



REPORT FROM: PLANNING, BUILDING CONTROL AND LICENSING
SERVICES MANAGER

TO: SCRUTINY MANAGEMENT TEAM

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Briefing Note on the Scope of Section 106 agreements

PURPOSE OF REPORT

To Brief Committee on the prevailing legislation and policy on section 106 agreements.

BACKGROUND

- 1 Dealing with planning applications involves navigating through layers of legislation and advice. The form of this has changed over time and is constantly being tinkered with but the basic framework remains constant.
- 2 Overarching the whole system is primary legislation in the form of Acts of Parliament. These set out the overarching framework within which planning policy must lie and within which both those administering the planning system and the judiciary must operate.
- 3 The primary legislation is the Town and Country Planning Act 1990 ("the Act"). This lays out the principles for planning obligations that can be entered into under the provisions of Section 106 of the Act. It states that obligation can be entered into for the following purposes:
 - To restrict the use of land in a specified way
 - Requiring specified activities to be carried out
 - Requiring land to be used in a specified way

- Requiring a sum or sums to be paid
- 4 Obligations may be unconditional or subject to conditions, can impose restrictions for a specified period or indefinitely and can require sums to be paid in full, periodically for a defined or indefinite period.
 - 5 Section 106 of the Act has been added to and amended in a series of different Acts of Parliament. The following information relates to the amalgamated changes that have been made to the Act over successive changes through successive Acts of Parliament.
 - 6 Section 106 agreements can be in the form of a joint agreement between the Local Planning Authority (“LPA”), land owner and any other relevant party. Applicants can also enter into Unilateral Obligations which do not have to be agreed to by the LPA.
 - 7 S106 agreements cannot be challenged for 5 years after which there is a right of appeal to the secretary of state. When an agreement is challenged the National Planning Policy Framework, at paragraph 205, requires that decision must take into account changes in market conditions and LPAs must also be sufficiently flexible to prevent planned development from being stalled. This adds a commercial test into deciding whether or not the provisions of an agreement can be altered.
 - 8 The primary legislation outlined above is supplemented by both secondary legislation (this has a pivotal role in how and when S106 agreements can be used) as well as planning policy and guidance.
 - 9 It also needs to be noted that the Government intends to legislate (set out in the Government Response to the Consultation on Improving the Use of Planning Conditions) to prohibit conditions (and presumably Section 106 agreements) where they would make a development economically unviable. It must be remembered that conditions and section 106 agreements can only be entered into where they are “necessary” so there appears to be a disjoin between promoting development and imposing necessary conditions.

Subordinate Legislation

- 10 There is supplementary legislation which sets out when it is possible and not possible to use section 106 agreements. The Community Infrastructure Levy Regulations 2010 states:

A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—

- (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.

- 11 Prior to this legislation coming into force in 2010 there was a much less arduous test to satisfy. The Courts had set out that provided that there was more than a diminimus link between the development and the S106 agreement that an agreement could be lawfully entered into.
- 12 The test now is akin to that for planning conditions that the S106 agreement must be necessary. If an agreement is entered into that is not necessary then there would be the possibility of a judicial review of the reasons for granting planning permission as in effect that permission may be seen as being “bought”.
- 13 The reality of this is that LPA’s are no longer legally able to secure planning gain from developments as that would go beyond what would be necessary to make a development acceptable.
- 14 Section 123 of the CIL Regulations also limit the number of agreements that can be entered into. They limit agreements to no more than 5 “*which provide for the funding or provision of that project, or type of infrastructure.*”

Planning Policy

- 15 Planning Policy is contained in three principle sources. Local Planning Policy is contained in the Local Plan. That sets out a range of polices that affect when a Section 106 agreement can be entered into. For example the Local Plan for Pendle sets out the percentage of affordable housing that can be required on a site. As applications are required to be determined in accordance with the development plan for the area exceeding what is required in the LP would be difficult to justify and defend if challenged.
- 16 National Planning Policy is contained in the National Planning Policy Framework (“the Framework”). This does not set out in specific detail any direct policy on S106 agreements. What it does do is set out a range of policies which have to be considered in determining planning applications. For example it deals with biodiversity and were a site to be developed where there would be a loss of biodiversity a section 106 agreement could be necessary to secure funding to offset that loss.
- 17 Paragraph 7 above deals with advice in the Framework on how to consider applications to alter obligations. In a similar vein sections 173 to 177 deal with ensuring development is viable and deliverable. These issues have to be kept in mind in dealing with section 106 requirements.
- 18 In addition to the Framework the Government has published the online National Planning Practice Guidance. This does not have the weight of policy but gives the Government’s view on how planning policy should be read and implemented.

19 Amongst the advice the NPPG gives includes obligations having to:

- Be fairly and reasonably related to the development
- Set out in local plans as to when they will be required
- Be fully evidenced and justified
- Not prevent development from going forward for affordable housing requirements
- Only use the funds for the terms set out in the obligation

20 The NPPG (**Paragraph: 006 Reference ID: 21a-006-20140306**) allows for negatively worded conditions to require section 106 agreements to be used in certain circumstances such as preventing development coming forward until a section 106 agreement requiring necessary infrastructure to come forward being entered into.

IMPLICATIONS

Policy: None

Financial: None arising directly from this report

Legal: None arising directly from the report.

Risk Management: None arising directly from the report.

Health and Safety: None arising directly from the report.

Sustainability: None arising directly from the report.

Community Safety: None arising directly from the report.

Equality and Diversity: None arising directly from the report.