

Section 106 drafting, monitoring and implementation procedure at Mendip District Council – Corporate Protocol

1 Introduction

1.1 The purpose of Section 106 planning obligations is to make acceptable development which would otherwise be unacceptable in planning terms. They are used to bring development in line with the objectives of sustainable development as articulated in national and local planning policies.

1.2 The purpose of this protocol is to formalise the Section 106 procedure at Mendip District Council and to provide information and guidance on the process to the stakeholders involved.

2 Pre-application Section 106 procedure and information available for applicants

Major developments and pre-application discussions

2.1 When a developer requests to enter into pre-application discussions with the Planning Department on major applications, the developer will need to discuss draft heads of terms with a planning officer if it is apparent at that stage that planning obligations will be necessary to make the proposed development acceptable. For major applications where confidentiality is not an issue, planning officers will notify ward councillors, Parish and Town Councils about emerging development proposals and comments will be invited from them.

Other developments

2.2 Advice on the need for S106/Heads of Terms for other types of application is available at Thursday afternoon Planning Surgeries for agents, or from the Duty Planner Service for members of the public. Standing advice on S106 planning obligations, to be agreed by the S106 Monitoring Group, will be published on the Council's website¹.

Heads of Terms and Validation of Planning Applications

2.3 Providing an agreed set of Head/s of Terms to accompany a planning application where it is apparent that planning obligations (rather than conditions) are necessary to make a development acceptable is not a validation requirement. However, developers are encouraged to do so in order to facilitate the timely granting of planning permission.

¹ Target date 7 Jan 2012.

Unilateral Undertakings

2.4 In some developments, where only the applicant needs to be bound by a planning obligation and not the Council, instead of agreeing obligations through the standard process of negotiation and agreement it may be acceptable and advantageous for the developer to make a unilateral offer or “unilateral undertaking” to the Council to settle obligations relevant to their planning application. Resolving planning obligations through unilateral undertakings can significantly speed up the processing of finalisation and as such the time taken for planning permission to be granted, as well as reducing costs. For such undertakings to be acceptable to the LPA the applicant will need to ensure they comply with the Council’s policies on planning obligations. Unilateral Undertakings are not appropriate for Affordable Housing obligations.

Development size and relationship with Section 106 Planning Obligations.

2.5 Affordable Housing – Local Plan Policy SN2. Planning obligations securing an appropriate level of affordable housing (or in certain limited cases an offsite contribution in lieu) will be required for developments of 15+ market dwellings.

2.6 Affordable Housing Rural Exception Schemes – Local Plan Policy SN3. Development consisting of affordable housing may be provided, on small sites where residential development would not otherwise be permitted, within or adjoining the development limits of a village, to meet local need in rural areas where the need cannot be reasonably be met within the development limits of village (Rural Exception Scheme). Permission for this type of development will be subject to S106 planning obligations securing the affordable status of the dwelling.

2.7 Education Provision.- Local Plan Policy SN6. Where a proposal for residential development will directly generate a need for educational infrastructure that cannot be met from existing or programmed resources, a planning obligation will be sought to make good the shortfall. The extent of the obligation will be determined by Somerset County Council. Developments of more than 50 dwellings will usually give rise to a requirement for a financial education contribution from a developer, however if there are already pressures on a particular school, then Somerset County Council has the option of seeking contributions from developments below this 50 dwelling threshold.

2.8 Public Recreational Space (PRS) - Local Plan Policy SN7. This policy provides that all new residential development that generates a need for additional recreational facilities will be required to make a provision for public recreational space, based on a recreation space standard of 2.5 hectares per 1,000 population. Where the provision of PRS on site is not appropriate, then a financial contribution may be required towards the provision of off-site facilities. The extent of this contribution (for planning obligations negotiated in 2012-13) is currently calculated by applying a figure of £1262.13 per dwelling. This figure will be reviewed and subject to indexation on 31st March of each year. PRS contributions will usually be required for developments of 10 or more dwellings. The Council retains the option of lowering or raising this number as dictated by the particular circumstances of a development.

2.9 Travel Plans – Local Plan Policy SN24. Major schemes involving employment, retail, leisure and service uses must be accompanied by a Travel Plan that sets out the measures by which sustainable transport objectives will be delivered. The County Council will be the relevant authority in respect of travel plan planning obligations. Travel plans will be secured by a S106 planning obligation or planning condition.

3 Action taken after receipt of a valid planning application

3.1 If a planning officer considers that a S106 agreement is required in order to make a development acceptable, then, if not begun in pre-applications discussions or as part of the validation process, they will begin negotiations on S106 obligations with the developer.

Consultations

External

3.2 Consultation carried out by the Development Control department on the planning application will draw attention to the S106 planning obligations being proposed and invite comments on this aspect of the planning application as part of the overall consultation process.

3.3 Travel Plans The Highways Authority will be consulted on major schemes involving employment, retail, leisure and service uses and will take the lead in agreeing Travel Plan obligations.

3.4 Education Provision. Somerset County Council will usually require an S106 agreement to be entered into for education provision on major residential developments of 50 dwellings or more. Education related obligations may also be required for smaller developments depending on existing shortfalls of education facilities in an area. This matter should normally be raised in pre-application discussions.

Internal

3.5 Affordable Housing. The Housing Development Officer is to be consulted and involved in drafting obligations relating to Affordable Housing contributions.

3.6 Public Recreational Space. The Council's Operational Assets team is to be consulted on proposed Public Recreational Space S106 obligations.

3.7 Section 106 Monitoring Officer. The S106 Monitoring Officer is to be informed as soon as a case officer determines that planning application requires a S106 or when a planning application is received accompanied by a draft Heads of Terms or a Unilateral Undertaking.

The S106 Drafting and Legal Process

3.8 As a matter of standard practice, while the heads of terms required in connection with a particular development will be discussed at pre-application stage, the legal process will not normally begin until it is clear that the S106 will be needed. It will in some cases be appropriate to wait until the Council has formally resolved that planning permission should be granted subject to a S106 before starting the legal process. The department or organisation responsible for the implementation of S106 obligations under negotiation will be identified during the S106 drafting process by the case officer and interested parties; for example, Council service department, Town or Parish Council or community organisation.

3.9 The planning officer will issue an instruction to proceed to the Council's Legal Section, entering the details of the draft Heads of Terms agreed with the developer into the Legal Service's template provided on SharePoint.

3.10 Receipt of the legal instruction will be acknowledged by the Legal Administration Assistant and the Principal Solicitor will then allocate the instruction to proceed to a member of the Legal Team. The appointed Legal Officer will check the instruction is clear and legally workable, e.g. meets criteria for planning obligations set out in the Community Infrastructure Levy Act 2010.

3.11 The Mendip District Council (MDC) Legal Officer will then contact the developer's solicitor for details of title and will at the same time request a formal undertaking that the Council's legal costs will be reimbursed whether or not the S106 is ultimately completed – an estimate of our legal costs will be given along with a caveat allowing an increase the amount of the undertaking to be requested where the actual costs incurred exceed the previously agreed amount.

3.12 Discussions will then start between two sets of solicitors to agree the detailed wording of the document. Ward Members, Parish and Town Councils will be consulted on material changes to the basis of the agreement which will then be approved by the Planning Board. The final "settled" document will then be engrossed and copies will be sent to all parties to the agreement for signature. Legal costs and any other upfront monies agreed in the S106 must be received by the Council (usually sent direct to the legal officer dealing with the matter) before the S106 is completed.

3.13 Unilateral Undertakings made by developers will also be checked for legal compliance by MDC's Legal team and the legal fees for this action are charged to the applicant, unless the application is decided at appeal.

Standard Clauses

3.14 Monitoring Fees . All S106s will have a standard clause requiring a Monitoring Fee to be paid. The fee charged will be in accordance with Appendix B to Agenda Item ?? discussed at the Cabinet Meeting dated 5th November 2012.

3.15 Commencement of the Development. All S106s will have a standard clause requiring the developer to give 14 days' notification of the commencement of the development to the Council's S106 Monitoring Officer.

4 **Monitoring and Implementation of S106 Agreements**

4.1 The completed S106 is to be scanned with along with a completion memo summarising the obligations agreed in the S106 and which also authorises the associated planning permission to be issued. These documents are then emailed to the Land Charges department, the S106 Monitoring Officer, Planning Officer and any other interested party. A text accessible version of the agreement will also be forwarded to S106 Monitoring Officer to facilitate the transfer of information into the S106 database and future scrutiny of the document.

4.2 The S106 will also be logged in the Legal Department's S106 log, given a Legal Department reference number and cross referenced with the associated planning application number.

4.3 The S106 will be entered as a legal charge against the land by the Land Charges department. The Legal Department reference and planning register reference are to be recorded in the land charge.

4.4 The Monitoring Officer will enter a summary of the S106 information into the S106 database along with review dates appropriate to the planning obligations agreed. It is intended that this database will permit public read only access via the Council's website in due course.

4.5 The S106 Monitoring Officer, liaising with Building Control and Enforcement Departments, will monitor the commencement of development and when obligation trigger points are reached and advise the relevant service representatives.

4.6 The S106 Monitoring Officer will compile and maintain a S106 representatives' contact list in the S106 database. He/she will send and record standard letters and emails to relevant stakeholders in the database as necessary and be responsible for hastening overdue compliance actions.

4.7 The S106 Monitoring officer will record compliance with planning obligations, as it occurs, in the S106 database.

4.8 The S106 Monitoring Officer will monitor outstanding actions on S106 agreements, including disbursement of funds by service departments. Reports on overdue S106 actions will be prepared and submitted to the Section 106 Monitoring Group on a quarterly basis and will include a report of S106 funds which are due to be spent or returned to the developer within the next six months.

4.9 When the S106 Monitoring Officer receives or is notified that a financial planning obligation has been received he/she will inform the delivery agency identified in the S106

drafting process and the appropriate Ward Member and Town or Parish Council. It will be up to the delivery agency to consider options and consult with Ward Members and Town/Parish councils if applicable. The agency will prepare a brief report setting out the consultation carried out and summarising its results and including a statement setting out how the proposed use of S106 monies complies with the S106 agreement. The report is to be submitted to the S106 Monitoring Officer. The Planning Team Manager will then determine whether the recommended proposal is legally in accordance with the purpose of the planning obligation. Before the S106 monies are released to delivery organisations external to MDC, these organisations will be required to enter into a legal agreement with MDC; to provide detailed accounts of the disbursement of the S106 fund, to spend the monies in accordance with the S106 agreement and to repay to MDC any monies not used within the timeframe agreed in the S106. Final release of funds will be approved by the Planning Team Manager.

4.10 The Housing Development Officer will be notified by the S106 Monitoring Officer when S106 Affordable Housing contribution trigger points have been reached. Monitoring the delivery of Affordable Housing in accordance with S106 planning obligation will thereafter be the responsibility of the Housing Development Officer.

4.11 Transfer of Land. If a developer wishes to transfer land to the Council in accordance with an S106 agreement they will notify the Council of their intent, using the S106 Monitoring Officer as their initial point of contact who will record the request in the S106 database. The Council's Strategic Assets team will assume responsibility for managing the transfer of land process. If it is not possible for the Council and the Developer to reach agreement on the condition of the land before transfer then an arbitration process should be initiated.

5 **Enforcement of Planning Obligations**

5.1 In situations where a covenanting party is failing to comply with S106 planning obligations, the Council will have to consider a range of potential actions in order to secure compliance.

5.2 In broad terms, a failure to fulfil financially-based obligations – usually involving a failure to pay a financial contribution on its due date – can lead to specific adverse consequences for a developer wishing to implement a planning permission. In monetary terms, a late payment will usually attract (a) additional index linking, which will generally apply from the date of the Agreement to the date on which payment is actually made and also (b) punitive interest running from the date on which payment was due until the date on which payment is made, usually set at 4% above the bank base rate.

5.3 It is also common for the fulfilment of financial obligations to be linked to the ability to proceed with the development. Ordinarily a Section 106 will contain provisions which not only impose a positive obligation to make a specific payment, but also a “negative” obligation which prevents the development either being commenced or being occupied unless and until payment is made.

5.4 In the case of non-financial obligations, while there will be no direct financial or monetary consequences of a failure to comply, there will usually be a negatively phrased restriction preventing the development from being commenced or occupied until compliance has taken place.

5.5 In the event of a direct breach of a specific planning obligation, the Council's options can be summarised as:

Direct action

Injunction

Other civil legal action

5.6 Dealing first with direct action, Section 106(6) says that "[without prejudice to subsection (5)], if there is a breach of a requirement in a planning obligation *to carry out any operations in, on, under or over land to which the obligation relates*, the authority by whom the obligation is enforceable may – (a) enter the land and carry out the operations; and (b) recover from the person or persons against whom the obligation is enforceable any expenses reasonably incurred by them in doing so". This course of action will only be initiated by the Council's Planning Team Manager in conjunction with by the Council's Legal Service.

5.7 Turning to injunctions, under the provisions of Section 106 itself. Section 106(5) says, "[a] restriction or requirement imposed under a planning obligation is enforceable by injunction".

5.8 If, for example, a developer fails to pay a contribution by a specified date/event or uses land in a way that is prohibited, the local planning authority may apply to the County Court for an injunction preventing the development being proceeded with.

5.9 Injunctions are not the only form of civil legal action available to the Council. It will also be possible for the Council to take formal proceedings with the aim of securing an order from the Court requiring the developer to take specific positive action to meet the requirements of a Section 106 Agreement.

5.10 Before any formal legal action is taken – whether for an injunction or otherwise - Council practice will usually entail providing the developer with an opportunity to comply with the obligation voluntarily (although in particularly urgent or serious cases, there may be a justification for legal action on an expedited basis). The following approach would be appropriate:

(a) After discussion with the Legal Service and Planning Team Manager the Monitoring Officer sends a letter warning of possible court action. The letter should give reasonable time to comply. What is reasonable will depend on what the obligation is for and the previous course of dealings with the developer on the matter concerned.

(b) If there is no satisfactory response to the letter, then the file and all relevant correspondence/telephone notes etc will be passed to Legal Services

with instructions to initiate formal proceedings. The file must include the necessary delegated approval to take this action from the Planning Team Manager.

5.11 Legal Services will then prepare the court papers and list the matter for court. The history of correspondence between the Council and the developer will form part of the evidence and should demonstrate that the Council has acted reasonably in all respects.

6 Financial Accounting for S106 Agreements.

Paying in Fees to the Council

6.1 Legal fees and “upfront” S106 monies are paid in to the Council via Capita Financial Services by the receiving department. Financial Services will ensure that S106 money is identified by the associated planning approval number and recorded as either S106 legal fees, S106 Monitoring Fees, S106 Financial Contributions or S106 Commuted Maintenance Funds as appropriate.

S106 Monetary Planning Obligations

6.2 Payment of S106 monetary planning obligations by the developer will usually be by cheque, payable to Mendip District Council, and forwarded to the S106 Monitoring Officer or by BACS Transfer. When sending in the cheque or Transfer the developer must clearly identify the planning approval to which financial contribution relates. Financial Services will account for each S106 financial contribution separately, identified by the associated planning approval number. As each fund is drawn down, a detailed record of what the fund is spent on will be kept by Financial Services. Final approval for disbursement of funds will be given by the Planning Team Manager. The Section 106 Monitoring Officer will record any refund dates for S106 contributions and notify the Section 106 Monitoring Group when a fund is within 6 months of a legal requirement to refund the money to the developer.

S106 Commuted Maintenance Contributions.

6.3 S106 Commuted Maintenance Contributions will be paid into the Council as above and Financial Services will also account for each Maintenance Contribution separately, identified by the associated planning approval number. Financial Services will ensure that that part of the annual budget given to the Operational Assets team for the maintenance of recreational spaces which is drawn from S106 commuted funds will show a breakdown of which S106 commuted fund the monies have been drawn against and the amount. Each fund will record a corresponding reduction. This will enable the Operational Assets team to ensure that the funds are spent on the appropriate Public Recreational Space in accordance with the providing S106 agreement.