THE USE OF PLANNING OBLIGATIONS TO ESTABLISH COMMUNITY FUNDS IN ASSOCIATION WITH THE SITING OF FACILITIES FOR MANAGING RADIOACTIVE WASTES

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NUCLEAR LEGACY ADVISORY FORUM

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1 Introduction

NuLeAF has taken a number of initiatives to promote the provision of community funds in association with the siting of radioactive waste management facilities. These include publication of Briefing Paper 14 (March 08) to inform discussion about the potential development of a national framework, meetings with NDA and Government to explore the possibility of establishing such a framework, and preparation of a paper for further discussion with Government[1].

As a result of discussion with officials, it is clear that Government will not adopt a strategic approach to Community Funds to encourage provision of facilities offering a multi-site and/or multi-customer service on a regional or national basis[2]. Its view is that the question of fund provision should be considered on a case by case basis as a normal part of the planning process. Such an approach would be consistent with well documented national and local policy approaches to the use of planning obligations for non-radioactive waste developments, and the approaches taken to the Copeland and Dounreay Community Funds (see page 4-5 below).

In the light of this, the NuLeAF Steering Group has endorsed the publication of this Briefing Paper on the use of planning obligations in association with the siting of radioactive waste management facilities.

The Briefing Paper covers:

- The basic principles of planning obligations
- Extent of use of planning obligations
- Local authority policies and approaches to planning obligations
- Use of S106 with regard to developments for radioactive waste management
- Potential impact of the Community Infrastructure Levy

[1] The paper did not cover community packages linked to the development of a geological disposal facility for higher activity wastes. These are being addressed as part of the Government's Managing Radioactive Wastes Safely programme.
[2] With the possible exception of the Geological Disposal Facility.

The Basic Principles of Planning Obligations

The Town and Country Planning Act 1990 – Section 106 provides that a developer may enter into a planning obligation enforceable by the local planning authority. Planning obligations can be entered into by means of a unilateral undertaking by a developer or by an agreement between a developer and a local planning authority.

As explained in Government guidance[3], planning obligations are intended to make acceptable development which would otherwise be unacceptable in planning terms (para B3). They can be used to secure a contribution from a developer to compensate for loss or damage created by the development, or to mitigate a development's impact.

Where compensation or mitigation are required, planning obligations should be based on a clear and up to date assessment of the impacts likely to be created by development and the nature and scale of the measures needed to address these impacts (para B28).

The guidance adds that there "are not hard and fast rules about the size or type of development that should attract obligations" (para B4).

There is an expectation that a planning obligation should meet all of the Secretary of State's policy tests. It should be:

- Relevant to planning
- Necessary to make the proposed development acceptable in planning terms
- Directly related to the proposed development
- Fairly and reasonably related in scale and kind to the proposed development and
- Reasonable in all other respects.

However, the guidance notes that whilst the Secretary of State sets out the policy tests for planning obligations, the question of whether or not an obligation is valid and material is ultimately a matter for the Courts. On a number of occasions, the Courts have held that planning obligations which go beyond the policy tests nevertheless meet statutory requirements (Circular 05/05, para 3).

Where there is a dispute or a problem in negotiating a planning obligation, Government advises that independent expert mediators could be used (para B37). It explains that:

[3] Circular 05/05: Planning Obligations, Office of the Deputy Prime Minister 2005. The circular encourages local planning authorities to use planning conditions in preference to planning obligations wherever possible.

> Although there will always be circumstances where no amount of mediation may lead to a solution and planning permission may have to be refused, third parties can provide valuable means of mediating an agreement … [4]

The guidance adds that if a local planning authority seeks unreasonable planning obligations, it is open to the applicant to refuse to enter into them (B56). A right of appeal then applies where an application has been refused planning permission due to the developer not agreeing to the inclusion of an obligation (B51).

Extent of Use of Planning Obligations

Over the last decade or more, the actions required by planning obligations have broadened beyond the direct provision of infrastructure to include features of general benefit to the community[5]. This has been accompanied by a significant broadening of the concept of development impact. These now incorporate aesthetic and environmental impacts requiring mitigation and demands for social facilities and services arising from schemes.

As highlighted by the Audit Commission[6], planning obligations have become increasingly important to the provision of public services associated with a wide range of developments:

> They are essential to delivering the necessary infrastructure for creating sustainable communities. They can: … mitigate the impact of development on communities; compensate for loss or damage created by a development; and support basic off-site infrastructure such as access roads.

Research in 2008[7] found that new policies and good practice were becoming more embedded with positive outcomes for the number and value of planning agreements. In 2005-06, the average number of planning obligation agreements per local planning authority was 27, with direct payment obligations rising far more than in-kind planning obligations. Consequently, the average value of direct payment obligations agreed per authority rose from just over £1.5m to £2.6 m.

More recently, the impact of the recession has made it more difficult for local authorities to negotiate S106 agreements with developers.

[4] Planning Obligations: Practice Guidance, Department for Communities and Local Government, July 2006.
[5] 'Planning Obligations and the Mediation of Development', H Campbell et al, RICS Foundation Research Paper, Nov 2001, p7.
[6] Audit Commission, 'Securing Community Benefits through the Planning Process', August 2006.
[7] 'Valuing Planning Obligations in England: 2005-06', DCLG, August 2008.

Local Authority Policies and Approaches to Planning Obligations

Government guidance highlights that:

> Development plan policies are … a crucial pre-determinant in justifying the seeking of any planning obligations since they set out the matters which, following consultation with potential developers, the public and other bodies, are agreed to be essential in order for development to proceed. (B8)

It also stresses that local planning authorities should include policies about the principles and use of planning obligations in their Development Plan Documents (B25). It adds that more detailed policies – for example on the likely level and types of contributions – ought then to be included in Supplementary Planning Documents (B26).

Most local authorities have followed this advice. In 2001, it was reported that 85% of local planning authorities have specific policies relating to planning obligations in their development plans[8]. This helps to provide clarity, legitimacy and provides a starting place for negotiation.

Government practice guidance also explains that some local authorities have appointed specialist S106 officers, with responsibility for developing and applying policies on planning obligations.

In 2006, the Audit Commission made a number of recommendations that sought to build on this approach. These included:

- Engaging Chief Executives, Leaders and Portfolio Holders to integrate potential contributions of S106 agreements with the delivery of community strategy and;
- Ensuring that other building blocks are in place, including the setting up of a system to deal with S106 agreements and draw on the experience of other councils.

An example of local authority policy on planning obligations is provided by Lancashire County Council[9]. This policy points out that if a particular planning obligation is necessary in order to make a development proposal acceptable, planning permission will not be granted without it (p13). It also states that:

[8] 'Planning Obligations and the Mediation of Development', H Campbell et al, RICS Foundation Research Paper, Nov 2000

[9] Lancashire County Council, Sept 2008.

- As a general principle, the local planning authority will expect each development proposal to consider all the negative impacts it may have on the local area and the environment. If a specific methodology in this document applies to a proposed development, the developer should expect to pay a contribution. However, it is entirely up to the local planning authority whether it imposes the full range of costs for planning obligations.
- Before buying land, developers need to consider the likely costs of any planning obligation. This document provides guidance on the range and amount of contributions a developer may have to pay. Discussion between developers and local planning authorities should take place at the earliest possible stage of a development scheme.
- If a proposal is viable but the developer and authority cannot agree on the range and amount of contributions, independent mediation and arbitration may be used. The authority and developer must agree on who should mediate, but the developer will normally have to pay any mediation costs.

Use of S106 with regard to Developments for Radioactive Waste Management

A recent notable use of S106 is in association with development of Vault 9 at the Low Level Waste Repository (LLWR) near Drigg in Cumbria[10].

Government and NDA agreed to the establishment of a fund, recognising the contribution that the local community will provide to the nation by hosting the LLWR. The NDA has committed to contributing £10 million to the fund to be paid in two stages, and to paying £1.5 million per year, for the period of operation of Vault 9 (around 10 years). The income or capital from the fund will be available to be spent on initiatives that are consistent with the NDA's socioeconomic policy, including employment, education and skills, economic and social infrastructure and economic diversification[11]. The NDA"s invoking of its socio-economic policy to guide use of the Community Fund sets a precedent for use of that policy in meeting local needs and mitigating impacts that will arise from proposed waste management facilities.

The basis for the fund is set out in the unilateral undertaking provided by the NDA to Cumbria County Council (dated 18 January 2008). The accompanying letter states that:

> Under the terms of the undertaking, the NDA offers to be bound, pursuant to section 106 of the Town and Country Planning Act 1990 and sections 7 and 10 of the Energy Act 2004, to set up a Community Benefit Organisation to administer a fund for the benefit of the residents of the Borough of Copeland in recognition of the national benefit derived from the future accommodation of low level radioactive waste from across the United Kingdom at the LLWR.

[10] Copeland Community Fund Case Study, Nov 08
[11] NDA Socio-Economic Policy (2008)

The provisions in the undertaking are stated to be planning obligations for the purposes of Section 106 of the 1990 Act. The undertaking further states that:

> In entering this planning obligation the NDA recognises that although the design of the Development has had due regard to minimising local impacts and although the total benefit from the Development in terms of contributing to meeting a national need will outweigh any residual adverse impacts of the Development it is appropriate to make financial provision to meet local needs arising from the Development including assisting participation of the community in the Development and to mitigate the residual economic and other impacts that will be caused by the Development. (para 12)

The undertaking also states that the NDA"s powers under Sections 7 and 10 of the Energy Act 2004 enable it to give encouragement and support to activities that benefit the social or economic life of communities living near designated sites, or that produce other environmental benefits for such communities, including the power to make grants and loans.

Although the NDA has made it clear that the LLWR Community Fund is based on recognition of the national role of the LLWR, there is nothing inherent in the provisions of Section 106 of the Town and Country Planning Act, or Sections 7 and 10 of the Energy Act, which restricts the provision of benefits to facilities with a national role.

It is understood that the provision of a Community Fund in association with the development of a LLW disposal facility adjacent to the Dounreay site in north Scotland also makes use of powers in Scottish law that are equivalent to S106. In this case, the total value of the fund is £4 million over the lifetime of the facility. £1 million is to be made available in 2011, when construction begins, with payments of £300,000 per year as soon as the facility becomes operational (expected in 2014).

A comparison of the size of the Copeland and Dounreay Community Funds, and the role, capacity and costs of the associated facilities are:

Facility	Role	Capacity	Costs	Community Fund
Vault 9, LLWR	Nationa – multi-site and multi-customer service	100,000 cubic metres	Thought to be approx. £20 million for construction	£10 million, plus £1.5 million per year of operation (approx 10 years)

LLW Disposal, Dounreay	Local – Vulcan and Dounreay only	Up to 175,000 cubic metres	Total costs (excluding operation £90 million)	£1 million, plus £300,000 per year of operation (approx. 10 years)

Potential Impact of the Community Infrastructure Levy (CIL)

The Community Infrastructure Levy (CIL) is a new charge which local authorities in England and Wales are empowered, but not required, to charge on most types of new development in their area. The CIL is scheduled to become operational in 2010. Its charges will be based on simple formulae which relate the size of the charge to the size and character of the development paying it. The proceeds of the levy are to be spent on local and sub-regional infrastructure to support the development of the area.

Government has stated that the facility to enter into a negotiated planning obligation will remain when the CIL is introduced[12]. It adds that this is because planning obligations can be a useful tool to ensure that the specific impacts of a development can be mitigated. The Government is considering whether restrictions on the use of planning obligations should be made once CIL is operational.

[12] 'The Community Infrastructure Levy', DCLG, August 2008.