

Appendix 4 – Legal Tests

S106 overview

Legislation

Planning obligations under Section 106 of **the Town and Country Planning Act 1990** (as amended), are more commonly known as s106 agreements. They are a mechanism which make a proposal for development acceptable in planning terms when it would otherwise not be the case. They focus on site specific mitigation of the impact of development and are negotiated during the planning process

A common use of a planning obligation is secure affordable housing and/or infrastructure, on site or a financial contribution to provide such off site. Their use, however, is also related to:

- a. restricting the development or use of the land in any specified way
- b. requiring specified operations or activities to be carried out in, on, under or over the land
- c. requiring the land to be used in any specified way; or
- d. requiring a sum or sums to be paid to the authority on a specified date or dates or periodically.

A planning obligation can be subject to conditions, it can specify restrictions definitely or indefinitely, and in terms of payments the timing of these can be specified in the obligation.

If the s106 is not complied with, it is enforceable against the person that entered into the obligation and any subsequent owner. The s106 can be enforced by injunction.

In case of a breach of the obligation the authority can take direct action and recover expenses.

The planning obligation is a formal document, a deed, which states that it is an obligation for planning purposes, identifies the relevant land, the person entering the obligation and their interest and the relevant local authority that would enforce the obligation.

There are clear legal tests for when a s106 agreement can be used. These are that the agreement must be:

- a. necessary to make the development acceptable in planning terms
- b. directly related to the development; and
- c. fairly and reasonably related in scale and kind to the development.

Together with the above, there are policy tests set out in the National Planning Policy Framework (NPPF). This includes ensuring a Local planning authority considering whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations. Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition.

Over the last few years there has been growing concern about delivery of development and development viability. This is reflected in the NPPF which states that where obligations are being sought or revised, local planning authorities should take account of changes in market conditions over time and, wherever appropriate, be sufficiently flexible to prevent planned development being stalled.

In March 2015, the Planning Practice Guidance (PPG) was amended in response to a consultation on measures to speed up the negotiation and agreement of S106. The changes were also set out in the Viability Guidance.

The changes emphasise the S106 legal and policy tests and relationship with the development plan. In terms of the process, the focus is on early engagement by the Local Planning Authority (LPA) with applicants and infrastructure providers and S106 being part of the pre-application process. There is a greater emphasis on public access to information and the S106 being available as part of the planning register. Guidance is also provided on the operation of the vacant building credit.

S106 - Amendments and Modifications – changes

Under the Planning Act, a person bound by the obligation can seek to have the obligation modified or discharged after five years.

The principles for modifying an obligation are that it "no longer serve a useful purpose" or "continues to serve a useful purpose equally well".

There is also a clause in the Act that allows for a new application and appeal procedure for the review of planning obligations on planning permissions which relate to the provision of affordable housing. The changes require a council to assess the viability arguments, to renegotiate previously agreed affordable housing levels in a S106 and change the affordable housing requirement or face an appeal.

This process will assess the viability of affordable housing requirements only. It will not reopen any other planning policy considerations or review the merits of the permitted scheme.

There are powers to renegotiate Section 106 agreements on a voluntary basis

S106 Agreements and Community Infrastructure Levy (CIL)

CIL has been in place now for many years. In terms of developer contributions, it has not replaced Section 106 agreements, but its introduction resulted in a tightening up of the s 106 tests. S106 agreements, in terms of developer contributions, should be focused on addressing the specific mitigation required by a new development. CIL has been developed to address the broader impacts of development. There should be no circumstances where a developer is paying CIL and S106 for the same infrastructure in relation to the same development.

Policy on seeking planning obligations

Policies for planning obligations should be set out in plans and examined in public and their requirements need to be clear.

The policies must be informed by evidence of, for example, infrastructure and affordable housing need, and a proportionate assessment of viability that takes into account all relevant policies, local and national standards and the cost implications of planning obligations. Viability assessment should not compromise sustainable development but should be used to ensure that policies are realistic, and the total cumulative cost of all relevant policies will not undermine deliverability of the plan.

Vacant building credit

National policy provides an incentive for brownfield development on sites containing vacant buildings. Where a vacant building is brought back into any lawful use or is demolished to be replaced by a new building, the developer should be offered a financial credit equivalent to the existing gross floorspace of relevant vacant buildings when the local planning authority calculates any affordable housing contribution which will be sought. Contributions may be required for any increase in floorspace.