S106 obligations overview

Legislation

Planning obligations under Section 106 of **the Town and Country Planning Act 1990** (as amended), commonly known as s106 agreements, are a mechanism which make a development proposal acceptable in planning terms, that would not otherwise be acceptable. They are focused on site specific mitigation of the impact of development. S106 agreements are often referred to as 'developer contributions' along with highway contributions and the Community Infrastructure Levy.

The Town and Country Planning Regulations 2013

The common uses of planning obligations are to secure affordable housing, and to specify the type and timing of this housing; and to secure financial contributions to provide infrastructure or affordable housing. However these are not the only uses for a s106 obligation. A s106 obligation can:

a. restrict the development or use of the land in any specified way
b. require specified operations or activities to be carried out in, on, under or over the land
c. require the land to be used in any specified way; or
d. require a sum or sums to be paid to the authority (or, to the Greater London Authority) on a specified date or dates or periodically.

A planning obligation can be subject to conditions, it can specify restrictions definitely or indefinitely, and in terms of payments the timing of these can be specified in the obligation.

If the s106 is not complied with, it is enforceable against the person that entered into the obligation and any subsequent owner. The s106 can be enforced by injunction.

In case of a breach of the obligation the authority can take direct action and recover expenses.

The planning obligation is a formal document, a deed, which states that it is an obligation for planning purposes, identifies the relevant land, the person entering the obligation and their interest and the relevant local authority that would enforce the obligation. The obligation can be a unitary obligation or multi party agreement.

The obligation becomes a land charge.

The legal tests for when you can use a s106 agreement are set out in regulation 122 and 123 of the Community Infrastructure Levy Regulations 2010 as amended.

Notes

CIL legislation page

The tests are:

a. necessary to make the development acceptable in planning terms
b. directly related to the development; and
c. fairly and reasonably related in scale and kind to the development.

National Planning Policy Framework (NPPF) – Policy Tests

As well as the legal tests, the policy tests are contained in the National Planning Policy Framework (NPPF):

"203. Local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations. Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition.

204. Planning obligations should only be sought where they meet all of the following tests:

- necessary to make the development acceptable in planning terms
- directly related to the development; and
- fairly and reasonably related in scale and kind to the development."

National Planning Policy Framework (NPPF)- Local authorities' policy consideration

Over the last few years there has been growing concern about delivery of development and development viability. This is reflected in the NPPF:

"205. Where obligations are being sought or revised, local planning authorities should take account of changes in market conditions over time and, wherever appropriate, be sufficiently flexible to prevent planned development being stalled."

Planning Practice Guidance (PPG) - amended March 2015

The Government in response to its consultation on on measures to speed up the negotiation and agreement of S106; and on affordable housing contributions and student accommodation has made significant changes to the **Planning Policy**

Guidance (PPG) particularly the S106 section but also related areas including the **viability guidance**.

The PPG changes emphasise the S106 legal and policy tests and relationship with the development plan (including neighbourhood plans). In terms of the process- the changes focus on early engagement by the Local Planning Authority (LPA) with applicants and infrastructure providers and S106 being part of the pre-application process. There are also a number of suggested improvement to the way LPAs approach S106 e.g. standard templates, and working with other authorities to pool expertise, There is a greater emphasis on public access to information and the S106 being available as part of the planning register. Further guidance has been provided on the operation of the vacant building credit.

In addition, following **the ministerial statement on starter homes**, the guidance states that LPAs should not seek **section 106 affordable housing contributions from developments of starter homes** (but can still seek s106 that mitigates the development impacts).

S106 - Amendments and Modifications – changes

Under the Planning Act s106 (A) a person bound by the obligation can seek to have the obligation modified or discharged after five years.

The Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992 set out the procedure for making an application to amend planning obligations, including standard forms. The principles for modifying an obligation are that it "no longer serve a useful purpose" or "continues to serve a useful purpose equally well".

There has been an amendment (28th Feb 2013) to the 1992 regulation and it is now possible to apply to amend any planning obligations entered into between 28 March 2008 and before 6 April 2010. Therefore obligations that were entered into 3 years ago can now be appealed. This amendment will become irrelevant after 6 April 2015.

The Growth and Infrastructure Act (clause 7) inserts new clauses into s106 of the 1990 Town and Country Planning Act that introduces a new application and appeal procedure for the review of planning obligations on planning permissions which relate to the provision of affordable housing. The changes require a council to assess the viability arguments, to renegotiate previously agreed affordable housing levels in a S106, and change the affordable housing requirement or face an appeal.

An appeal can be made if the authority does not modify the planning obligation as requested, or fails to make a determination within a specified time. Obligations which include a "requirement relating to the provision of housing that is, or is to be made available, for people whose needs are not adequately served by the commercial housing market" are within scope of this new procedure.

The application and appeal procedure will assess the viability of affordable housing requirements only. It will not reopen any other planning policy considerations or review the merits of the permitted scheme.

These new application and appeal procedures don't replace existing powers to renegotiate Section 106 agreements on a voluntary basis. In addition, this provision related to affordable housing does not replace the provisions to modify an obligation set out in the 1992 regulations and updated by the 2013 regulations (see above).

Section 106 affordable housing requirements - Review and appeal

DCLG have issued a guidance document to support the changes in the Growth and Infrastructure Act 2013 that provides more detailed information on what is required to modify, and assess requests to modify, the affordable housing provision in a section 106 obligations. This is guidance on the format of the application, appeal and evidence; particularly what viability evidence will be required and how it should be assessed.

S106 Agreements and CIL

The Government viewed S106 as providing only partial and variable response to capturing funding contributions for infrastructure. As such, provision for the Community Infrastructure Levy (CIL) is now in place in the 2008 Planning Act.

In terms of developer contributions, the Community Infrastructure Levy (CIL) has not replaced Section 106 agreements, the introduction of CIL resulted in a tightening up of the s 106 tests. S106 agreements, in terms of developer contributions, should be focused on addressing the specific mitigation required by a new development. CIL has been developed to address the broader impacts of development. There should be no circumstances where a developer is paying CIL and S106 for the same infrastructure in relation to the same development.

The balance between the use of S106 and CIL will be different depending on the nature of the area and the type of development being undertaken. There is further guidance on the balance between s106 and CIL set out in **the CIL Guidance April 2014**:

More information

Community Infrastructure Levy (CIL) proposals

Relevant appeal and examination decisions

Barnet Chase Farm (PDF, 74 pages, 685KB)
685.3 KB - PDF

Beckenham (PDF 8 pages 59KB)
59.73 KB - PDF

Bishops Cleeve Tewkesbury Gloucestershire (PDF 111 pages 644KB)
644.69 KB - PDF

Bristol (PDF 14 pages 89KB)
89.14 KB - PDF

Burgess Farm Salford (PDF 79 pages 438KB)
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Clay Farm (PDF 122 pages 790KB)
790.07 KB - PDF

Woodstock (PDF 20 pages 196KB)
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Vannes v Royal Borough of Kensington and Chelsea and Secretary of State for Communities and Local Government (PDF 10 pages 35KB)
35.69 KB - PDF

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