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Guidance

Planning obligations: good practice advice

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Applies to England

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1. Introduction

Planning obligations in connection with planning appeals, enforcement appeals and called in planning applications comprise both agreements and unilateral undertakings ([section 106 of the Town and Country Planning Act 1990 “the Act” \(as amended\)](#) (<https://www.legislation.gov.uk/ukpga/1990/8/section/106>)). In this annexe where it refers to the Inspector, it should be taken to mean the Secretary of State for recovered appeals.

This document provides good practice advice to guide appellants/applicants in preparing planning obligations. It should be read alongside Government policy on the use of planning obligations in the National Planning Policy Framework and the [planning practice guidance](#) (<http://planningguidance.communities.gov.uk/blog/guidance/planning-obligations/>). Also, the Law Society has published a second edition of its model section 106 agreement (June 2010).

It is the responsibility of the appellant/applicant, at the outset of the process, to establish what are the relevant legal interests in the land, and who holds those legal interests. There is also a duty on the Council to check the information provided to them, in order to advise the Inspector whether the ownership position is agreed.

A glossary of legal and technical terms and guidance on execution as a deed is included below.

2. Justifying the need for the planning obligation

[Regulation 122 of the Community Infrastructure Levy Regulations 2010 Statutory Instrument 2010/948](#) (<https://www.legislation.gov.uk/uksi/2010/948/regulation/122/made>) makes it unlawful for any planning obligation to be taken into account as a reason to grant a planning permission if it does not meet the 3 tests set out in the Regulation. That it is:

- necessary to make the development acceptable in planning terms
- directly related to the development
- and fairly and reasonably related in scale and kind to the development

The [National Planning Policy Framework](#) (<https://www.gov.uk/government/publications/national-planning-policy-framework--2>) sets out at paragraph 57, 3 policy tests which mirror the tests in the Regulations.

The following evidence is likely to be needed to enable the Inspector to assess whether any financial contribution provided through a planning obligation (or the local planning authority’s requirement for one) meets the tests:

- the relevant development plan policy or policies, and the relevant sections of any supplementary planning document or supplementary planning guidance
- quantified evidence of the additional demands on facilities or infrastructure which are likely to arise from the proposed development
- details of existing facilities or infrastructure, and up-to-date, quantified evidence of the extent to which they are able or unable to meet those additional demands
- the methodology for calculating any financial contribution necessary to improve existing facilities or infrastructure, or provide new facilities or infrastructure, to meet the additional demands
- and details of the facilities or infrastructure on which any financial contribution will be spent.

3. Format of the planning obligation

All parts of the planning obligation, including the signatures, should follow in sequence without gaps. The signatures should preferably not start on a new page. The planning obligation should be securely bound, and its pages should be numbered.

Any manuscript alterations to the text must be initialled by all the parties. Any documents or plans which are annexed to the planning obligation must be clearly identified in the text (by document title and date or drawing number) and any plans which are identified must be attached. Any plans must be signed by all the parties and any colouring of plans must match the description given in the text. If any plan is found to be inaccurate or missing, the planning obligation will need to be re-executed with the correct plans attached.

The original planning obligation should be held by an officer (a solicitor) of the enforcing planning authority – it should not be sent to us as we destroy hard copy case files after 1 year. A copy should be sent to us with a signed statement by that officer certifying that it is a true copy of the original.

4. Parties to the planning obligation

Under section 106(1) of the Act, any person interested in the land may enter into a planning obligation. Persons can only bind their own interest and any successors in title to that interest. Normally all persons with an interest in land affected by a planning obligation – including freeholders, leaseholders, holders of any estate contracts and any mortgagees – must sign the obligation. Where there are different ownerships, it may be necessary to define them by reference to a plan.

The planning obligation must give details of each person's title to the land. This should be checked by the local planning authority, and in hearing and inquiry cases the Inspector will ask for its assurance. In written representations cases, and in cases where the local planning authority is unable to give an assurance, the applicant or appellant will need to provide evidence of title to the Inspector. Normally this is in the form of an up-to-date copy entry or entries from the Land Registry.

Where a developer has only an option to purchase the land, the current landowners will need to be party to any obligation binding the land.

Counterpart documents are legal documents identical in all respects except that each is signed by a different party or parties. This is not appropriate to planning obligations, since these are public law documents which are entered on the planning register and the local land charges register and are often copied to residents and other interested people. The planning obligation should be conveniently available as one single document executed by all the relevant parties.

There may be exceptional circumstances where it is agreed in advance by the parties that counterparts are the only practical option. In these cases, both the Inspector and the local planning authority should be satisfied that certified copies of all the individually signed documents have been provided (by a solicitor or other suitably legally qualified person). It is preferable in such circumstances that each counterpart document includes a clause confirming that while the deed may be executed in counterparts, or in any number of counterparts, each of these shall be deemed to be an original (or a duplicate original), but all of them, taken together, shall constitute one and the same agreement. While such a clause is recommended in order to improve clarity, its absence will not make the counterparts invalid.

5. Content of the planning obligation

It should provide clear and concise definitions for frequently-used terms and use consistent terminology throughout.

The planning obligation must be dated and executed by all the parties to it as a deed. For details of how to achieve execution as a deed, see below.

The planning obligation must identify:

- the land to which it relates (by a plan if necessary)
- and the parties to the obligation, by names and addresses, and their relevant interest in the land - if a party is an offshore company, we expect it to give an address for service of documents in the UK.

It must state:

- that it is a planning obligation made under the terms of Section 106 of ~~the Act~~ (or if not, it must state under which other legislation it is made) and name the planning authority by which it is enforceable
- which part or parts come into effect upon the grant of planning permission - even if the actions required by the obligation are triggered by subsequent events, such as commencement of the development
- precisely the requirements which it imposes on the party or parties giving the covenant in sufficient detail (including the parts of the land to which they are to apply, where relevant) to make them enforceable
- that any financial contributions are to be paid to the local planning authority or (by a suitably worded provision in the deed) any other relevant body responsible for the provision of the particular public services to which the contributions apply.

It might be necessary to define by reference to a plan the proposed site(s) of particular facilities (e.g. open space) to be provided, or the detailed specification of the purposes to which particular financial contributions are to be put (including any time limits, quality checks, etc. which are to be applied).

It must make it clear when each of its requirements is triggered and whether there are any conditions affecting the performance of that requirement. For example, it should make it clear whether some other event needs to occur, or formal notice needs to be given, before a financial contribution becomes payable; or whether the terms of a transfer of land need to be agreed before affordable housing or some other community benefit is delivered.

Care should be taken to ensure that the obligations fall within the terms of section 106 of ~~the Act~~ as set out below:

- restricting the development or use of the land in a specified way
- requiring specified operations or activities to be carried out in, on, under or over the land
- requiring the land to be used in a specified way
- requiring a sum or sums to be paid to the local planning authority.

See for example *Westminster City Council v. Secretary of State for Communities and Local Government* [2013] EWHC 690 (Admin).

6. Requirements imposed by unilateral undertakings

If using the unilateral undertaking form of obligation, it is acceptable for it to set out the conditions under which any financial contribution may be made – such as the purpose for which it may be used and the timing or phasing of the payments.

However, a unilateral undertaking should not try to impose requirements or obligations on any person other than the signing party for example, it would not be acceptable to try to require a Registered Provider to exchange contracts within a set period.

7. Modifying or discharging planning obligations

A deed executed under section 106 cannot provide for its own modification or discharge after a given period or in given circumstances.

Planning obligations, whether section 106 agreements or unilateral undertakings, can usually only be modified or discharged under section 106A of the Act.

Section 106A enables modification or discharge to be achieved either by an agreement with the local planning authority (which must be executed as a deed), or by an application to the local planning authority.

Periods within which applications to modify or discharge an obligation can be made, are as follows:

- for obligations entered into on or before 6 April 2010 – an application can be made at any time
- for obligations entered into after 6 April 2010 – an application can be made after 5 years beginning with the date the obligation has been entered into to.

There is a right of appeal under section 106B if any application is refused.

Great care should be taken in preparation, before executing a unilateral undertaking, so as to avoid any need to modify it subsequently. Where an obligation has been entered into, and executed, it will not usually be possible for the obligation to be subsequently withdrawn or modified unilaterally.

8. Planning obligations and the provision of affordable housing

This section should be read alongside the relevant sections of the Law Society's model section 106 agreement (second edition - June 2010).

If a planning obligation provides for affordable housing as part of the proposed development, the Inspector will need to be satisfied that:

- the types of affordable housing which it is proposed to provide are satisfactorily defined
- where there is a split between the different types of affordable housing it is justified and that there are arrangements to secure it
- there are clear and specific provisions dealing with the distribution of the affordable housing
- the covenants are drafted in a way which will ensure delivery of the proposed housing. The planning obligation should state who is to be responsible for the construction of the affordable housing
- if the land to be used for affordable housing is to be transferred (for example, to a Registered Provider), the relevant land is clearly identified on a plan, and there is a restriction on development until arrangements for the transfer are made as set out in the planning obligation or in a document annexed to it
- if the Registered Provider is a party to the planning obligation, it includes positive covenants to ensure that the affordable housing will be constructed and (by a suitably worded provision) transferred to the Registered Provider (possibly with a cascading mechanism in case of default

- by the preferred Registered Provider)
- if none of the parties to the planning obligation is a Registered Provider (and assuming the applicant itself is not going to build the affordable housing), there are adequate and reasonable arrangements for securing a Registered Provider
 - the phasing arrangements for delivery of the affordable housing are satisfactory - the planning obligation should not allow most of the market housing to be sold before the affordable units are available for occupation. The provision/occupation of both types of housing should be appropriately synchronised
 - if the affordable housing is to be provided off-site, or a financial contribution made in lieu of provision, there is robust justification for this, and what is on offer is of broadly equivalent value (see paragraph 50 of the Framework)
 - the planning obligation contains adequate controls to ensure that any affordable housing is retained as affordable for an unlimited duration
 - the arrangements for allocating the affordable housing (for example, nomination rights involving use of the local authority's housing waiting list or allocations to qualifying persons by a Registered Provider) are satisfactory
 - if the planning obligation includes a cascade arrangement, there are adequate time-periods at each stage, especially before triggering any "fall-back" clause which would enable the affordable housing to revert to the developer for sale on the open market
 - the proposed arrangements for managing the affordable housing are adequate.

9. Planning obligations for pooled contributions/tariffs

Formerly Regulation 123 of the CIL Regulations restricted the use of planning obligations in two ways:

- It prevented the use of a planning obligation for the provision or funding of infrastructure, which was to be funded, wholly or partly, by CIL, to ensure that a developer did not pay twice for the same infrastructure in connection with a particular development
- No more than 5 planning obligations could be pooled towards the funding of a single piece of infrastructure.

However, Regulation 123 was removed by the 2019 CIL Amendment Regulations on 1 September 2019. It is no longer unlawful, when considering the grant of planning permission at appeal, to take account of mitigation in the form of funding for an infrastructure project, which is also included in an authority's infrastructure list to be funded by CIL, or is being funded from pooled contributions from more than 5 other S106 obligations. However, obligations will still need to be assessed to check if they meet all three statutory tests as set out in Regulation 122. Relevant guidance on this can be found in the Planning Obligations and CIL chapters of the [Planning practice guidance](https://www.gov.uk/government/collections/planning-practice-guidance) (<https://www.gov.uk/government/collections/planning-practice-guidance>) at the following paragraphs: Reference ID: 23b-003-20190901, 23b-004-20190901 and 23b-006-20190901 and Reference ID: 25-166-20190901 to 25-170-20190901.

10. Glossary

Affordable housing See National Planning Policy Framework [DCLG, March 2012].

Agreement A legal document executed and delivered by all the parties named. Must be between 2 or more parties.

Attorney A person appointed by another to act in the latter's place.

Benefit Something, for example an area of open space, a community facility, an item of infrastructure, or a financial contribution, which is provided by means of a planning obligation.

Certified copy A copy of a legal document which has been signed and certified as a true copy by the person to whose custody the original is entrusted.

Common seal See Sealing below.

Completed A legal document that has been executed and delivered to the other party or parties unconditionally.

Completion The act of completing a legal document.

Condition precedent A provision which delays the right or requirement to do something until another action or event has occurred.

Covenant A binding promise given by one party to another to observe or perform an obligation.

Deed A legal document that is executed as a deed.

Delivered A deed is delivered at the point at which it takes effect, that is to say when it has been both executed and dated.

Discharge Release from a planning obligation.

Enforceable / Legally enforceable Binding in a legal sense and capable of being enforced if not complied with.

Estate contract A contract by an owner of land to convey the land to another.

Evidence of title / Details of title Documents which evidence ownership of property, (also sometimes referred to as Title Deeds – see below.)

Executed See Appendix.

Instrument / Legal instrument A formal legal document.

[Legal] interest in land An interest in land includes freehold ownership, leasehold interest, interest as a mortgagee, etc.

Under section 106 it is a pre-requisite to entering into a planning obligation.

Landowner Person holding a legal estate in land for example, a freeholder or leaseholder.

Liability A duty or obligation enforceable by law.

Mortgagee A person with security against a property usually by way of a loan.

Obligation / Planning obligation An obligation in the strict sense is something which a party is legally bound to do (for example, they may be bound by a section 106 agreement or unilateral undertaking to make a financial contribution towards educational facilities, lay out an access road, and so on). A planning obligation is an obligation to do any of the things listed in section 106(1) of the Town and Country Planning Act 1990, and is contained in an instrument executed as a deed – see

section 106(9). However the term 'obligation' is also sometimes used as shorthand for 'planning obligation', which in this generic sense refers to both section 106 agreements and unilateral undertakings.

Option to purchase A right (made by agreement) to buy or not, within a certain time.

Power of Attorney Legal document authorising a named person to sign documents on another's behalf in specified circumstances.

Registered Provider An organisation which is registered with the Homes and Communities Agency as a provider of social housing. This can include Housing Associations, Local Authorities and private companies.

Section 106 agreement An agreement made under section 106 of the Town and Country Planning Act 1990, containing covenants from one or more parties (who must have a legal interest in the land) to another party (usually the local planning authority).

Sealing (of a legal document) Method of signing a document by means of a corporate or common seal. See Appendix.

Successor(s) in title Persons who are entitled to succeed the current holder(s) of a title to a property.

Title

A right to ownership of land or property.

Title Deed A legal document which provides evidence of title to the land or property.

Unilateral undertaking A planning obligation executed solely by the party or party giving the covenants and not by the party (usually the local planning authority) having the benefits of those covenants. In this way it differs from a section 106 agreement which is executed by all the parties including the local planning authority.

Witness / witnessing A document is witnessed if it is signed in the presence of one or more other persons – the witness(es) – who then also sign to indicate that they have witnessed the signature.

11. Appendix

Section 106(9) of the Town and Country Planning Act 1990 (as substituted by section 12 of the Planning and Compensation Act 1991) states that a planning obligation may not be entered into except by an instrument (that is to say, a formal legal document) executed as a deed.

Execution of a deed can be fulfilled in the following ways:

11.1 Execution by an individual

Section 1(3) of the Law of Property (Miscellaneous Provisions) Act 89 provides that an instrument is validly executed as a deed by an individual if:

- it is signed by them in the presence of a witness who attests the signature; (or, at their direction and in their presence and the presence of two witnesses who each attest the signature)
- **and** it is delivered as a deed by them or a person authorised to do so on their behalf.

Example

The above requirements are satisfied if the words “In Witness to the above the Owner has executed and delivered this Deed the day and year first above written” appear in the document **and** the document is signed in the following manner:

Signed as a Deed by:)

A N Other) (A N O signs here)

In the presence of)

..... (Signature of witness)

..... (Name of witness in print)

..... (Address of witness)

11.2 Execution by a company

Section 44 of the Companies Act 2006 provides that a document is executed as follows:

- by the affixing of its Common Seal
- **or** by signature in accordance with section 44(2) that is, by any 2 authorised signatories (authorised signatories are defined as every Director of the Company and the Secretary (or any joint secretary) of the Company)
- **or** by a Director of the Company in the presence of a witness who attests the signature.

Examples

The above requirements are satisfied in the following examples.

By sealing

The following words appear in the document: “In Witness to the above the Company has affixed its Common Seal the day and year first above written” **and**

The Common Seal of)

J R Ltd was affixed) (Seal of JR Limited here)

in the presence of)

..... (Director)

..... (Director/Secretary)

[Usually a Director signs according to the rules of the Company.]

By signature

The following words appear in the document: “In Witness to the above the Company has executed and delivered this document as a Deed the day and year first above written” **and** the document is signed in the following manner:

Executed as a Deed by)

J R Ltd) [signatures of authorised signatories here (See above for definition of “authorised signatories”.)]

Acting by)

..... (Signature) (Signature)

..... (Name and position in print) (Name and position in print)

By signature by a director in the presence of a witness

The document should be signed in the following manner:

Signed as a Deed by)

JR Limited) [signature of Director here]

Acting by)

..... (Signature) (Signature of witness)

..... (Name and position in print) (Name of Witness)


11.3 Other scenarios

If it is proposed to execute a document in any other way, documentary evidence that the signatories are authorised to sign should be provided. For example:

- if a Company signs on behalf of an individual or another Company - section 44(8) of the Companies Act 2006 applies
- if the office of Director or Secretary of a Company is held by an individual of a Firm (for example, a firm of accountants or solicitors) - section 44(7) of the Companies Act 2006 applies
- if a Building Society or Bank refers to ‘authorised signatories’ who are not Directors or the Company Secretary
- if a document is signed on behalf of a Trust by named Trustees
- there are special provisions for execution under a power of attorney
- in the case of foreign corporations, it is usually necessary to obtain opinion letters from suitable foreign lawyers to confirm due execution.

11.4 General note

If parties are legally represented, we would expect their lawyers to inform the Inspector as to whether or not they are satisfied with the execution of the obligation.



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