Horsham District Council

s106 in the Planning Process

16 December 2015

What is s106?

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- Planning obligations under Section 106 of the Town and Country Planning Act 1990 (as amended), commonly known as s106 agreements, are a mechanism which make a development proposal acceptable in planning terms, that would not otherwise be acceptable.
- They are focused on site specific mitigation of the impact of development. S106 agreements are often referred to as 'developer contributions' along with highway contributions and the Community Infrastructure Levy.

Uses for s106

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- To secure affordable housing
- To secure financial contributions to provide infrastructure or affordable housing
- To restrict the development or use of the land in any specified way
- To require specified operations or activities to be carried out in, on, under or over the land
- To require the land to be used in any specified way
- To require a sum or sums to be paid to the authority on a specified date or dates or periodically

Uses for s106

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- 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.

Relevant legislation

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- The primary legislation is set out in the Town and Country Planning Act 1990 (as amended)

- The Community Infrastructure Levy Regulations 2010 (as amended)

Legal tests

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The legislation sets out legal tests that all obligations must meet:

1. necessary to make the development acceptable in planning terms;
2. directly related to the development; and
3. fairly and reasonably related in scale and kind to the development.

NPPF Compliance

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As well as the legal tests, the policy tests are contained in the National Planning Policy Framework (NPPF):

"203. Local planning authorities should consider 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.

204. Planning obligations should only be sought where they meet all of the following tests: 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."

Viability

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There has been growing concern about delivery of development and development viability. This is reflected in the NPPF:

"205. 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."

Guidance in dealing with s106

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Planning Policy Guidance (PPG) has recently been updated in relation to s106 to include viability guidance.

The PPG changes emphasise the S106 legal and policy tests and relationship with the development plan (including neighbourhood plans).

In terms of the process- the changes focus on early engagement by the Local Planning Authority (LPA) with applicants and infrastructure providers and S106 being part of the pre-application process.

There are also a number of suggested improvement to the way LPAs approach S106 e.g. standard templates, and working with other authorities to pool expertise.

There is a greater emphasis on public access to information and the S106 being available as part of the planning register.

Amendments to s106

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- Under the Planning Act s106 (A) 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“

s106 and CIL

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- The Government viewed S106 as providing only partial and variable response to capturing funding contributions for infrastructure. As such, provision for the Community Infrastructure Levy (CIL) is now in place in the 2008 Planning Act.
- CIL has not replaced Section 106 agreements, the introduction of CIL resulted in a tightening up of the s 106 tests

S106 and CIL

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- 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.

s106 process at HDC

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- Application type and size may determine the need for a s106 – e.g. 25 dwellings requires 35% affordable housing
- Site specific requirements known following the consultation period ending and the information contained in consultation responses from HDC departments, WSCC etc
- Instructions sent to Legal to draw up the s106 agreement once figures and schemes are known (arising form consultation responses)

s106 process at HDC

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- Legal team prepare and draw up the s106
- Planning officer reviews draft s106 when this has been prepared
- Legal team will liaise with the developers legal advisors on this regarding trigger points and timeframes for payments etc
- Legal will arrange for the s106 to be signed by all parties and engrossed
- Once engrossed, the planning decision is released.