

# The Planning Series: 13 - Section 106 agreements

April 2019



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# **The Planning Series:**

## **13 - Section 106 agreements**

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## 1. What are Section 106 agreements?

Section 106 agreements are made under Section 106 of the ***Town and Country Planning Act 1990***. They are sometimes also called ‘planning obligations’ or ‘developer contributions’.

A Section 106 (S106) agreement 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.

S106 agreements are intended to mitigate the negative impacts of a development to make it acceptable in planning terms. They require developers to meet 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, secure a contribution from a developer to compensate for any loss or damage caused by a development, or 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 a combination of both. The LPA may use formulae and standard charges as a means of making quantitative estimates of the level of contribution that is 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 agreement. No final decision notice will be issued for the application until the S106 agreement has been signed. The date that the S106 agreement is signed becomes the decision date for the permission. The S106 agreement 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.

The Planning Officers Society for Wales has produced **guidance on the use of S106 agreements for Welsh local authorities**.

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 and our separate briefing on the CIL).

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

## 2. What is the purpose of a S106 agreement?

For the majority of planning decisions, LPAs rely upon **planning conditions** attached to 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 may also extend to the payment of a sum of money to an LPA. Where there is a direct choice between imposing planning conditions or entering into a S106 agreement, the imposition of planning conditions 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 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 onsite 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 may also be pooled towards infrastructure developments such as a local school. However, the scope to do this is more limited since the introduction of the CIL (see question 5 below).

### 3. How are S106 agreements agreed?

LPA's should include general policies about the principles and use of planning obligations in their Local Development Plans (LDPs). These include matters to be covered by 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. LPA's should make available sufficient information on their planning obligation 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. LPA's and developers can use independent expert mediators to help in the process of negotiating the detail of planning obligations for complex or major applications to help to facilitate dispute resolution where disputes are unduly delaying negotiations.

**LPA's 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.**

### 4. How are S106 agreements enforced?

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

If a S106 agreement 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 doing so.

## 5. How does the Community Infrastructure Levy 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.** There is still a role for development-specific planning obligations to enable an LPA to be confident that the specific consequences of development can be mitigated. Unlike the CIL, contributions under Section 106 agreements are negotiable.

The CIL Regulations introduced statutory restrictions on the use of S106 agreements. The main reason for this is to avoid the potential situation where a developer pays through both the CIL and a S106 agreement for the same thing.

Regardless of whether or not the 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 contributions from a number of different developments could be collected together to help pay for new infrastructure, such as a new school, but from April 2010 onwards a maximum of five such contributions is allowed. This is to encourage further take-up of the CIL by LPAs.

An LPA introducing the CIL should publish a list of 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.

## 6. How do S106 agreements for affordable housing work?

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 **practice guidance** on this in July 2008. Its aim was to assist LPAs to 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.

LDPs must include an authority-wide target (expressed as numbers of homes) for affordable housing to be provided through the planning system. This is based on the housing need identified in the Local Housing Market Assessment. LDPs 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 (e.g. road access improvements).

LDPs and/or Supplementary Planning Guidance 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 offsite. In some cases a financial contribution in lieu of on-site provision (a commuted sum) is preferred.

The Welsh Government's **practice 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.

## 7. Key Sources

### Welsh Government

The **planning section** of the Welsh Government's website provides information including:

- **Delivering Affordable Housing Using S106 Agreements: Practice Guidance (2008)**;
- **Delivering affordable housing using section 106 agreements: Guidance Update (2019)**;
- **Welsh Office Circular 13/97: Planning Obligations; and**
- **Planning Policy Wales (Edition 10, December 2018)**

### Planning Aid Wales

**Planning Aid Wales** is a charitable organisation helping **eligible** individuals and communities to participate more effectively in the planning system. It provides advisory services, including a helpline.

### Planning Portal

The **Planning Portal** is the UK Government's planning and building regulations resource. It includes information on the planning system in Wales, although some of the content only applies to England.

### Planning Officers Society for Wales

- **Section 106: Guidance on the use of planning obligations for Welsh Local Authorities (2008)**

### Senedd Research

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