Planning Gain

Version: 1.1

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Planning gain Overview

Planning Gain is covered by a legal agreement under section 106 of the Town and Country Planning Act 1990. The agreements are often referred to as 106 agreements. Other key bits of legislation include the section 278 Highways Act. In the past, prior to 1990, these agreements were referred to as section 52 Agreements.

What are 106 agreements?

The agreements cover infrastructure requirements for new developments including cash contributions. These can cover a range of items from road improvements to education costs. Social housing issues are also covered for example, the provision on-site of Housing Association units. Other typical items are play areas and public open spaces and the commuted sums for their future maintenance.

The legal position as to how wide in the sense of the matters and costs these agreements can cover has had a chequered history. The courts have been called upon to interpret policy and there have been a number of major landmark decisions. However, the current position has widened and is covered by the new Community Infrastructure Levy regulations 2010 especially reg122 and the tests relating to sustainability set out in circular 05/05. Given the complexity of these rules it is likely that the courts will be called upon again in the future to interpret matters.

Extract from CIL Regulation

Limitation on use of planning obligations122. (1) This regulation applies where a relevant determination is made which results in planning permission being granted for development. (2) 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.

Extract from Circular 05/05

B3. Planning obligations (or "s106 agreements") are private agreements negotiated, usually in the context of planning applications1, between local planning authorities and persons with an interest in a piece of land (or "developers"), and intended to make acceptable development which would otherwise be unacceptable in planning terms. Obligations can also be secured through unilateral undertakings by developers. For example, planning obligations might be used to prescribe the

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nature of a development (e.g. by requiring that a given proportion of housing is affordable); or to secure a contribution from a developer to compensate for loss or damage created by a development (e.g. loss of open space); or to mitigate a development's impact (e.g. through increased public transport provision). The outcome of all three of these uses of planning obligations should be that the proposed development concerned is made to accord with published local, regional or national planning policies.

B4. Planning obligations are unlikely to be required for all developments but should be used whenever appropriate according to the Secretary of State's policy set out in this Circular. There are no hard and fast rules about the size or type of development that should attract obligations.

B5. 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.

B6. The use of planning obligations must be governed by the fundamental principle that planning permission may not be bought or sold. It is therefore not legitimate for unacceptable development to be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms (see B5(ii)).

B7. Similarly, planning obligations should never be used purely as a means of securing for the local community a share in the profits of development, i.e. as a means of securing a "betterment levy".

The secretary of state's policy tests

B8. As summarised above, it will in general be reasonable to seek, or take account of, a planning obligation if what is sought or offered is necessary from a planning point of view, i.e. in order to bring a development in line with the objectives of sustainable development as articulated through the relevant local, regional or national planning policies. Development plan policies are therefore a crucial pre-

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determinant in justifying the seeking of any planning obligations since they set out the matters which, following consultation with potential developers, the public and other bodies, are agreed to be essential in order for development to proceed. Obligations must also be so directly related to proposed developments that the development ought not to be permitted without them – for example, there should be a functional or geographical link between the development and the item being provided as part of the developer's contribution.

B9. Within these categories of acceptable obligations, what is sought must also be fairly and reasonably related in scale and kind to the proposed development and reasonable in all other respects. For example, developers may reasonably be expected to pay for or contribute to the cost of all, or that part of, additional infrastructure provision which would not have been necessary but for their development. The effect of the infrastructure investment may be to confer some wider benefit on the community but payments should be directly related in scale to the impact which the proposed development will make. Planning obligations should not be used solely to resolve existing deficiencies in infrastructure provision or to secure contributions to the achievement of wider planning objectives that are not necessary to allow consent to be given for a particular development.

B10. In some instances, perhaps arising from different regional or site-specific circumstances, it may not be feasible for the proposed development to meet all the requirements set out in local, regional and national planning policies and still be economically viable. In such cases, and where the development is needed to meet the aims of the development plan, it is for the local authority and other public sector agencies to decide what is to be the balance of contributions made by developers and by the public sector infrastructure providers in its area supported, for example, by local or central taxation. If, for example, a local authority wishes to encourage development, it may wish to provide the necessary infrastructure itself, in order to enable development to be acceptable in planning terms and therefore proceed, thereby contributing to the sustainability of the local area. In such cases, decisions on the level of contributions should be based on negotiation with developers over the level of contribution that can be demonstrated as reasonable to be made whilst still allowing development to take place.

Can they be changed?

Currently, once in place, these agreements can only be changed by agreement between the parties unless 5 years have elapsed. After 5 years they can be appealed like a planning appeal if necessary. However, the Government are keen to see development go-ahead and are encouraging local authorities to review agreements where the financial obligations entered into are now too onerous because of the

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downturn in the economy. There may be a need for a financial assessment and valuation of the development proposal to prove the facts relating to this.

Unilateral Agreements

These are like 106 agreements but as their name suggests are put forward unilaterally by one party usually the developer. It is a way for a developer to cut through delay from the local authority. Often it is a precursor to an Appeal situation.

Community Infrastructure Levy (CIL)

CIL has been introduced to replace the lengthy negotiation of s106 agreements. The idea is that this will be a District or Borough wide flat rate levy on new development. However, this will not cover the negotiation of affordable housing or of site specific requirements. It is early days for CIL as there are very few schemes in place and formally adopted. In London there will be two CIL rates in place-the London wide Mayor's levy and the individual Borough rates. These will need to be added together to calculate the full overall rate for a development scheme.

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