

# Planning - Section 106 agreements

Quick Guide

July 2015

Section 106 agreements are agreements made under Section 106 of the *Town and Country Planning Act 1990*. These agreements are sometimes called 'Planning Obligations' or 'Planning gain'. This Quick Guide aims to answer some common questions that Members and their constituents may have regarding these agreements.

## What are Section 106 agreements?

A Section 106 agreement (S106) is a legally binding private contract between a developer (or a number of interested parties) and a Local Planning Authority (LPA) that operates alongside a statutory planning permission.

Such agreements require developers to carry out specified planning obligations when implementing planning permissions and are the result of negotiations on these matters between the parties. An agreement may be entered into to prescribe the nature of development, to secure a contribution from a developer to compensate for any loss or damage caused by a development, or to mitigate a development's wider impact.

Obligations can be delivered either by providing what is needed to a standard set out in the agreement or by paying a sum to the LPA which will then itself provide the facility, or by a combination of both. The LPA may use formulae and standard charges as a means of making quantitative estimates of the level of contributions that are likely to be sought for a particular type of planning obligation from an individual development.

Planning permission is sometimes granted subject to the signing of a S106. No final decision notice will be issued for the application until the S106 has been signed. The date that the S106 is signed becomes the decision date for the permission. The S106 is a legal charge on the land, so it will transfer automatically with any subsequent change in ownership.

*Welsh Office Circular 13/97: Planning Obligations* sets out the Welsh Government's policy for the use of planning obligations.<sup>1</sup> The Planning Officers' Society for Wales has produced guidance on the use of S106 agreements for Welsh local authorities.<sup>2</sup>

Since the introduction of the Community Infrastructure Levy (CIL) in 2010, some restrictions have been placed on the use of S106 agreements (see question 5 below).<sup>3</sup>

In a limited number of cases, where only the applicant needs to be bound by a planning obligation and not the LPA, instead of a S106, a developer may make a "unilateral undertaking" to an LPA to settle obligations relevant to their planning application.

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<sup>1</sup> Welsh Government, *Welsh Office Circular 13/97: Planning Obligations*

<sup>2</sup> Welsh Planning Officers' Society, *Section 106: Guidance on the use of planning obligations for Welsh Local Authorities*, 2008

<sup>3</sup> See also our [Quick Guide on the Community Infrastructure Levy](#)



## What is the purpose of a Section 106 agreement?

For the majority of planning decisions, LPAs rely upon **planning conditions** attached to a planning permission to control development. S106 agreements differ from planning conditions in that they can apply to matters on and off the development site. They can also extend to the payment of a sum of money to an LPA. In a situation where there is a choice between imposing planning conditions and entering into a S106, the imposition of a planning condition should be chosen.

**S106 agreements assist in mitigating the impact of unacceptable development to make it acceptable in planning terms.** They are useful arrangements to overcome obstacles which may otherwise prevent planning permission from being granted. Contributions from developers may be used to offset negative consequences of development, to help meet local needs, or to secure benefits which will make development more sustainable.

An agreement may only be included as a condition of granting planning permission if it meets the statutory tests that any planning obligations in the agreement are **necessary to make the development acceptable in planning terms, directly related to the development, and fairly and reasonably related in scale and kind.** Examples could include providing direct site access, flood protection and wildlife protection measures and on-site leisure provision such as open space.

Such agreements can also be used to secure the provision of **affordable housing** or financial contributions towards the provision of affordable housing (see question 6 below). Contributions from developers collected through S106 agreements can also be pooled towards infrastructure developments such as a local school, but the scope to do this is now more limited since the introduction of CIL (see question 5 below).

## How are S106 agreements agreed?

LPAs should include in their Local Development Plans general policies about the principles and use of planning obligations – including matters to be covered by planning obligations and factors to be taken into account when considering the scale and form of contributions or the level of affordable housing provision. Supplementary Planning Guidance also prepared by the LPA will normally go into greater depth about the likely level and type of obligations that will be sought, either across the LPA or within a particular geographical area. LPAs should make available sufficient information on their planning obligations policies to enable applicants to understand clearly what type and level of planning obligations the LPA is likely to seek from them.

Discussions about planning obligations should take place as early as possible in the planning process, including at the pre-application stage. This should prevent delays in finalising those planning applications which are granted subject to the completion of S106 agreements. LPAs and developers have sometimes used independent expert mediators to help in the process of negotiating the detail of planning obligations for complex or major applications, to help to facilitate in dispute resolution where disputes are unduly delaying negotiations.

**LPAs should ensure that all agreed planning obligations are registered as local land charges. The local land charges register is open to public inspection and should contain a description of the charge and details of where the relevant documents may be inspected**



## How are S106 agreements enforced?

In order to ensure that agreed planning obligations are implemented effectively, LPAs should have systems in place to be able to monitor the timely and efficient delivery of obligation and take any enforcement action where necessary.

If a S106 is not complied with, it is enforceable by injunction against the person that entered into the obligation and any subsequent landowner. The decision whether, and how, to enforce a planning obligation is one for the LPA having regard to its planning objectives. The LPA has powers to enter onto the land to carry out the works itself and to recover its reasonable expenses for so doing.

## How does the Community Infrastructure Levy (CIL) differ from S106 agreements?

Where the CIL is introduced by an LPA, it is expected to replace much of the funding previously provided under S106 agreements.

The **CIL is intended to provide infrastructure** to support the development of an area rather than to make individual planning applications acceptable in planning terms. Planning Policy Wales states that there is still a legitimate role for development-specific planning obligations to enable a LPA to be confident that the specific consequences of development can be mitigated.<sup>4</sup> Unlike CIL, contributions under Section 106 agreements are negotiable.

The CIL Regulations introduced statutory restrictions on the use of S106 (see question 2 above). The main reason for this is to avoid the potential situation where a developer could be paying through both the CIL and a S106 for the same thing.

Regardless of whether or not CIL has been introduced in an area, from April 2015 the UK Government has also restricted the number of S106 contributions that can be “pooled” to pay for new infrastructure. Previously such contributions from a number of different developments could be collected together to help pay for new infrastructure, such as a new school, but now a maximum of five such contributions from April 2010 onwards are allowed. This is to encourage further take-up of CIL by LPAs.

Authorities introducing CIL should publish a list of those projects or types of infrastructure that it intends to fund, or may fund, through the levy (known as a Regulation 123 list). S106 agreements can then only be used for matters that are directly related to a specific site, and are not set out in a Regulation 123 list. As part of the planning system, S106 agreements are a devolved matter, whilst the CIL is not.<sup>5</sup>

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<sup>4</sup> Welsh Government, *Planning Policy Wales, Edition 7*, July 2014

<sup>5</sup> See also our [Quick Guide on the Community Infrastructure Levy](#)

## How do S106 agreements for affordable housing work?

National planning policy states that both planning conditions and S106 agreements may be used, where justified, to achieve the development and use of land in a way that contributes to meeting the identified need for affordable housing and to achieving mixed and sustainable communities. The CIL cannot be used to collect contributions for affordable housing.

The Welsh Government published its practice guidance on this in July 2008.<sup>6</sup> Its aim was to assist LPAs improve the development, negotiation and implementation of S106 agreements so that more affordable housing is delivered through the planning system. An update to this guidance was issued in 2009 following the economic downturn.<sup>7</sup>

Local Development Plans must include an authority-wide target (expressed as numbers of homes) for affordable housing to be provided through the planning system, based on the housing need identified in the Local Housing Market Assessment. Development plans should also set out site-capacity thresholds above which a proportion of affordable housing will be sought. Negotiating the amount and type of affordable housing to be provided should take account of a scheme's viability and any other planning obligations (eg: road access improvements).

Development plans and/or Supplementary Planning Guidance (SPG) should set out the circumstances where LPAs will use planning conditions or S106 agreements to ensure that the affordable housing provided is occupied in perpetuity by people falling within particular categories of need.

Onsite provision of affordable housing is preferred, but in exceptional circumstances the provision can be off-site. In some cases a financial contribution in lieu of on-site provision (a commuted sum) is preferred.

The Welsh Government's guidance suggests that such S106 agreements should include some or all of the following:

- defining what is affordable,
- determining the tenure of affordable housing,
- the mix and timing of delivery, specification and standards,
- access and management,
- the rules on affordable housing in perpetuity,
- use of developer contributions (off-site or commuted sums) and
- small rural exception sites solely for affordable housing.

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<sup>6</sup> Welsh Government, [Delivering Affordable Housing Using S106 agreements](#), 2008

<sup>7</sup> Welsh Government, [Delivering Affordable Housing Using S106 agreements a Guidance Update](#), 2009



## Further information

For further information on the **Section 106 agreements**, please contact **Graham Winter** ([Graham.Winter@Assembly.Wales](mailto:Graham.Winter@Assembly.Wales)), Research Service.

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