

Development Contributions

S69 and S75 Legal Agreements

Introduction

In terms of Policy G5 of the Scottish Borders Adopted Local Plan 2011, where a development proposal is otherwise acceptable, but cannot proceed due to deficiencies in infrastructure and services or to environmental impacts, any or all of which will be created or made worse as a result of the development, the Council will require Planning Applicants to make provision for full or part contribution towards the cost of addressing such deficiencies. The terms of settlement and spend of these contributions are regulated by Legal Agreements between the Applicants, Scottish Borders Council (SBC) and any other party with a legitimate interest in the subject of application.

Further information about Developer Contributions can be found in SBC's Supplementary Planning Guidance (SPG) no. 9 on Development Contributions: [SPG no. 9 - Developer Contributions](#)

Before submitting any Application for Planning Permission you should check whether it complies with all relevant policies and guidance. A development proposal that does not satisfy Planning Policy and guidance will not be supported just because a Development Contribution is agreed to be settled.

Executive Summary

- **Where a Development Contribution need is identified in respect of a Planning Application, the Applicant will be required to enter into a Legal Agreement to provide for its settlement**
- **Applicants will be contacted soon after their development proposals have been registered to provisionally advise of potential contribution requirements**
- **Agreeing to settle identified Development Contributions or drafting a Legal Agreement will not influence the prospects of a Planning Application being approved**
- **Not agreeing to settle identified Development Contributions will result in Planning Permission being withheld and is likely to result in the Application being recommended for refusal**
- **There are two types of Legal Agreements to regulate contributions – Section 69s (s69s) and Section 75s (s75s)**
- **S69s are easier to draft and quicker to conclude than s75s. They do not attract SBC Legal Fees or Recording Dues**
- **S69s, however, require the full settlement of contributions prior to the release of Planning Permission**
- **S75s provide for contributions to be settled at an agreed point in the future and after the release of Planning Permission**

- **However, s75s attract SBC Legal Fees and Recording Dues (£315 - £525 and £60 respectively), which s69s do not, and generally take longer to conclude. The Applicant only incurs these costs should their Planning Application subsequently be approved**
- **Applicants are encouraged to enter into an associated Processing Agreement with SBC. This will provisionally set out the dates by which key actions necessary to conclude the Legal Agreement process will be undertaken by the respective parties to it.**
- **Development should never commence until Planning Permission has been obtained and any requirement of conditions have been fully met**
- **Legal Agreements should be drafted in advance of Application determination to help reduce the time taken to release Planning Permission, where approved, though this will never influence the outcome of the planning process. They will not, however, be signed unless the application has been determined for approval**
- **Unreasonable delays to the conclusion of a Legal Agreement caused by Applicant actions or inactions may result in the Application being recommended for refusal. A period of 3 months from the date of commencement of negotiations is generally considered sufficient for the conclusion of a s75. The Planning Authority reserves the right to reconsider its decision should the legal agreement not be signed within this timeframe**
- **SBC recommends that Applicants always seek appropriate independent legal advice prior to entering into any Legal Agreement and in all instances**

The need for Legal Agreements

In cases where contributions have been identified as necessary to allow development to happen, then a Legal Agreement will need to be entered into between the Council, Planning Applicant, and any other parties that have an interest in the subject of Application.

Should a Planning Application be approved by the Planning Authority, and Development Contributions are identified, Planning Permission will not be released unless a Legal Agreement is concluded to provide for these payments. As a key Council Policy, were such matters not met by the Applicant, then their development proposal will be recommended for refusal.

Legal Agreements are needed to ensure that signatories to them fulfil their obligations.

For the Applicant, this essentially means settling the contribution at the agreed time.

In return, the Council will be obliged to spend or apply the contribution for the purpose collected by an agreed point in time.

Clauses are included to control the consequences should either party to a Legal Agreement not fully comply with the terms. These include additional interest added to the contribution should it not be settled on time, and the return of contributions, plus interest, if not spent or applied for the purpose collected and within agreed deadlines.

As Development Contributions can be required for Applicants to comply with SBC Policy, the conclusion of a Legal Agreement will be essential prior to the release of Planning Permission. Development is prohibited until this point in the planning process is reached.

The main parts of a typical Legal Agreement will state:

- the parties to the agreement i.e. the Council, Applicant and anyone with an interest in the subject of application
- the development to which the Legal Agreement relates
- the contributions requiring to be paid
- when the contribution is required to be paid i.e. settlement trigger point
- whether the contribution should be paid in one or multiple instalments
- the consequences should the contribution not be settled when agreed
- the purpose for which the contribution will be spent or applied by SBC
- the deadline by which the contribution will be spent or applied by SBC
- the terms of contribution return if required
- any other planning restrictions, where necessary e.g. land use restrictions

NB: SBC recommends that Applicants in all instances seek appropriate independent legal advice prior to entering into any Legal Agreement.

Development should never start until Planning Permission has been released by the Planning Authority. Development works for which Planning Permission has not been issued may result in enforcement action being taken against the Applicant by the Council.

Legal Agreements state the terms and conditions applicable to signatories to them. As these are legal documents, options are available, and will be applied by the Council, should parties to the agreement fail to comply.

Types of Legal Agreement

Any Council is entitled to seek full settlement of Development Contributions prior to the release of Planning Permission. However, SBC Policy recognises that some Applicants may prefer or not be able to settle full contribution requirements for some developments on this basis.

Consequently, there are two types of Legal Agreement which can be used to help accommodate Applicants' specific circumstances and requirements – 'Section 69' and 'Section 75' Legal Agreements.

If Development Contributions are required, the Applicant will need to agree with the Council which type of Legal Agreement should be used. Applicants are encouraged to discuss this matter with the Development Negotiator at the very earliest opportunity after submitting their Planning Application.

To assist with ensuring that the Planning Application process is concluded as efficiently as possible, and reflecting Scottish Government guidance, SBC encourages Applicants to enter into an associated Processing Agreement. These are brief and straight-forward schedules designed to provide clarity in terms of which parties are responsible for specified actions required to conclude the Legal Agreement and by what dates it would be reasonable for them to be undertaken. They are not, however, legally binding and should events occur which would potentially jeopardise the meeting of indicative deadlines, then the subsequent action-dates can, by mutual consent, be amended.

NB: Addressing Development Contribution and Legal Agreement requirements at an early stage in the Application process will assist with the speed of their conclusion. This will help, where the development proposal is approved, with the efficient release of Planning Permission. To this end, the Council will provide Applicants, or their Agents, with indicative contribution requirements at, or soon, after, Application registration. This will allow discussion and consensus to be reached on the proposed terms and conditions of an Agreement, known as Heads of Terms, these being written into the final legal document.

Section 69 Legal Agreements (s69s)

Section 69 Legal Agreements ([Local Government \(Scotland\) Act 1973](#)) are more straightforward and therefore the quicker and cheaper to conclude of the two Legal Agreement types available. As the contributions are paid **in full** and **prior** to the release of Planning Permission, the legal document itself is short and uncomplicated by comparison with a Section 75 (s75).

Further, as the contribution is settled prior to the release of Planning Permission, there is no need to register the Agreement as a Burden against Title, as is the case for s75s (see below).

The Development Contribution is, however, required to be paid **in full** at the time of signing a s69 Legal Agreement and **prior** to Planning Permission being issued.

NB: S69 Legal Agreements will not be drafted by SBC until the associated Planning Application has been approved in principle. Applicants should note that, although SBC do not seek Legal Fees to draft a S69, the applicant will be responsible for any other Legal Fees they may incur in the course of drafting Legal Agreements or their compliance with them.

Contributions settled via sS69 will not be returned by SBC on the grounds that the proposed development does not subsequently take place.

Section 75 Legal Agreements (s75s)

Section 75 Legal Agreements ([Town & Country Planning \(Scotland\) Act 1997](#)) allow for phased contribution payment(s) at a mutually agreeable future point(s) in the development and **after** the issue of Planning Permission.

Sometimes contributions will require to be settled at a relatively early point in the development process. This can enable service provision needed to support development to be in place prior to its completion. Other contributions, however, can be settled at comparatively later points in the development programme without impacting upon service delivery.

If contribution settlement trigger points, and as set out in an agreement, are not reached, e.g. the development does not commence or is not completed, then the relevant contributions will **not** need to be paid.

The timing requirements of contribution settlement are likely to vary from Planning Application to Planning Application. Applicants are therefore encouraged to liaise with the Development Negotiator to agree mutually acceptable terms and conditions for the Legal Agreement at the earliest opportunity. These terms and conditions, known as The Heads of Terms, provide the basis for the Legal Agreement.

For residential developments exceeding 16 units, applicants will ordinarily need to provide Affordable Housing on-site. This requirement is detailed in [SPG no. 10 - Affordable Housing](#). In such cases, a s75 will **always** be necessary, s69s not being an option.

As s75s are more complex and need to be registered as a Burden against Title, they will take longer to draft and conclude than the s69 equivalent. Registration is necessary to make sure that the terms agreed are fully complied with, either by all of the signatories to the Legal Agreement, or anyone who acquires an interest in the development site after the agreement is concluded.

Consequently, the Council, in addition to working with an Applicant's legal representative, will need to examine Title of the subject of Application to be fully satisfied of ownership rights. It is therefore advised that the Applicant's legal representatives are asked to supply the Council with copy of Title as early as possible and to respond quickly to all other requests.

NB: Given on-site Affordable Housing (AH) can clearly not be delivered in advance of the release of Planning Permission, a s75 will need to be concluded in all instances where on-site AH provision is required.

Unreasonable delays to the conclusion of a Legal Agreement caused by Applicant actions or inactions may result in the Application being considered withdrawn or even recommended for refusal. A period of 3 months from the date of the commencement of negotiations is generally considered sufficient for the conclusion of a s75. The Planning Authority reserves the right to reconsider its decision should the legal agreement not be signed within this timeframe

Legal Agreement charges

SBC do not seek Legal Fees to draft a s69 Legal Agreement as these are relatively uncomplicated legal documents.

However, s75 Agreements are more complex. They need detailed examination of landowner Titles to the site subject of Application. This is necessary to make sure that the site owner, and other parties with an interest in the land, are signatories to the Legal Agreement and are aware of the obligations which will be placed upon them when concluded.

It is necessary for s75s to be registered as a Burden against Title to make sure that what has been agreed will be complied with by whoever has an interest in the subject of application at the point which contribution settlement is required. Therefore, anyone who acquires an interest in a site or property which has a s75 attached as a burden will need to honour the obligations in the Legal Agreement when required to do so.

The level of Council's Legal Fees will be dependent upon the complexity of the s75 to be drafted, ordinarily in the range of £315 - £525.

However, and due to the requirement for the Registration of s75s, £60 Recording Dues also need to be settled by the Applicant. These Dues may change e.g. should recording be prevented by a technical issue or when multiple-titles for the same site or property are involved.

The Council needs Legal Fees and Registration Dues for s75 Legal Agreements to be paid in full by the Applicant upon their conclusion.

NB: Applicants are only required to settle SBC Legal Fees should their Planning Application be approved

However, Applicants should note that they may be responsible for any other fees that they incur in the course of drafting Legal Agreements, or for their compliance with them, even if the Application is not approved.

Contribution indexation

In order to account for the impact of inflation, most contributions are changed every year, with effect from 1 April, in line with Building Cost Information Service Indices (BCIS). These indices show changes in building construction costs over time. The amount of contribution requiring to be paid will be calculated from the rate in force, and as published in [SPG no. 9 - Developer Contributions](#), at the point of settlement requirement.

As s75 Legal Agreements push back the settlement of contributions to agreed points in the future, indexation is more likely to impact on these types of agreement than the s69 equivalent as costs, and therefore contribution levels, can change over time.

NB: Construction costs, and therefore contribution levels, change over time. The amount needing to be settled will reflect the contribution amount in force at the point of payment requirement and as published in the Supplementary Planning Guidance.

Settling Contributions

As stated above, for s69 legal agreements, the identified contribution needs to be settled in full at the point of signing the agreement.

However, s75s allow for the payment of contributions at agreed future points in the development process.

Clauses are written into s75 Legal Agreements to encourage Applicants to settle contributions on time and without being specifically requested. This is not dependent upon invoices being raised by the Council and they will not be issued unless specifically requested. Where appropriate, additional interest will be applied should contributors not pay on time. The Council will seek to enforce such provisions in all instances.

NB: Developers are required to pay agreed contributions as and when Legal Agreement settlement trigger points occur and without being asked to do so. Whilst not required, SBC will, upon request, issue invoices in respect of contributions due.

Risk

Where Applicants are able to pay contributions in advance of development using a s69, there are benefits in terms of the speed with which matters can be concluded as well as being a cheaper option to draft.

However, there is also an element of risk to the Applicant should a s69 Legal Agreement be used.

If the proposed development does not subsequently commence, and a contribution has been settled via a s69 Legal Agreement, the Council will **not** return the settled contribution unless they have not been spent or applied for the purpose collected and/or within the timeframes agreed.

Whilst s75s incur SBC Legal Fees and Recording Dues, take longer to conclude relative to a s69, and may result in changing contribution levels, contributions may not need to be paid if the agreed and stated settlement trigger points are not reached e.g. if a s75 states that contributions will be paid upon the occupation of a house, and that house is not occupied, then the contribution does not need to be settled.

Consequently, Applicants are encouraged to consider how likely it is their development proposals will commence and be concluded, in addition to the other factors noted, when considering which Legal Agreement type would be most appropriate for their circumstances.

NB: Different types and level of risk apply to the different types of Legal Agreement available. Applicants should make sure that they understand and accept these risks before they choose whether a s69 or s75 legal agreement best reflects their circumstances.

Pre-determination instruction of Legal Agreement drafting

In an effort to minimise the time taken to release Planning Permission, and should the Application be approved, the drafting of a Legal Agreement should start **in advance** of the Council's decision. This can allow the terms of the Legal Agreement to be substantially agreed, and even drafted, prior to determination. However, a Legal Agreement shall **never** be concluded until the Council has confirmed that it has approved the Application, subject to specified conditions and the conclusion of a Legal Agreement.

The only motivation for pre-determination Legal Agreement drafting is to assist both the Applicant and the Council by streamlining the planning process, this reflecting Scottish Government guidance.

However, pre-determination Legal Agreement drafting will **never** influence the outcome of the planning process.

Applicants will only be charged Council Legal Fees for drafting pre-determination agreements in the event that their Application is approved. However, Applicants should be aware that they will be responsible for their own legal costs incurred irrespective of whether or not the Application is later approved.

NB: The drafting of Legal Agreements in advance of any decision being made about the Application will never affect or influence the outcome of the planning process

Pre-determination negotiation of the terms of a Legal Agreement does not prohibit the Planning Authority, either via Committee or Delegated Authority, from varying the contribution terms or conditions from those initially agreed. Under such circumstances, the Legal Agreement will need to be amended to reflect any such requirements accordingly.

Release of Planning Permission

Works in respect of a Planning Application should never be started until Planning Permission has been given by the Council.

Where a Planning Application has been Approved in Principle, also known as being Minded to Approve, and pending the conclusion of a Legal Agreement, the release of Planning Permission will be influenced by a number of factors.

If a s69 is agreed, then Planning Permission can, when the contribution has been settled in full, be released upon completion i.e. signature by all parties to the Agreement.

However, because a s75 requires to be registered against Title, Planning Permission cannot be released until the Council is fully satisfied that the Legal Agreement has been, or will be, recorded. Ordinarily, this requires acknowledgement from the Keeper, the body responsible for registering Title and associated burdens, that the Legal Agreement has been successfully recorded.

Notification that recording has been successful can take some time and neither SBC nor the Applicant has much opportunity to influence the speed of this process.

However, and in an effort to reduce the time taken to conclude, the Council may release Permission when the s75 is received for recording if an appropriate Letter of Undertaking has been lodged by the Applicant's legal representative.

A Letter of Undertaking is a legal document which ensures that, should the recording process be stopped by a technical matter, then the parties to the s75 will both assist with rectifying the problem as well as abiding by the terms of the Agreement.

Templates for acceptable forms of Letter of Undertaking can be obtained upon request from the Council's Legal & Democratic Services Dept.

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- **SBC recommends that Applicants always seek appropriate independent legal advice prior to entering into any Legal Agreement and in all instances**

Information Resources

Scottish Borders Council's website provides a wide range of information to assist you when you are considering applying for planning permission.

Internet

Information on the website is available free of charge.

http://www.scotborders.gov.uk/info/161/planning-and_building_standards

If you do not have access to a computer at home, internet accessible computers are available to use free of charge in all SBC libraries. Booking of this service is advisable. Contact Library Headquarters for more information. Tel: 01750 726400.

Hard copies of the Structure Plan, Local Plan and Supplementary Planning Guidance notes may be obtained from:

Planning and Regulatory Services

Council Headquarters

Newtown St Boswells

Melrose

TD6 0SA

Tel: 0300 100 1800

Email: localplan@scotborders.gov.uk

There will normally be a charge for these documents.

Hard copies of these documents are available for inspection at SBC libraries – contact Library Headquarters for more information.