

NOTE IN RESPECT OF PROPOSED SECTION 106 AGREEMENTS

1. **What is a Section 106 Agreement?**

Although it is possible to record planning obligations by the site owner giving a deed of unilateral undertaking, by far the most common form of obligation is by agreement with the District Council and/or, where the obligations concern education, waste or highways, the County Council under S.106 of the Town and Country Planning Act 1990 which allows the Local Planning Authority to come to terms with any person interested in land in the district for the purpose of restricting the development or use of land, either permanently or during such period as may be agreed, requiring certain things to be carried out on the land, requiring the land to be used in a specified way or requiring money to be paid. Any Agreement may contain such incidental and consequential provisions, including provisions of a financial character, as appear to the Planning Authority to be necessary or expedient for the purposes of the Agreement. All outstanding obligations ‘run with’ the land and can be enforced against subsequent site owners, not just the original owners or developers, although the agreement may expressly limit the extent of future liability.

An Agreement can provide for something quite straightforward and simple, such as a requirement for the owner to provide a satisfactory means of foul water drainage before taking occupation of a new house, the subject of the planning application. In larger terms, a planning agreement may provide for substantial planning gain to the community, such as the provision of public amenity areas, a village hall, off-site highway matters and so on. In every case, the substance of the Agreement is referable to the development being contemplated.

2. **Planning Conditions**

It is sometimes the case that matters the subject of a Section 106 Agreement can also be dealt with by planning condition. More usually, however, a Section 106 Agreement provides for matters which cannot be attached by way of condition, even though the Section 106 provisions do relate to the proposed development. There are a number of reasons for this and they include, for example, that the provisions relate to off-site matters or they require some positive covenant on the part of the developer. Section 106 conditions are enforceable in contract, even against subsequent owners of the land, whereas enforcement of planning conditions is restricted to the relevant provisions relating to Enforcement Notices in Sections 172-179 of the 1990 Act (these are appealable to the Planning Inspectorate), Breach of Condition Notices under S.187A (which are not appealable) or Injunction under S.187B. It is usual to deal with money provisions in a Section 106 Agreement and not in planning conditions.

3. **Common Form Agreements**

The most common types of Agreement are as follows :

- (a) “Granny” or “Family” Annexe provision
- (b) Education Contributions by developers of larger residential developments
- (c) Provision of public open space or other community infrastructure
- (d) Restoration of land
- (e) Non-implementation of an earlier or conflicting permission
- (f) Particular restrictions on the use(s) or occupation of land
- (g) Provision of social/affordable housing
- (h) Travel for Work Plans

Total infrastructure contributions including education or other community contributions (for such purposes as proportionate funding for village hall, public art, off-site provision for car parking and so on) necessitated by the development, and commuted sums for maintenance or establishment, may be dealt with at the option of the Council by apportioning the aggregate amount on a per completed dwelling basis

4. **Plan**

It is the practice of this Authority to include a plan on every Agreement. Usually we will use a copy of the plan on the planning application. Unless it is an OS plan extract the copyright belongs to the person who prepared it, and we would seek permission to use the plan for this purpose, please. The Council will assume consent unless there is any objection.

5. **Title**

The persons entering into the Agreement must be all the persons who own all the interests in the land – freeholders, lessees, mortgagees, persons who have entered into a contract to purchase all or part of the property and persons with rights of option or pre-emption. A full list of owners and all other such persons, together with their full names and addresses, should please be given. The mortgage or legal charge date(s) and parties should also be given.

In addition, Certification of Title is required from a Solicitor as to the nature of the title and any incumbrances. That should be given upon the footing that any changes prior to the Agreement being completed will be notified to the Council. The Certificate can be given in the form of a simple letter, or a modern Office Copy of the Land Registry entries.

6. **Maintenance of Public Open Space**

The Council is keen to ensure that where the provision of POS is a part of the development, somebody is made permanently responsible for its control and upkeep. Developers, who tend to lose interest once all houses are sold, can in a S106 Agreement formalise their proposals for permanent maintenance of POS by, for example, agreeing terms with the Parish Council. Although a condition of the planning permission can restrict development until a scheme for permanent maintenance has been approved by the Council, it is always preferable to agree a scheme from the outset before the application is decided. The amenity land will not remain in private ownership. Developers will therefore expect to negotiate terms directly with the Parish Council and undertake to pay the Parish Council's reasonable legal fees of agreement preparation and the costs and fees of later transfer of the land. Once the requirement for infrastructure is identified in the planning process, the District Council is not usually involved in process except to ensure that what the parties will have agreed is enshrined in the s. 106 deed. The Parish Council will be responsible for the land after transfer has taken place and will therefore need to ensure that its condition is satisfactory and meets the requisite standard. These principles will govern all community infrastructure adopted by the Parish Council.

7. **Costs**

It is the practice of this Council, in common with other Local Planning Authorities, to draw up the draft Agreement for submission to the applicants and all land owners, etc. or their agents or Solicitors for approval. The costs of the preparation of the Agreement are requested from the applicant. These are pitched purposely on the reasonable side and effectively amount to a reimbursement of the in-house cost. Because of this, no VAT is charged. The draft Agreement may include the suggested figure but the Council's costs after the first letter enclosing the draft Agreement (up to any amount suggested in the latest draft) will nevertheless be payable by the applicant in the first instance whether or not the Agreement is signed or completed. If the draft does not mention a figure then the amount will be such sum as is reasonable in the light of the amount of work done and its complexity. Parish Councils' legal costs are of course extra.

8. **Execution**

This simply means the signing of the Agreement. Individuals will, of course, sign with their usual signature in the presence of a witness, who will add his or her address and occupation. Corporate Bodies, however, will usually seal with the Common Seal and usually in the presence of a Director and the Secretary. That is a matter for the Company or Corporate Body concerned. Some Banks and larger Corporate Institutions do, however, prefer to execute documents by an Attorney executing under Power of Attorney. In such instances it would be helpful if the Council could be told at the draft Agreement stage, so that the appropriate wording can be entered in the testatum. In each such case a copy of the Power of Attorney, duly certified, should be provided when the document is returned duly executed.

9. **Duplicates**

A duplicate of the Agreement is always provided by the Local Planning Authority and the costs allows for this. The duplicate should be kept safely with the Title Deeds of the property to which the planning permission ultimately will refer. If there are Mortgagees holding the Title Deeds then the duplicate Agreement will be forwarded to the Mortgagees to place with the bundle.

If there are other parties, who will also require a copy of the Agreement for whatever reason, then provided this is made clear at an early stage the appropriate number of duplicates can be prepared.

10. **Timing**

The preparation of Section 106 Agreements is now quite common and an important part of the planning process. Because of the need to avoid delays in this process, it is considered by the Council that draft Agreements should be prepared as soon as possible. This will take a matter of only a few days before submission to the applicant for approval. The engrossments and execution will take a little longer, but the whole process could take as little as 10 days. No planning permission is usually given pending the completion of a Section 106 Agreement where one is required. The normal course of events is, however, for the Planning Committee to have approved the application subject to a Section 106 Agreement. The co-operation of the applicant, therefore, is sought in progressing the Agreement to completion. The Council has at least one Sealing session each week, usually on a Friday.

All Members of the Planning Committee and the Planning Officers are particularly concerned to provide a prompt and efficient service. However, in some instances inordinate delays are caused in the process of some applications because applicants, or their agents or advisers, hang on either because they are not sure whether the matter is going forward at all, or some other reason. In these cases – not the genuine instances where, for example, owners experience modest delays in securing mortgagee approval of the draft Agreement or inevitable delay in getting everyone in a multi-party agreement to sign the final document – it is advisable for applicants to consider whether it would be sensible to withdraw the application, save administrative delays and costs, and perhaps have another go later.

If any applicant/agent has to wait more than 4 working days before receiving from the Council a draft Agreement (from the date of instructions being given) or receiving any response to any letter, phone call or query, then the Head of Legal Services or Planning Director want to be told.

11. **No Agreement**

If for any reason it will not have been possible to come to terms on the provisions of an Agreement, either in principle or any substantial detail, then the matter would go back to Committee for further

consideration. On matters of substance the Committee is likely to take a view against the planning application.

12. **Registration**

The Agreement will be registered (no fee) in the register of local land charges and the details will remain on the register until cancelled. Unless otherwise specified in the Agreement, cancellation will be effected either upon request or upon the Head of Legal Services' own initiative when the substance of the Agreement has been effected and there is no continuing obligation under it.

13. **Tenants, Lodgers and Paying Guests**

A Section 106 Agreement which restricts the occupation of an annexe to members of the family occupying the (whole) dwelling does **NOT** stop the taking in of lodgers or paying guests of the family. That is common. But creating a tenancy of part of the dwelling (which might be the annexe) is not allowed under the Agreement. A tenancy gives separate rights of occupation of that part to the exclusion of the owner and, in effect, creates a separate unit even though some facilities may be shared. Whether a tenancy exists as such is very much a matter of fact and degree but owners should always bear in mind the "single dwelling" obligation.

14. **Commencement of Development**

The Agreement may be expressed to take effect only upon the commencement of development and refer to one or more of the material operations described in Section 56 (4) of the Act. The wording of that sub-section is as follows:-

"56 (4) "material operation means –

- (a) any work of construction in the course of the erection of a building;
- (aa) any work of demolition of a building;
- (b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building;
- (c) the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b);
- (d) any operation in the course of laying out or constructing a road or part of a road;
- (e) any change in the use of any land which constitutes material development"

15. **Modifications and Discharge**

Planning obligations can be modified or discharged by agreement with the Council or, after a certain period (usually 5 years), by application to the Council which will be determined by the Council in its discretion. It may decide to modify or not and can discharge an obligation if it serves no useful purpose. You can appeal to the Secretary of State where the Council do not decide to modify the obligation. The criterion as to whether the obligation serves a useful purpose is not solely a planning issue, although the Secretary of State will have regard principally to planning purposes of any such obligation.

16. **Enforcement**

The District Council has an absolute discretion whether it wishes to enforce any obligation. Several factors may influence this decision. Obligations which affect only the Parish Council's interests may be pursued by the Parish Council (any agreement will provide for this) as those obligations will have been negotiated directly by the Parish Council with proper legal advice, and any default by the developers will normally have been picked up at an early stage within the parish concerned.

Developers should ensure that, to avoid default situations arising where there are trigger points for the provision of community infrastructure for which permission or approval of reserved matters needs to be obtained, arrangements are put in hand at a suitably early stage for those permissions or approvals to be applied for and granted, for contracts to be let and for the work to be completed **prior** to those trigger points. S. 106 agreements will be likely to include prohibition of further development until any default situation is remedied.

17. **Further Guidance**

The Government has given further guidance in the DoE Circular 1/97: "Planning Obligations" although the Office of the Deputy Prime Minister published in November 2003 a consultation paper "Contributing to Sustainable Communities – A New Approach to Planning Obligations". The Council's position is fully set out in the 2004 District Local Plan Part I, Chapter 8: "Community Services and Infrastructure" an extract of which is available from the Planning Department price £12.50 and can be seen on the Council's website <http://www.scambs.gov.uk>. In case of any doubt or difficulty the Council's Legal Office will be happy to advise.

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