SECTION 106 PLANNING AGREEMENTS

RELATING TO HIGHWAYS

1. Section 106 agreements are used for a variety of purposes, including securing funding for new access roads where the current access is inadequate, other off-site highways works,\(^1\) and traffic-management plans. They are appropriate for the payment of money for off-site works, but they are not generally appropriate for off-site obligations. The main exceptions to this are displacement arrangements, \( e.g. \) creating and maintaining a habitat for a protected species off-site to compensate for a habitat destroyed by the development. While they are distinct from the other agreements relating to highways and planning (\( i.e. \) under section 38 and 278 of the Highways Act 1980), “\textit{there is of course merit in ensuring a joined-up approach is taken to the planning of the provision of all infrastructure and services relating to a site}.”\(^2\) Although some people do it, I would strongly discourage trying to combine a s106 agreement with an agreement under the Highways Act.

2. In general the law of contract applies to section 106 obligations, but the section overrides the normal requirement of privity of contract and goes beyond the rules of equity that provide a limited exception to that requirement, so that even positive obligations can bind successors in title. They do not have to do this and, for example, it is normal to draft s106 obligations so that, individual owner-occupiers of dwelling-houses are not bound by them.

3. As a contract a s106 obligation should meet the requirement of certainty since an agreement that is so vague or uncertain that no definite meaning can be given to it will lack contractual force. While such uncertainty is uncommon, poor drafting is a recipe for legal disputes and for a contract being held to mean something that the losing party to the dispute did not intend.

\(^1\) ODPM circular 05/2002, paragraph B15.

\(^2\) ODPM circular 05/2002, paragraph B52.
4. A deed must make clear on its face that it is intended to be a deed by the person or persons making it. ³

Section 106 of the Town and Country Planning Act 1990

5. Section 106 in broadly its current form was substituted by the Planning and Compensation Act 1991. The principle changes from the former s106 (or, as many people remember them, s52 agreements) are that s106 allows for unilateral obligations and has more widely drawn powers. It has since been amended by the Planning Act 2008 and the Greater London Authority Act 2007. ⁴ The Planning Act 2008 added new subsections (1A), (9)(aa) and 14.

6. Section 106(1) provides:

   (1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A and 106B as “a planning obligation”), enforceable to the extent mentioned in subsection (3) -

   (a) restricting the development⁵ or use of the land in any specified⁶ 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 (or, in a case where section 2E applies, to the Greater London Authority) on a specified date or dates or periodically.

7. Hence the person who enters into the obligation must be a person who is interested in land in the area of the LPA. It is important to consider what is the

⁴ Its prospective repeal by the Planning and Compulsory Purchase Act 2004 remains on the statute book, but is unlikely to come into effect.
⁵ S106(1A) provides: “(1A) In the case of a development consent obligation, the reference to development in subsection (1)(a) includes anything that constitutes development for the purposes of the Planning Act 2008.”
⁶ The specified in s 106 means: “specified in the instrument by which the planning obligation is entered into and in this section” (s106(13))
capacity to bind the land of the person entering into the agreement. A tenant cannot bind his landlord, a prior mortgagee may foreclose, and guarantors, neighbours and persons in possession may have relevant rights. A long lease may not be as secure as it first seems, since it may be surrendered or forfeited. If such third parties are to be bound by the obligation, they must sign it. The investigation of such rights is a part of normal conveyancing practice and should not (in general) cause difficulty in the case of a bilateral obligation or of a unilateral obligation produced after appropriate cooperation between the covenantor and the authority. Where a unilateral obligation is offered in the course of an appeal the inspector may (and normally will) seek evidence of title.7

8. The provision for a payment of a sum of money under s106(1)(d) will be of use where a development requires highway works of a particular size, but the authority wishes more extensive highway works (perhaps because of the combined effect of several developments).8 The developer can undertake to pay a sum equivalent to the works appropriate for its development; while the authority rather than build those works can use the sum (where appropriate with other s106 contributions) towards the more extensive works it considers appropriate. ODPM circular 05/2005 gives guidance on pooled contributions.9

9. It is normal to require that the money concerned be spent within a specific period and that, if it is not is should be returned. In a complex development different periods may be specified.

Example

The Council hereby covenants with the Developers and each and every one of them for themselves and their respective assigns and successors in title to the Land:

(1) To put any Financial Contribution in a commercial interest bearing account;
(2) To provide "on request" annual accounts to the Developer detailing how any Financial Contribution has been spent; and

7 ODPM circular 05/2002 paragraph B54, which also specifies “Where a trunk road is involved, the developer will also need the agreement of the relevant highway authorities and any necessary highway orders.”
8 For an example of off-site highway works being shared by developers see R v Lichfield District Council ex parte Lichfield Securities Ltd [2001] EWCA Civ 304, CA.
9 Paragraphs B21 – B24; also Planning Obligations Practice Guidance 2006, paragraphs 2.18 to 2.20.
(3) To repay any Financial Contribution (and any accrued interest) in accordance with the provisions of Clause…

10. Section 106(2) provides:

(2) A planning obligation may -

(a) be unconditional or subject to conditions;

(b) impose any restriction or requirement mentioned in subsection (1)(a) to

(c) either indefinitely or for such period or periods as may be specified; and

(c) if it requires a sum or sums to be paid, require the payment of a specified amount or an amount determined in accordance with the instrument by which the obligation is entered into and, if it requires the payment of periodical sums, require them to be paid indefinitely or for a specified period.

11. Subsection 2(a) enables an obligation to be conditional. For example it may only apply if planning permission is granted and parts may only apply if certain events occur (e.g. the occupation of a specific number of houses).

**Example**
The Developer covenants with the Council prior to the Occupation of … Dwellings to…

12. It is normal to provide that the developer will not be required to carry out the substantive obligations in the agreement (other than paying the LPA’s costs) unless he implements the planning permission. The definition of ‘implement’ requires careful consideration. The starting point the Town and Country Planning Act 1990 s56(4), but a developer is likely to wish to exclude minor initial works.

**Example**
"Implement " "Implemented" and "Implementation" mean the carrying out on the Land or on a specified part of the Land of a material operation including change of use as defined in section 56(4) of the 1990 Act comprised within the Development provided that demolition works, excavation, archaeological works, site surveys, site preparation, environmental preparatory works, the erection of fencing to enclose the
Development or any part of the Development or the laying or provision of any services and/or services diversion works on or under the Development or any part of the Development, the laying out of roads for construction purposes, and similar works preparatory to the construction of buildings, structures or roads shall not be deemed to be carrying out of a material operation for the purposes of this Deed so that on the carrying out of such works Implementation shall not be so deemed to have occurred.

13. Subsection (4) expressly enables the obligation to provide “that a person shall not be bound by the obligation in respect of any period during which he no longer has an interest in the land”; although it is normal not to go so far as excluding liability for breaches occurring before transfer of the land to a purchaser. Authorities should take care that this does not create a lacuna in liability, e.g. if liability ceases on transfer, but is not passed on to owner-occupiers of dwelling-houses. In complex cases it may be appropriate to impose primary liability.

Example
Any reference to a person being "primarily liable" or "primary liability" refers to the enforcement provisions in Schedule… but does not necessarily mean that another person may not be liable to observe the covenant concerned.

14. Subsection 2(c) makes it clear that the sum or sums may be a specific sum or may be determined in accordance with the terms of the s106 obligation. A bilateral agreement can include determination (in default of agreement) by a court, arbitrator or expert and can provide for mediation in advance of any such determination. More complex agreements provide for different bodies to appoint arbitrators for different types of dispute. Typical clauses providing for arbitration or expert determination are:

Examples
Any dispute or difference arising out of or in connection with this Deed shall be determined by the appointment of a single arbitrator to be agreed between the parties, or failing agreement within… after either party has given to the other a written request to concur in the appointment of an arbitrator, by an arbitrator to be appointed by the President or a Deputy President of the Chartered Institute of Arbitrators.
Or
In the event of any dispute arising between the Parties in respect of any matter contained in this Deed the same shall be referred (by any Party within ... of so notifying the other Parties) to an Expert, such Expert to act as an expert and not as an arbitrator and whose decision shall be final and binding on the Parties and whose costs shall be in his award and the Expert shall be of at least ten years standing in his field of expertise. [THIS NEEDS TO BE FOLLOWED BY PROVIDING FOR THE EXPERT’S APPOINTMENT]

15. It may sometimes help to involve an independent third party, perhaps as a mediator, when seeking agreement on planning obligations. Advice on this is given in circular 05/2005,10 which also encourages public involvement.

16. Subsection (3) is important in providing the critical distinction between a s106 obligation and a non-statutory contract. It provides:

Subject to subsection (4) a planning obligation is enforceable by the authority identified in accordance with subsection (9)(d) -

(a) against the person entering into the obligation; and

(b) against any person deriving title from that person.

17. Where the two-tier system of local government applies, the ‘authority’ will be the local planning authority, i.e. most often the district council and it may help to make the highway authority a party.

Example

PARTIES
(1) ... DISTRICT COUNCIL of...
(2) ... COUNTY COUNCIL of...
(3) [THE FREEHOLDER] of ...
(4, etc) [OTHER INTERESTED PERSONS] of ...

18. Drafters of s106 obligations must always remember its subsection (9), the current form of which provides:

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10 Paragraphs B37 to B40.
A planning obligation may not be entered into except by an instrument executed as a deed which -

(a) states that the obligation is a planning obligation for the purposes of this section;

(aa) if the obligation is a development consent obligation,\(^\text{11}\) contains a statement to that effect;\(^\text{12}\)

(b) identifies the land in which the person entering into the obligation is interested;

(c) identifies the person entering into the obligation and states what his interest in the land is; and

(d) identifies the local planning authority by whom the obligation is enforceable and, in a case where section 2E applies, identifies the Mayor of London as an authority by whom the obligation is also enforceable.

19. These requirements are mandatory. Non-compliance will prevent the obligation being a s106 obligation and, while it may remain a valid contract between the original parties, will prevent it binding successors except to the limited extent allowed in equity. Subsection (9) should not be viewed as containing mere formalities. It can lead to an agreement not being binding.\(^\text{13}\)

**Law of Property (Miscellaneous Provisions) Act 1989 section 2**

20. If the s106 obligation contains an obligation to transfer land, section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, which requires contracts for sale etc. of land to be made by signed writing will apply. Its subsections (1) – (3) provide:

\begin{quote}
(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.
\end{quote}

\(^{11}\) In section 106, “development consent obligation” means a planning obligation entered into in connection with an application (or a proposed application) for an order granting development consent. (s106(14) as inserted by the Planning Act 2008 s174(2) with effect from 1st March 2010).

\(^{12}\) Clause (aa) was inserted by the Planning Act 2008 s174(2) with effect from 1st March 2010.

\(^{13}\) Southampton City Council v Hallyard Ltd [2008] EWHC 916, Ch.
(2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.

21. A clause that fails to comply with this section is at risk of being struck down by a court.\textsuperscript{14}

21. Dedication or vesting land for a new road for no monetary consideration does not constitute a supply for VAT purposes, so that no VAT is chargeable. It is prudent to ensure that the s106 obligation makes it clear that this is what is happening. The input tax of constructing is recoverable according to the normal VAT rules. The same applies to transfers of roads to management companies. There are also favourable income tax provisions for site restoration payments;\textsuperscript{15} so if the section 106 includes such a payment this should be made clear.

\textsuperscript{14} There are conflicting authorities on this point. The safe course is to ensure that a s106 agreement complies with section 2. In some cases the Contracts (Rights of Third Parties) Act 1999 may apply.

\textsuperscript{15} Income and Corporation Taxes Act 1988 s91A.
ODPM Circular 05/2005

22. The principal Government guidance on Planning Obligations is contained in ODPM circular 05/2005. It Annex B is of particular importance. Paragraph B5, which should always be borne in mind, provides:

*The Secretary of State’s policy requires, amongst other factors, that planning obligations are only sought where they meet all of the following tests. The rest of the guidance in this Circular should be read in the context of these tests, which must be met by all local planning authorities in seeking planning obligations.*

A planning obligation must be:

(i) relevant to planning;
(ii) necessary to make the proposed development acceptable in planning terms;
(iii) directly related to the proposed development;
(iv) fairly and reasonably related in scale and kind to the proposed development; and
(v) reasonable in all other respects.

23. As the text (and also case-law\(^{16}\)) makes clear each of these tests should be satisfied. They are not alternatives.

24. LPAs should involve all the relevant public-sector infrastructure providers when formulating planning obligations policies. These providers may include the highways department for the area and neighbouring areas and the Highways Agency.\(^{17}\)


Further points in respect drafting a section 106 agreement


26. Local authorities will often require notice within a short period of time of any transfer. This should require details of the transferee’s name and address and the land transferred. This should not extend to transfers after the first transfer of the land concerned to somebody who is not bound by the obligation, e.g. to subsequent owner-occupiers of a dwelling-house.

27. Performance bonds (or sureties) can avoid the risk of total or partial non-delivery of obligations and may be sought for out highways infrastructure works.  

28. A failure to ensure that the statutory requirements are met could easily give rise to a successful action in negligence against the drafter.

29. A checklist of some key drafting points is at the end of this paper.

Definitions

30. Use the definition clause(s) to make clear what words and phrases with more than one possible meaning are intended to mean, to extend or limit meanings and to provide abbreviations of frequently used phrases.

**Examples**


“Bond” means a bond for securing the performance of its obligations (as to Highway Works) in this Deed such bond to be in the form contained in Schedule… and with a bondsman approved by the County Council and in a sum equal to the sum estimated by the County Engineer to be the reasonable cost to the County Council of carrying out the Highway Works.

“Business Day” means a day other than a Saturday, Sunday, bank holiday or public holiday in England and Wales or the period between 24 December and 1 January inclusive.

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18 Planning Obligations Practice Guidance 2006 paragraph 10.15.
“County Engineer” means the Director of Engineering or his appointed representative for the time being of the County Council.

“Cycle Lane” means the cycle lane (including hard and soft landscaping seating and lighting) shown coloured red on Drawing…

“Drawings” shall mean the Drawings annexed in Schedule…

“Highway Agreement” means an agreement for… substantially in the form set out in Schedule… with such amendments as shall be agreed between the Parties.

“Highway Works” means the highways that the Developer constructs pursuant to Clause… as shown coloured red on Drawing… or such variation to Drawing… as shall be agreed between the Parties.

OR “Highway Works” means:
(a) the works described in Schedule…
(b) such other ancillary works as the County Council shall reasonably require
(c) any accommodation works
(d) works which may as a consequence of (a) (b) or (c) be necessary to statutory undertakers’ and telecommunications apparatus and all other equipment under in or over the highway
(e) any variation to (a) (b) (c) or (d) as agreed between the parties in writing be necessary

“Junction Improvements” shall mean the improvements described in the plans and transport assessment accompanying the Planning Application and listed in Table… at Clause… as may have been or as may be modified as a result of safety audits and detailed design with the agreement of the Council and shown on Drawings…

“Pedestrian Link” means the provision of a crossing for pedestrians comprising a … over … Road and associated works as shown on Drawing…

"TfL" means Transport for London

“VMS Route Signs” means variable messaging system traffic signs as required by Clause… Table…
Jurisdiction

31. Do not forget to specify the jurisdiction.

Example
This Deed is governed by and interpreted in accordance with the law of England and Wales

Unilateral obligations

32. The fact that a developer is preparing a unilateral obligation does not mean that it should not seek to involve the authority. Inclusion (where reasonable) of the authority’s standards terms may save unnecessary argument on appeals.¹⁹ Some councils have model clauses for such things as highway construction and highway dedication and/or skeleton agreements on their websites. An LPA that refuses to cooperate with the drafting of a s106 undertaking risks having an order for costs made against it in a planning appeal.²⁰

33. A unilateral obligation cannot impose an obligation upon the authority (or anybody else who is not a party to it), but it may by the use of conditions precedent make the carrying out of obligations conditional upon acts of the authority.

Community Infrastructure Levy Regulations 2010 Part 11

34. The CIL was intended to provide infrastructure to support the development of an area, rather than to make individual planning applications acceptable in planning terms. That could still leave site-specific impact-mitigation requirements without which a development could not be granted planning permission, so that a role for s106 obligations would remain.

35. Part 11 of the CIL Regulations gives statutory force to part of the Guidance in circular 05/2005, paragraph B5. Its reg. 122 (1) and (2) provide:

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¹⁹ LPAs are encouraged to have standard agreements/undertakings.
²⁰ [R v Secretary of State for the Environment ex parte Wakefield Metropolitan Borough Council [1996] The Times 29th October. Also ODPM circular 05/2005 paragraph B57.]

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(1) This regulation applies where a relevant determination\(^{21}\) is made which results in planning permission being granted for development.

(2) A planning obligation\(^{22}\) 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.

36. Regulation 123 will provide further limitations on use of planning obligations in the case of development, that is capable of being charged the CIL (whether there is a local levy in operation or not). It will not apply until the earlier of a CIL charging schedule taking effect or 6\(^{th}\) April 2014:

(1) This regulation applies where a relevant determination\(^{23}\) is made which results in planning permission being granted for development.

(2) A planning obligation\(^{24}\) may not constitute a reason for granting planning permission for the development to the extent that the obligation provides for the funding or provision of relevant infrastructure.\(^{25}\)

\(^{21}\) Defined in reg. 123(3) as: “‘relevant determination’ means a determination made on or after 6th April 2010 - (a) under section 70, 76A or 77 of TCPA 1990 of an application for planning permission which is not an application to which section 73 of TCPA 1990 applies; or (b) under section 79 of TCPA 1990 of an appeal where the application which gives rise to the appeal is not one to which section 73 of TCPA 1990 applies.”

\(^{22}\) Defined in reg. 123(3) as: “‘planning obligation’ means a planning obligation under section 106 of TCPA 1990 and includes a proposed planning obligation”.

\(^{23}\) Defined in reg. 123(4) as: “‘relevant determination’ means - (a) in relation to paragraph (2), a determination made on or after the date when the charging authority's first charging schedule takes effect, and (b) in relation to paragraph (3), a determination made on or after 6th April 2014 or the date when the charging authority's first charging schedule takes effect, whichever is earlier” ; and “determination” means a determination - (a) under section 70, 76A or 77 of TCPA 1990 of an application for planning permission which is not an application to which section 73 of TCPA 1990 applies, or (b) under section 79 of TCPA 1990 of an appeal where the application which gives rise to the appeal is not one to which section 73 applies.”

\(^{24}\) Defined in reg. 123(4) as: “‘planning obligation’ means a planning obligation under section 106 of TCPA 1990 and includes a proposed planning obligation but does not include a planning obligation that relates to or is connected with the funding or provision of scheduled works within the meaning of Schedule 1 to the Crossrail Act 2008”. 
(3) A planning obligation (“obligation A”) may not constitute a reason for granting planning permission to the extent that -

(a) obligation A provides for the funding or provision of an infrastructure project or type of infrastructure; and

(b) five or more separate planning obligations that—

(i) relate to planning permissions granted for development within the area of the charging authority; and

(ii) which provide for the funding or provision of that project, or type of infrastructure,

have been entered into before the date that obligation A was entered into.

Checklist

Checklist of Statutory Requirements

(1) Is the person entering into the obligation a “person interested in land in the area of a local planning authority”? (s106(1))

(2) Do the restrictions and requirements relate to the land in which the person is interested in the manner specified is subsection (1) (a), (b) and (c)?

(3) Is the interest in land bound by the obligation sufficient, e.g. have all landlords and mortgagees, guarantors and neighbours with relevant rights over the land signed the section 106?

(4) Does it state that the obligation is a planning obligation for the purposes of section 106? (s106(9)(a))

25 Defined in reg. 123(4) as: ““relevant infrastructure” means - (a) where a charging authority has published on its website a list of infrastructure projects or types of infrastructure that it intends will be, or may be, wholly or partly funded by CIL, those infrastructure projects or types of infrastructure, or (b) where no such list has been published, any infrastructure.” A charging authority should set out its intentions for how revenue raised from the levy will be spent on its website (The Community Infrastructure Levy An overview, 2010

26 Defined in reg. 123(4) as: “funding” in relation to the funding of infrastructure, means the provision of that infrastructure by way of funding”.

27 Defined in reg. 123(4) as: “charging authority” means the charging authority for the area in which the development will be situated”
(5) If the obligation is a development consent obligation, does it contain a statement to that effect? (s106(9)(aa))

(6) Does it identify the land in which the person entering into the obligation is interested? (s106(9)(b))

(7) Does it identify the person entering into the obligation and states what his interest in the land is? (s106(9)(c))

(8) Does it identify the LPA by whom the obligation is enforceable (and, in a case where section 2E applies, does it identify the Mayor of London as an authority by whom the obligation is also enforceable)? (s106(9)(d))

(9) Does make it clear on its face that it is intended to be a deed by the persons making it.

(10) In respect of any obligations to transfer land does it incorporate all the terms that the parties have expressly agreed? (Law of Property (Miscellaneous Provisions) Act 1989 s2).