

Understanding Section 106 agreements



Introduction

This advice note has been drafted with a view to increase the understanding of planning obligations among Parish Councils and is to be read on conjunction with the other advice notes published in the Parish Planning Pack.

As stated in Advice Note 6: Determining a Planning Application, the use of legal agreements is a necessary element to the planning process. The purpose of agreements, commonly referred to as Section 106 agreements, includes relieving the additional burden on infrastructure, as a result of new development.

The term Section 106 agreement refers to Section 106 of the Town and Country Planning Act 1990. This states “A local planning authority may enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be prescribed by the agreement.”

A Section 106 agreement is a method of delivering, or addressing matters that are necessary to make a development acceptable in planning terms. Such an agreement is not intended as a tool for providing additional funding towards current deficiencies in local infrastructure.

This is a common misconception, not helped by the frequently used term ‘planning gain’.

Purpose

ODPM [Circular 05/2005](#) provides five tests for Local Planning Authorities to adhere to when considering a Section 106 agreement. The circular states a planning obligation must be:

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| (i) | Relevant to planning; |
| (ii) | Necessary to make the proposed development acceptable in planning terms; |
| (iii) | Directly related to the proposed development; |
| (iv) | Fairly and reasonably related in scale and kind to the proposed development; and |
| (v) | Reasonable in all other respects. |

Examples for the use of planning obligations could be:

- o Prescribing the nature of the development to achieve planning objectives (e.g. restricting the use of land)
- o Mitigating the impact of a development (e.g. making provision for contributions towards local education facilities in relation to the increased demand on school places)
- o Compensating for loss or damage caused by a development (e.g. a developer may be required to provide habitats for species affected as a result of developments)

Pre-application discussions

Applicants are expected to undertake research regarding the contributions they may be expected to provide as a result of development.

Not only does this reduce the amount of negotiation required at a later date, but it will also enable the applicant to foresee whether the development itself is viable.

This process can involve contacting agencies such as the County Council to understand the current education provision, or the Primary Care Trust to ascertain the demands on local health facilities. As an important party in the application process, the Parish Council may be approached for information regarding the development and needs of for additional community provision which would arise as a result of their development proposals. This is a reasonable request and allows for a relationship to be built whereby all parties know the expectations of the other. This relationship is also beneficial when it comes to monitoring of agreements, including transferring infrastructure at a later date.

The District Council is more than happy to facilitate and participate in these discussions so that the Parish Council is guided appropriately.

Whilst Parish Councils are encouraged to participate in this process, they are to be cautious to avoid pre-determination. They must continue in the normal consultation process, irrespective of the pre-application discussions and planning obligation requirements. See Advice Note 6: Determining a Planning Application for more information on pre-determination.

Heads of terms

The findings of this research are to be published and submitted, along with the planning application in a document referred to as a Heads of Terms. This type of document has also been known to be called a 'letter of intent', 'memoranda of understanding' and 'heads of agreement'.

Whilst this document sets out the terms proposed, they are not binding, with more detailed negotiation expected. The importance of these early discussions is

also highlighted by its inclusion in the process flowchart, within the adopted Open Space in New Developments Supplementary Planning Document.

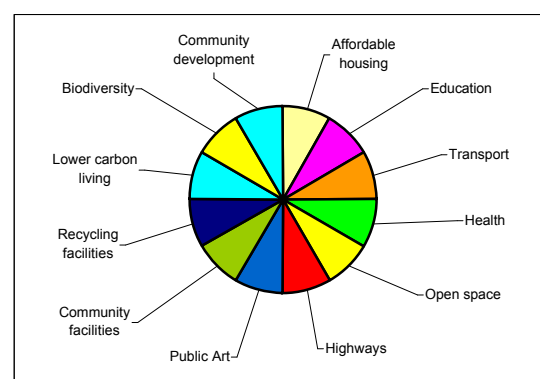
Consultation

When a planning application has been received, the Council's Registration Team is responsible for identifying the interested parties and sending out consultation letters.

Interested parties need to respond to a planning consultation with clear and relevant requirements to be requested for inclusion within any planning agreement.

South Cambridgeshire District Council now has the services of a dedicated Section 106 officer, who is responsible for identifying the needs of the community, through Parish Councils and other groups. This ensures the negotiation of agreements is relevant to local needs.

There remains the continual demand on Section 106 agreements, despite the current economic climate. The Local Planning Authority has to consider the validity of requests and prioritise these. Inevitably some requests, although deemed essential to one body, may not be included in the agreement simply because of the viability issues.



Planning policy

The local planning authority is required to create, consult and adopt robust planning policies by which to obtain planning obligations. The District Council's overriding document is known as the Core Strategy. The Development Control

Policies, outlines the principles of obtaining developer contributions.

Supplementary Planning Documents expand on the Development Control Policies document and detail the method and level of the obligations. At present the District Council has a Supplementary Planning Document for [Open Space in New Developments](#), which specifies the rate of obligation, as well as the thresholds when these are required. The District Council has also adopted a [Public Art SPD](#).

Planning policy changes depending on the Authority, with no standard applied across the Country. The District Council requires open space to be provided on all net increases in dwellings, whereas neighbouring Authorities have different standards and thresholds of provision (e.g. Huntingdonshire DC currently only requires open space contributions on developments of 10 dwellings or above.

The Council is in the initial stages of drafting an SPD for the purpose of obtaining contributions towards community facilities. In the future the aim of the Council is to produce a definitive SPD for planning obligations that will incorporate all obligations, whilst allowing flexibility on certain developments.

Larger developments, however, may be required to provide additional infrastructure not currently included within an adopted planning document. So long as the request satisfies the five tests outlined above, it may be proposed to the applicant and be negotiated during the planning process. It is easier to negotiate planning obligations that are backed up by relevant evidence such as an adopted Parish Plan, which includes an action plan for the local community.

Process

Where required, a Planning Obligation must be completed before a planning permission can be issued.

Whilst some developers are proactive in agreeing the necessary contributions during the pre-application stage, thereby reducing the time spent drafting the agreement, many don't. This means that although the planning application may be acceptable in principle, many months may be spent negotiating agreements, especially for larger sites. If the obligations cannot be agreed then the applicant has the right to take the application to appeal on these grounds. A planning inspector will then consider whether the requests are justified.

Triggers

Planning obligations often have a variety of trigger points, which are negotiated alongside the obligation itself, and are sometimes as contentious. Like the contribution, the trigger must be relevant and reasonable. Whereas expecting all contributions to be paid prior to commencement is unreasonable, requesting that any on-site provision of open space is made available for public use, prior to the occupation of say 50% dwellings is not.

Some examples of basic trigger points:

- Prior to the commencement of development
- Within **x** months of permission being issued
- Prior to the occupation of **x** open market dwellings
- Before the last dwelling is occupied

Certain obligations may also have more than one trigger point depending on the necessity. An example of this could be that whilst open space is to be made available for public use prior to the occupation of 70% of the dwellings, it is the responsibility of the developer to undertake ground works on the open space prior to the occupation of 50% dwellings. This additional 'step' allows for the monitoring of the obligation at an earlier stage, with progress and potential

non-compliance of the obligation tracked through site visits.

Should a Parish Council have a strong opinion over the requirement of multiple trigger points, and can justify their inclusion in the agreement, this should be highlighted at the consultation stage.

Certain trigger points will always take priority over others. It may be more acceptable for education and highways obligations to be provided prior to that of a playground due to their urgency and the residents direct need for them at the earliest possible date.

It is also considered best practice for consulted parties to provide details of requested trigger points, for their requested obligations, as well as the rationale.

Unilateral undertaking

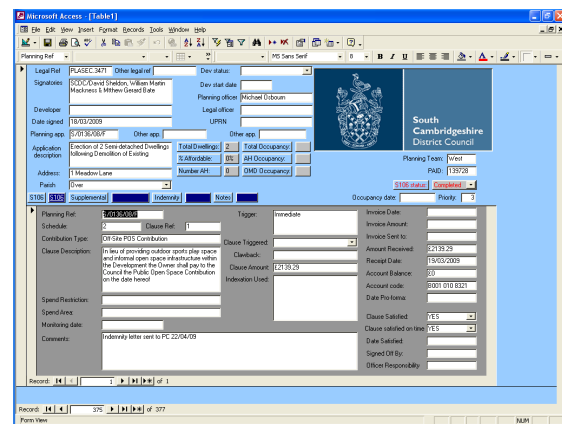
There is more than one type of planning obligation. A planning agreement that is not signed by the local planning authority is referred to as a unilateral undertaking. It is the right of a developer to submit this type of agreement during the planning process. It is for the local planning authority to determine the unilateral undertaking alongside the application itself as a material consideration. Proposals believed to be insufficient would result in the application being refused.

This method of providing the necessary infrastructure is a lot quicker than negotiating a Section 106 agreement as the unilateral undertaking becomes effective with the granting of the permission, and is not delayed by any further negotiation between the District Council and the applicant. Although the use of these agreements is rare, they are often used if an application is to be taken to appeal. When this happens both parties are unable to agree to the extent of the obligations at the time of appeal, which usually results in the unilateral undertaking, as constructed by the applicant, being applied.

Monitoring

The monitoring of Section 106 agreements has been increasingly important in recent years. This is due to the complexities of obligations, as well as the current economic climate causing developers to experience cash flow issues.

The District Council manages a database for assessing the status of development, with regards to the Section 106 obligations.



The past, the future and the figures

South Cambridgeshire District Council are at the beginning of a long project in order to ensure that all previous Section 106 obligations have been complied with and, where necessary support Parish Councils in completing transfers of open space and infrastructure.

- Current records show that there are over 400 Section 106 agreements dating back to 1997.
- Of these agreements, 92 are classified as a major applications, which is a development of 10 dwellings or greater.
- There are currently 53 developments between 2 and 9 dwellings, with a Section 106 agreement.
- Of the 145 developments of 2 dwellings or more, almost 100 have been classified as 'completed' by Cambridgeshire

- County Council - which monitor development completions, where all dwellings have been constructed, if not occupied.
- o Prior to the adoption of the open space SPD the District would be responsible for drafting, issuing, implementing and monitoring up to 40 agreements per year.
 - o With the adopted SPD for open space requiring Section 106 planning obligations for single developments this number is set to treble. The majority of these agreements will also require an indemnity to be signed between the District Council and the Parish Council.

Whilst investigating the current status of obligation compliance may be relatively straightforward, the issue of resolving outstanding matters is more time-consuming.

Whereas it is the intention of the District Council to resolve all outstanding matters sometimes understanding the original intentions are more difficult to ascertain and the Council may be heavily reliant on the Parish Councils to assist in this process as much as possible.

Indemnities

A planning agreement will be signed between the local planning authority and the developer/land owner. In certain circumstances agreements may also include the signature of the County Council. Only on larger developments, where infrastructure is to be eventually maintained by a Parish Council, would a Parish Council be required to enter into the agreement. On smaller developments, where Section 106 planning contributions are obtained on behalf of the Parish Council or third party, a separate agreement will need to be signed prior to the transfer of the contribution. This is referred to as an indemnity agreement.

An indemnity agreement is between the District Council and a separate body, wishing to receive planning obligations as a result of a new development. Essentially the indemnity will reference the original Section 106 agreement and require that the third party spend the money as per the original intention.

The reason for this is that most Section 106 agreements include both a spend restriction as well as a "sunset clause" i.e. the time by which the contribution is to be spent. The indemnity ensures that the third party abides by these clauses, and are liable for the contribution. Should the District Council transfer the money to a third party without such an agreement then the District Council would remain liable if it is not spent within the terms of the agreement.

Summary

This advice note has been prepared with a view to improving the overall understanding of Section 106 agreements, their use and limitations. The overriding principle of these agreements in so far as Parish Council responsibilities is to offset the additional demand on infrastructure, services and facilities, as well as to place any necessary restrictions on land use. These legal agreements are also complex documents and, although increasingly the District Council relies upon standardised agreements, they can require a large amount of input and negotiation; hence delay the signing and implementation of permissions.

The Section 106 agreement is not intended as a developer tax or to provide infrastructure that would be necessary regardless of the development itself.

Additional information

Further guidance and documents are available in the Communities and Local Government website for [Planning Obligations](#)

Any questions regarding the Section 106 process should be directed to James Fisher via james.fisher@scambs.gov.uk

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Queries relating to the monitoring of agreements should be directed to Jane Gifford via jane.Gifford@scambs.gov.uk