

# SWLP Annex A

## Developer Contributions

### Policy Guidance

#### A1 Introduction

Local Planning Authorities can collect monies and other non-financial contributions towards the provision of infrastructure to support new development. The scale of these contributions cannot render development unviable. There are two main types of contribution:

- Community Infrastructure Levy (CIL) ~ a fixed payment per sqm of development that can be used to fund provision of new infrastructure
- Planning Obligations ~ also known as Section 1096 Agreements are a legal agreement or unilateral undertaking typically used to provide on-site infrastructure or as a ‘commuted sum’ of money to fund provision elsewhere

Importantly, a planning obligation must be:

- Necessary to make the development acceptable in planning terms
- Directly related to the development
- Fairly and reasonably related in scale and kind to the development

One of the most common types of planning obligation is known as a Section 278 Agreement which is required in order to undertake works to the highway. Planning Obligations will typically be sought to address the following matters:

<ul style="list-style-type: none"> <li>• Affordable Housing</li> <li>• Air Quality Initiatives</li> <li>• Outdoor Sports Facilities/ Playing pitches</li> <li>• Indoor Sports Facilities</li> <li>• Local GP Surgeries / health centres / Hospitals</li> <li>• Community Safety / Policing</li> <li>• Biodiversity Offsetting</li> </ul>	<ul style="list-style-type: none"> <li>• Open space and Green Infrastructure</li> <li>• Sustainable Drainage Systems (SuDS)</li> <li>• Education</li> <li>• Highways and Transport</li> <li>• Local Labour Agreements</li> <li>• Libraries</li> <li>• Community Halls</li> </ul>
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In the majority of cases when planning consents are granted, conditions are attached to the permission. Planning Conditions set out details or required standards, timeframes and works which must be carried out at prescribed stages in the development process. They may also require further details to be submitted in order to make a proposal acceptable. Importantly, planning conditions cannot require the transfer of land or the payment of monies.

Where there is a choice between imposing planning conditions and entering into a planning obligation to manage the impacts of a new development, the use of planning conditions is always preferable. However, planning conditions:

- Cannot be used to secure financial contributions
- Cannot be used in relation to land outside the application site; and
- Can be appealed by the applicant if they believe them to be unreasonable

## **A2 Pre-Application Discussions**

As part of any pre-application discussions the LPA will seek to agree the requirements and Heads of Terms for any planning obligation.

It is the Council's strong preference, where applications and associated planning obligations are more complex, that negotiations occur, and agreement on Heads of Terms is achieved, prior to the submission of a planning application. Pre-application discussions can help to resolve potential problems and issues which may otherwise delay the determination of a planning application.

It is recommended in the Council's Validation List that draft Heads of Terms accompany any application that requires a planning obligation. Indeed, the Local Validation list will be a useful starting point to shape/ identify the range of issues / infrastructure that a development is likely to need to consider and address.

## **A3 Viability**

The Local Planning Authority will seek to secure a fair and reasonable developer contribution without adversely affecting the ability for new development to take place. As such, the Local Planning Authority will consider a request from the developer, applicant, or landowner in writing to reduce the level of planning obligations on the basis that the scheme is not financially viable. Such requests must clearly set out the reasons why the development cannot support the full planning obligations requirements and include comprehensive evidence in order for the Local Planning Authority to take it into account.

The viability appraisal is an 'open book' assessment which should include information covering at least the following issues supported by comparable market evidence and costs supported by tendered quotations or BCIS data:

- Existing use values
- Proposed use values (sales and rental)
- Demolition and construction costs
- Finance and marketing costs
- Assumed yield
- Abnormal site costs
- Development phasing/timetable.

The assessment should be submitted, if possible, at the pre-application stage of the planning process to enable the request to be considered and verified by the Local Planning Authority.

The Local Planning Authority will test the viability by seeking other enhancements by various means of cash-flow improvements, for example, deferring contribution payments. If, following an investigation of the alternative options, there is still a viability concern then the Local Planning Authority will expect the submission of a viability appraisal.

The Local Planning Authority will not take into account the price paid or agreed by the applicant for the land whilst reviewing the viability assessment, but will consider what a reasonable land value would be which is sufficient to incentivise the land owner to sell or develop for the proposed scheme based upon a number of factors including case law, market conditions and guidance.

All viability submissions will be carefully considered by the Local Planning Authority. Once submitted the Local Planning Authority's professional advisors will review the information provided to support a reduction in the required planning obligations to initially determine if sufficient information has been

provided to support the request. Following this the Local Planning Authority advisors will carry out an independent appraisal of the site to determine if acceptable development would be viable which would bring forward development of the site.

The land value and the developer's return elements of the appraisal will be determined as to what is sufficient to incentivise both parties to sell and develop the scheme. These will broadly be reflective of the returns currently being sought and accepted within the market, including any adjustment to account for the market risk of the scheme. Developers return will typically range between 15% and 22.5%.

If the Council alters the planning obligation sought on viability grounds, a clause will be built into the S106 Agreement which requires a review of the viability situation unless the development is completed within a defined timeframe.

#### **A4 Inflation & Indexation**

All developer contributions payments will be index linked to a relevant index, which at present comprises the BCIS Price Adjustment Formulae Indices for all highways related obligations and the Retail Price Index for all other obligations. Late Interest Payments In the event of a delay in making any payment required under a S106 Agreement, interest shall be payable at a rate above the base lending rate set at that point and will be applied for the period from the date that the relevant payment falls due to the date of actual payment.

Contributions are based upon the costs of infrastructure. Financial contributions will therefore be indexed (i.e. index-linked to inflation) to ensure that they retain their 'original' real value. The base date and appropriate index to be applied will be set out in the legal agreement. Where a formula has been set for the calculation of contribution levels (e.g. contractor rates), any cost figures will be updated periodically to take account of inflation and are the sums required at the time of negotiation. All payment levels will be subject to an inflation factor adjusted according to the fluctuations between the date of the obligation and the quarter period in which payment is due to the Local Planning Authority. Payments to other bodies may also be subject to adjustments.

#### **A5 Publication of Information**

It is important that the negotiation of S106 planning obligations and subsequent expenditure of any contributions received from developers in a transparent and accountable way. The Local Planning Authority will maintain an ongoing overview of progress with the implementation of site specific and community infrastructure projects. Because S106 Planning Obligations form part of the planning permission, which is a public document, the S106 information will be placed on the public Planning Register together with the planning decision notice. This information will usually be made available on the Local Planning Authority website.

In respect of information relating to the viability assessments of S106 Planning Obligations, if a viability assessment is submitted in relation to a valid planning application, then the Local Planning Authority will treat the submission as a public document, as set out in the NPPF and in line with General Data Protection Requirements 2018. If it is submitted as part of the pre-application process the Local Planning Authority endeavours to keep all pre-application enquiries confidential. However, the Council cannot guarantee this and the applicant is advised to provide a clear justification when the application is submitted why they consider the information is confidential.

## **A6 Other Considerations**

### **Legal Information**

Developers will need to produce satisfactory proof of title for their particular site and all persons with an interest in the development site including, owners, mortgagees, tenants and option holders must be party to the agreement. The developer will also be expected to pay the local planning authority's legal costs and will need to provide a solicitor's undertaking that the costs will be paid.

### **Local Land Charges**

S106 planning obligations have to be registered as local land charges. Applicants will therefore need to produce the title to the site and third parties, such as mortgagees, may have to be party to agreements.

### **Cross Boundary Applications**

The Local Planning Authority will, as far as possible, work to coordinate proportionate planning obligation requirements. If, however, agreement cannot be reached, the Local Planning Authority will seek obligations for the portion of the site that falls within Local Planning Authority boundary.

### **Triggers for S106 Planning Obligations**

S106 planning obligations are normally triggered on commencement of development, i.e. the date on which works to begin the development start, as defined by the carrying out of a material operation (section 56 of the 1990 Town and Country Planning Act). This may be earlier or later, e.g. first occupation, or for significant major development it may be phased through the development process.

The developer should notify the Local Planning Authority (or relevant body) of a trigger point being reached and their intention to pay the financial contribution.

### **Varying a S106 Planning Obligation**

Applicants can seek to vary a S106 planning obligation. This can only be done through a formal 'deed of variation'.

## **A7 Fees**

The Local Planning Authority's legal costs of preparing a Planning Obligation will be borne by the developer. These costs will be based on an hourly rate and will depend on the complexity of the agreement and the length of time taken to settle the draft and proceed to completion. The developer will be required to provide a 'cost undertaking' to pay for the Local Planning Authority's reasonable fees, prior to it being able to instruct its acting solicitors. It should be noted, that the Local Planning Authority's reasonable fees will need to be met even if the planning obligation is not completed. Standard unilateral undertakings will be subject to an administration charge covering legal costs and if necessary the transfer of money to third parties.

## **A8 Monitoring**

The Council monitors all planning obligations and will work with developers to ensure that financial contributions and non-financial obligations are delivered on-time. Monitoring fees will be charged in order to undertake such work. The monitoring fee will be derived using a formula that considers the complexity of the agreement (the number of obligations in a particular agreement), the number of officer hours required the monitoring officer's salary rate and the number of years it is estimated that monitoring

will be required for a particular development. The monitoring fee (and its calculation) will be stipulated in each agreement.

Monitoring activities will include: -

- the request, management and distribution of financial contributions and other obligations associated with the deed
- monitoring on-line systems for planning officers, managers and the public domain
- checking recording and updating each trigger-point (timing requirement)
- physical monitoring of the development site (site visits)

## **A9 Enforcement**

Where there is evidence of non-compliance with a Planning Obligation (such as the non-payment of financial contributions, failure to comply with an obligation, or failure to notify the Local Planning Authority of a due payment or event as required), the Local Planning Authority will seek to recover all reasonable administration costs incurred. This could include, for example, site visits, the recovery of any unpaid monies and /or correspondence. If it is clear that matters within the planning obligation are not being complied with, the Local Planning Authority may be take formal enforcement or legal action to secure compliance.