where substantial sums of money have to be paid either before the development gets under way or at an early stage in construction. Staged or phased payments could help the overall viability and success of a project.

This is particularly relevant where infrastructure requires to be put in place before the development is completed, but the cost of doing so would make the development unviable. Planning authorities should give consideration to the possibility of infrastructure being funded, and development thus enabled, through other mechanisms, with costs being recovered through staged payments as development progresses.

Reasonableness Test

Planning obligations should be reasonable in the circumstances of the particular case. The following questions should be considered:

- is an obligation, as opposed to conditions, necessary to enable a development to go ahead? (this question should have regard to the necessity test set out in paragraph 15 above)
- in the case of financial payments, will these contribute to the cost of providing necessary facilities required as a consequence of or in connection with the development in the near future?
- is the requirement in the obligation so directly related to the regulation of the proposed development that it should not be permitted without it?
- will the obligation mitigate the loss of, or the impact upon, any amenity or resource present on the site prior to the development?

Where the answer to any of the questions would be no, a planning obligation is generally not appropriate.

Appendix B: Planning Obligations Entered into 2023/24

Site	Proposed Development	Reference	Developer	Total Base Value	No of Affordable Units
Newton Farm/ Wellington Farm (LDP Hs1)	Residential Development; including formation of access roads car parking and associated works	17/00408/DPP & 17/00409/DPP	CALA Management Ltd	£1,827,778.36	155
Land at Robertson Bank, Gorebridge	Erection of 14 dwellinghouses; formation of access roads, car parking and associated works	20/00899/DPP	Carlsson Properties Ltd	£171,602.06	0
Land Southeast of Auchindinny, The Brae, Auchendinny, Penicuik	Erection of 395 dwellings, formation of access road, car parking, landscaping and associated works	22/00848/DPP	Bellway Homes	£5,003,262	98
Land at Newbyres Site B, River Gore Road, Gorebridge	Erection of 96 dwellings; formation of access road, car parking, SUDS, landscaping and associated	22/00066/DPP	Persimmon Homes	£954,899	24
Land South of Mayfield and East of Newtongrange, Crawlees Road, Gowkhill, Gorebridge	Planning permission in principle for residential development with associated neighbourhood retail, commercial and/ or community facilities; and associated infrastructure works (EIA Development)	22/00027/PPP	Springfield Properties	£12,345,024.56	232
Land 100M Southwest of Newlandburn House, Gorebridge	Planning permission in principle for residential development and associated works	21/00571/PPP	Ruth Barbara Darling, Rachael Sheila Darling or Logan, Lindsay Ereica Darling or Sturgeon	£142,470	0
Inveravon Hotel, 9 Inveravon Road, Loanhead EH20 9EF	Erection of 2 dwellinghouses and associated works	22/00858/DPP	Mayburn House Ltd	£11,065	0
Total				£20,456,100.98	509

Appendix C: Planning Obligation Payments Received 2023/24

Site	Application Reference	Developer	Category	Total Amount Paid in the Financial Year
Land North and South of Lasswade Road	14/00420/PPP	Dandara Homes	Non-Denominational Primary Education	£117,357.88
Land North and South of Lasswade Road	14/00420/PPP	Dandara Homes	Non-Denominational Secondary Education	£180,111.12
Land North and South of Lasswade Road	14/00420/PPP	Dandara Homes	Denominational Primary	£12,573.93
Land North and South of Lasswade Road	14/00420/PPP	Dandara Homes	Borders Rail Contribution	55,487.97
Land North and South of Lasswade Road	14/00420/PPP	Dandara Homes	Borders Rail Contribution	56,805.63
Land North and South of Lasswade Road	14/00420/PPP	Dandara Homes	Denominational Primary contribution	12,282.26
Land North and South of Lasswade Road	14/00420/PPP	Dandara Homes	Non-Denominational Primary Education Contribution	114,635.66
Land North and South of Lasswade Road	14/00420/PPP	Dandara Homes	Non-Denominational Secondary Education Sum	175,933.28
Food Store, Edinburgh Road	22/00273/DPP	Farmfoods Ltd	A701 Relief Road	£22,963.08
Thornlea Nursing Homes, 21 Hawthorn Gardens, Loanhead	22/00624/DPP	Patrick Black	A701 Relief Road	5,724.26
Thornlea Nursing Homes, 21 Hawthorn Gardens, Loanhead	22/00624/DPP	Patrick Black	Community Facilities Contribution	2,262.17
Thornlea Nursing Homes, 21 Hawthorn Gardens, Loanhead	22/00624/DPP	Patrick Black	Non-Denominational Secondary Education Sum	17,399.93
Land at Junction of The A701 and Pentland Road, Old Pentland, Edinburgh	21/00338/DPP	Aldi Stores	TRO	2,330.33
Land Northeast of Sheriffhall Park and Ride, Easter Shawfair	20/00906/PPP	David Lloyd Leisure	Borders Rail Contribution	13,834.82
Land Northeast of Sheriffhall Park and Ride, Easter Shawfair	20/00906/PPP	David Lloyd Leisure	Sheriffhall Roundabout	38,986.22
Site Hs11 Dalhousie South, Bonnyrigg	18/00740/DPP	Springfield Homes	Non-Denominational Primary Education Contribution	80,833.33
Site Hs11 Dalhousie South, Bonnyrigg	18/00740/DPP	Springfield Homes	Non-Denominational Secondary Education Sum	53,888.89
Land between Rosewell Road and Carnethie Street, Rosewell	18/00403/DPP	Barratt David Wilson	Community Facilities Contribution	25,159.38
Land between Rosewell Road and Carnethie Street, Rosewell	18/00403/DPP	Barratt David Wilson	Non-Denominational Secondary Education Sum	228,071.25
Land between Rosewell Road and Carnethie Street, Rosewell	18/00403/DPP	Barratt David Wilson	Non-Denominational Primary Education Contribution	255,564.69
Land between Rosewell Road and Carnethie Street, Rosewell	18/00403/DPP	Barratt David Wilson	Open Space and Play Equipment	21,500.05
Land between Rosewell Road and Carnethie Street, Rosewell	18/00403/DPP	Barratt David Wilson	Borders Rail Contribution	32,825.00
Land West of The Laird and Dog Hotel, High Street, Lasswade	18/00382/DPP	Dimension Homes	A7 urbanisation	2,803.70
Land West of The Laird and Dog Hotel, High Street, Lasswade	18/00382/DPP	Dimension Homes	A7 urbanisation	2,803.70

Land West of The Laird and Dog Hotel, High Street, Lasswade	18/00382/DPP	Dimension Homes	A7 urbanisation	2,910.36
Land West of The Laird and Dog Hotel, High Street, Lasswade	18/00382/DPP	Dimension Homes	Non-Denominational Primary Education Contribution	17,570.85
Land West of The Laird and Dog Hotel, High Street, Lasswade	18/00382/DPP	Dimension Homes	Non-Denominational Primary Education Contribution	17,570.85
Land West of The Laird and Dog Hotel, High Street, Lasswade	18/00382/DPP	Dimension Homes	Non-Denominational Primary Education Contribution	18,239.31
Land West of The Laird and Dog Hotel, High Street, Lasswade	18/00382/DPP	Dimension Homes	Non-Denominational Secondary Education Sum	8,543.35
Land West of The Laird and Dog Hotel, High Street, Lasswade	18/00382/DPP	Dimension Homes	Non-Denominational Secondary Education Sum	8,543.35
Land West of The Laird and Dog Hotel, High Street, Lasswade	18/00382/DPP	Dimension Homes	Non-Denominational Secondary Education Sum	8,868.37
Land West of The Laird and Dog Hotel, High Street, Lasswade	18/00382/DPP	Dimension Homes	Borders Rail Contribution	2,696.75
Land West of The Laird and Dog Hotel, High Street, Lasswade	18/00382/DPP	Dimension Homes	Borders Rail Contribution	2,696.75
Land West of The Laird and Dog Hotel, High Street, Lasswade	18/00382/DPP	Dimension Homes	Borders Rail Contribution	2,799.34
Land West of The Laird and Dog Hotel, High Street, Lasswade	18/00382/DPP	Dimension Homes	Denominational Secondary Contribution	135.00
Land West of The Laird and Dog Hotel, High Street, Lasswade	18/00382/DPP	Dimension Homes	Denominational Secondary Contribution	135.00
Land West of The Laird and Dog Hotel, High Street, Lasswade	18/00382/DPP	Dimension Homes	Denominational Secondary Contribution	135.00
Land West of The Laird and Dog Hotel, High Street, Lasswade	18/00382/DPP	Dimension Homes	Open Space and Play Equipment	1,210.95
Land West of The Laird and Dog Hotel, High Street, Lasswade	18/00382/DPP	Dimension Homes	Open Space and Play Equipment	1,210.95
Land West of The Laird and Dog Hotel, High Street, Lasswade	18/00382/DPP	Dimension Homes	Open Space and Play Equipment	1,257.02
Land 470M West of Corby Craig Terrace, Bilston, Roslin	17/00968/DPP	Taylor Wimpey	Non-Denominational Primary Education Contribution	274,042.55
Land 470M West of Corby Craig Terrace, Bilston, Roslin	17/00968/DPP	Taylor Wimpey	Non-Denominational Primary Education Contribution	81,941.33
Land Northwest of Moat View, Roslin	18/00535/PPP	Barratt David Wilson	Non-Denominational Secondary Education Sum	258,270.19
Land Northwest of Moat View, Roslin	18/00535/PPP	Barratt David Wilson	Non-Denominational Secondary Education Sum	258,270.19
Land Northwest of Moat View, Roslin	18/00535/PPP	Barratt David Wilson	Non-Denominational Secondary Education Sum	258,270.19
Land Northwest of Moat View, Roslin	18/00535/PPP	Barratt David Wilson	Community Facilities Contribution	20,479.71
Land Northwest of Moat View, Roslin	18/00535/PPP	Barratt David Wilson	Community Facilities Contribution	20,479.71
Land Northwest of Moat View, Roslin	18/00535/PPP	Barratt David Wilson	Community Facilities Contribution	20,479.71

Land Northwest of Moat View, Roslin	18/00535/PPP	Barratt David Wilson	Non-Denominational Primary Education Contribution	222,222.00
Land Northwest of Moat View, Roslin	18/00535/PPP	Barratt David Wilson	Non-Denominational Primary Education Contribution	222,222.00
Land Northwest of Moat View, Roslin	18/00535/PPP	Barratt David Wilson	Non-Denominational Primary Education Contribution	222,222.00
Land Bounded by A702, Old Dalkeith Road and The Wisp, Millerhill, Dalkeith	02/00660/OUT	Shawfair LLP	Shawfair Combined Education	549,418.12
Land Bounded by A702, Old Dalkeith Road and The Wisp, Millerhill, Dalkeith	02/00660/OUT	Shawfair LLP	Shawfair Combined Education	113,840.98
Land Bounded by A702, Old Dalkeith Road and The Wisp, Millerhill, Dalkeith	02/00660/OUT	Shawfair LLP	Shawfair Combined Education	210,071.63
Land Bounded by A702, Old Dalkeith Road and The Wisp, Millerhill, Dalkeith	02/00660/OUT	Shawfair LLP	Denominational Secondary Contribution	4,590.00
Land Bounded by A702, Old Dalkeith Road and The Wisp, Millerhill, Dalkeith	02/00660/OUT	Shawfair LLP	Denominational Secondary Contribution	945.00
Land Bounded by A702, Old Dalkeith Road and The Wisp, Millerhill, Dalkeith	02/00660/OUT	Shawfair LLP	Denominational Secondary Contribution	1,755.00
Land Bounded by A702, Old Dalkeith Road and The Wisp, Millerhill, Dalkeith	02/00660/OUT	Shawfair LLP	Borders Rail Contribution	62,116.03
Land Bounded by A702, Old Dalkeith Road and The Wisp, Millerhill, Dalkeith	02/00660/OUT	Shawfair LLP	Borders Rail Contribution	12,870.62
Land Bounded by A702, Old Dalkeith Road and The Wisp, Millerhill, Dalkeith	02/00660/OUT	Shawfair LLP	Borders Rail Contribution	23,750.25
Land Bounded by A702, Old Dalkeith Road and The Wisp, Millerhill, Dalkeith	02/00660/OUT	Shawfair LLP	Sheriffhall Roundabout	51,896.31
Land Bounded by A702, Old Dalkeith Road and The Wisp, Millerhill, Dalkeith	02/00660/OUT	Shawfair LLP	Sheriffhall Roundabout	10,753.06
Land Bounded by A702, Old Dalkeith Road and The Wisp, Millerhill, Dalkeith	02/00660/OUT	Shawfair LLP	Sheriffhall Roundabout	19,842.71
Land Between Deanburn and Mauricewood Road, Penicuik	17/00068/DPP	CALA/ Avant Homes	Local Transport Infrastructure	369,211.58
Land Between Deanburn and Mauricewood Road, Penicuik	17/00068/DPP	CALA/ Avant Homes	Denominational Secondary Contribution	9,450.00
Land Between Deanburn and Mauricewood Road, Penicuik	17/00068/DPP	CALA/ Avant Homes	Non-Denominational Primary Education Contribution	255,688.07
Land Between Deanburn and Mauricewood Road, Penicuik	17/00068/DPP	CALA/ Avant Homes	Community Facilities Contribution	28,221.20
Land Between Deanburn and Mauricewood Road, Penicuik	17/00068/DPP	CALA/ Avant Homes	Non-Denominational Primary Education Contribution	72,724.00
Land Between Deanburn and Mauricewood Road, Penicuik	17/00068/DPP	CALA/ Avant Homes	Community Facilities Contribution	220,199.70
Land Between Deanburn and Mauricewood Road, Penicuik	17/00068/DPP	CALA/ Avant Homes	Non-Denominational Primary Education Contribution	46,451.73
Land Between Deanburn and Mauricewood Road, Penicuik	17/00068/DPP	CALA/ Avant Homes	Non-Denominational Secondary Education Sum	58,355.34
Land Between Deanburn and Mauricewood Road, Penicuik	17/00068/DPP	CALA/ Avant Homes	Penicuik Nursery Capacity	15,386.80
Land Between Deanburn and Mauricewood Road, Penicuik	17/00068/DPP	CALA/ Avant Homes	Community Facilities Contribution	26,057.50
Land Between Deanburn and Mauricewood Road, Penicuik	17/00068/DPP	CALA/ Avant Homes	Denominational Primary contribution	78,822.74

Housing Site S, Land to The East and West Of, Hunterfield Road, Gorebridge, Midlothian	07/00352/FUL	Persimmon Homes	Non-Denominational Primary Education Contribution	15,820.00
Housing Site S, Land to The East and West Of, Hunterfield Road, Gorebridge, Midlothian	07/00352/FUL	Persimmon Homes	Non-Denominational Primary Education Contribution	15,820.00
Housing Site S, Land to The East and West Of, Hunterfield Road, Gorebridge, Midlothian	07/00352/FUL	Persimmon Homes	Non-Denominational Secondary Education Sum	160,138.81
Housing Site S, Land to The East and West Of, Hunterfield Road, Gorebridge, Midlothian	07/00352/FUL	Persimmon Homes	Non-Denominational Secondary Education Sum	160,138.81
Land North of Dalhousie Dairy, Bonnyrigg	16/00712/PPP	Springfield Homes	A7 urbanisation	86,924.00
Land Previously Occupied by The Roslin Institute, Roslin	13/00877/PPP	Taylor Wimpey	A701 Relief Road	75,793.65
Land Previously Occupied by The Roslin Institute, Roslin	13/00877/PPP	Taylor Wimpey	A701 Relief Road	75,793.65
Land Previously Occupied by The Roslin Institute, Roslin	13/00877/PPP	Taylor Wimpey	Community Facilities Contribution	19,477.07
Land Previously Occupied by The Roslin Institute, Roslin	13/00877/PPP	Taylor Wimpey	Community Facilities Contribution	19,477.07
Land Previously Occupied by The Roslin Institute, Roslin	13/00877/PPP	Taylor Wimpey	Non-Denominational Primary Education Contribution	135,860.12
Land Previously Occupied by The Roslin Institute, Roslin	13/00877/PPP	Taylor Wimpey	Non-Denominational Primary Education Contribution	135,860.12
Land Previously Occupied by The Roslin Institute, Roslin	13/00877/PPP	Taylor Wimpey	Non-Denominational Secondary Education Sum	208,508.33
Land Previously Occupied by The Roslin Institute, Roslin	13/00877/PPP	Taylor Wimpey	Non-Denominational Secondary Education Sum	208,508.33
Land Previously Occupied by The Roslin Institute, Roslin	13/00877/PPP	Taylor Wimpey	Denominational Secondary Contribution	3,213.00
Land Previously Occupied by The Roslin Institute, Roslin	13/00877/PPP	Taylor Wimpey	Denominational Secondary Contribution	3,213.00
Land Southwest of Bilston Seafield Moor Road	12/00814/PPP	Barratt David Wilson	Denominational Secondary Contribution	3,375.00
Land Southwest of Bilston Seafield Moor Road	12/00814/PPP	Barratt David Wilson	Denominational Secondary Contribution	2,025.00
Land Southwest of Bilston Seafield Moor Road	12/00814/PPP	Barratt David Wilson	Non-Denominational Primary Education Contribution	253,325.00
Land Southwest of Bilston Seafield Moor Road	12/00814/PPP	Barratt David Wilson	Non-Denominational Primary Education Contribution	151,995.00
Land Southwest of Bilston Seafield Moor Road	12/00814/PPP	Barratt David Wilson	Non-Denominational Secondary Education Sum	195,347.85
Land Southwest of Bilston Seafield Moor Road	12/00814/PPP	Barratt David Wilson	Non-Denominational Secondary Education Sum	119,992.03
Total				£7,778,585.52