



**Penderfyniadau
Cynllunio ac
Amgylchedd **Cymru****

**Planning &
Environment
Decisions **Wales****

Planning Obligations

1. Introduction

- 1.1. Planning obligations in connection with planning appeals and called in planning applications comprise both agreements and unilateral undertakings (section 106 of the Town and Country Planning Act 1990 “the Act” as amended). In this annexe where it refers to the Inspector, it should be taken to mean the Welsh Ministers for called-in planning applications and recovered appeals.
- 1.2. This annexe provides good practice advice to guide applicants/appellants in preparing planning obligations. It should be read alongside Government policy on the use of planning obligations in Planning Policy Wales Edition 9 – November 2016; WO Circular 13/97 – Planning Obligations. Also the Law Society has published a second edition of its model section 106 agreement (June 2010).
- 1.3. A glossary of legal and technical terms is at [Appendix 01](#). Guidance on Execution of a Deed is at [Appendix 2](#).

2. Deadline for receipt of planning obligations

Written representations cases

- 2.1. If the appellant intends to send a planning obligation and wants to be certain that it will be taken into account by the Inspector they must make sure that it is executed and a certified copy is received by us no later than 6 weeks from the start date.
- 2.2. Planning obligations received after this date will be taken into account only at the Inspector’s discretion as he or she will not delay the issue of a decision to wait for an obligation to be executed, unless there are very exceptional circumstances.

Hearing and inquiry cases

- 2.3. If the appellant intends to send a planning obligation they should make sure that a final draft, agreed by all parties to it, is received by us no later than 10 working days before the hearing or inquiry opens. The Inspector’s and other parties’ ability to prepare for the hearing or inquiry is likely to be significantly hampered if this deadline is not met.
- 2.4. We ask for a final draft, rather than an executed planning obligation, to allow for the possibility that the wording may need to be changed as a result of

discussion and examination during the hearing or inquiry. Nonetheless the planning obligation should normally be executed before the hearing or inquiry closes, without the need for an adjournment. However if that is not practicable the Inspector will agree the details for the receipt of the executed planning obligation with the appellant/applicant and the local planning authority at the hearing or inquiry.

3. Justifying the need for the planning obligation

3.1. Regulation 122 of the Community Infrastructure Levy Regulations 2010 Statutory Instrument 2010/948¹, makes it unlawful for any planning obligation (capable of being charged a Community Infrastructure Levy) to be taken into account in determining a planning application if it does not meet the 3 tests set out in the Regulation. The Inspector will need to assess whether these tests are met by a planning obligation, even where the parties are satisfied with it. The parties should ensure that they provide the necessary evidence to enable this assessment to be made. Inspectors will not take into account any obligations, including standard charges or formulae, which do not meet one or more of the statutory tests.

3.2 The following evidence is likely to be needed to enable the Inspector to assess whether any financial contribution provided through a planning obligation (or the local planning authority's requirement for one) meets the tests:

- the relevant development plan policy or policies, and the relevant sections of any supplementary planning document or supplementary planning guidance;
- quantified evidence of the additional demands on facilities or infrastructure which are likely to arise from the proposed development;
- details of existing facilities or infrastructure, and up-to-date, quantified evidence of the extent to which they are able or unable to meet those additional demands;
- the methodology for calculating any financial contribution necessary to improve existing facilities or infrastructure, or provide new facilities or infrastructure, to meet the additional demands;
- details of the facilities or infrastructure on which any financial contribution will be spent.

4 Format of the planning obligation

¹ The Community Infrastructure Regulations 2010 (SI 2010/948); Community Infrastructure Levy - A Guide to the Production of a Charging Schedule; Community Infrastructure Levy (Amendment) Regulations 2011; Community Infrastructure Levy Guidance April 2013; and The Community Infrastructure Levy (Amendment) Regulations 2014(draft only)

- 4.1 All parts of the planning obligation, including the signatures, should follow in sequence without gaps. The signatures should preferably not start on a new page. The planning obligation should be securely bound and its pages should be numbered.
- 4.2 Any manuscript alterations to the text must be initialled by all the parties. Any documents or plans which are annexed to the planning obligation must be clearly identified in the text (by document title and date or drawing number) and any plans which are identified must be attached. Any plans must be signed by all the parties and any colouring of plans must match the description given in the text. If any

plan is found to be inaccurate or missing, the planning obligation will need to be re-executed with the correct plan(s) attached.
- 4.3 The original planning obligation should be held by an officer (a solicitor) of the enforcing planning authority – it should not be sent to us as we destroy hard copy case files after 3 months. A copy should be sent to us with a signed statement by that officer certifying that it is a true copy of the original.

5 Parties to the planning obligation

- 5.1 Under section 106(1) of the Act, any person interested in the land may enter into a planning obligation. Persons can only bind their own interest and any successors in title to that interest. Normally, therefore, all persons with an interest in land affected by a planning obligation – including freeholder(s), leaseholder(s), holders of any estate contract(s) and any mortgagees – must sign the obligation. Where there are different ownerships it may be necessary to define them by reference to a plan.
- 5.2 The planning obligation must give details of each person's title to the land. This should be checked by the local planning authority, and in hearing and inquiry cases the Inspector will ask for its assurance. In written representations cases, and in cases where the local planning authority is unable to give an assurance, the applicant or appellant will need to provide evidence of title to the Inspector. Normally this is in the form of an up to date copy entry or entries from the Land Registry.
- 5.3 Where a developer has only an option to purchase the land, the current landowner(s) will need to be party to any obligation binding the land.

- 5.4 Counterpart documents are legal documents identical in all respects except that each is signed by a different party or parties. This is not appropriate to planning obligations, since these are public law documents which are entered on the planning register and the local land charges register and are often copied to residents and other interested people. The planning obligation should be one single document executed by all the relevant parties.
- 5.5 There may be exceptional circumstances where it is agreed in advance by the parties that counterparts are the only practical option. In these cases, both the Inspector and the local planning authority should be satisfied that certified copies of all of the individually signed documents have been provided (by a solicitor or other suitably legally qualified person).

6 Content of the planning obligation

General points

- 6.1 It should provide clear and concise definitions for frequently-used terms and use consistent terminology throughout.
- 6.2 The planning obligation must be dated, signed by all the parties to it, and executed as a deed. For details of how to achieve execution as a deed, see Appendix K. 2.
- 6.3 The planning obligation must identify:
- the land to which it relates (by a plan if necessary); and
 - the parties to the obligation, by names and addresses, and their relevant interest in the land. If a party is an offshore company it must give an address for service of documents in the UK.
- 6.4 It must state:
- that it is a planning obligation and name the planning authority by which it is enforceable;
 - that it comes into effect upon the grant of planning permission - even if the actions required by the obligation are triggered by subsequent events, such as commencement of the development;
 - precisely the requirements which it imposes on the party or parties giving the covenant(s) in sufficient detail (including the parts of the land to which they are to apply, where relevant) to make them enforceable; and

- that any financial contributions are to be paid to the local planning authority or (by a suitably worded provision in the deed) any other relevant authority responsible for the provision of the particular public services to which the contributions apply.

6.5 It might be necessary to define by reference to a plan the proposed site(s) of particular facilities (e.g. open space) to be provided, or the detailed specification of the purposes to which particular financial contributions are to be put (including any time limits, quality checks, etc. which are to be applied).

6.6 It must make it clear when each of its requirements is triggered and whether there are any conditions affecting the performance of that requirement. For example, it should make it clear whether some other event needs to occur, or formal notice needs to be given, before a financial contribution becomes payable; or whether the terms of a transfer of land need to be agreed before affordable housing or some other community benefit is delivered.

7 Requirements imposed by unilateral undertakings

- 6.7 If using the unilateral undertaking form of obligation, it is acceptable for it to set out the conditions under which any financial contribution may be made – such as the purpose for which it may be used and the timing or phasing of the payments.
- 6.8 However, a unilateral undertaking should not try to impose requirements or obligations on any person other than the signing party e.g. it would not be acceptable to try to require a Registered Provider to exchange contracts within a set period.

7 Modifying or discharging planning obligations

- 7.1 A deed executed under section 106 cannot provide for its own modification or discharge after a given period or in given circumstances.
- 7.2 Planning obligations, whether section 106 agreements or unilateral undertakings, can usually only be modified or discharged under section 106A of the Act. Section 106A enables modification or discharge to be achieved either by an agreement with the local planning authority (which must be executed as a deed), or by an application to the local planning authority.
- 7.3 Periods within which applications to modify or discharge an obligation can be made, are as follows:

- for obligations entered into on or before 6 April 2010 – an application can be made at any time;
- for obligations entered into after 6 April 2010 – an application can be made after 5 years beginning with the date the obligation has been entered into to.

7.4 There is a right of appeal under section 106B if any application is refused.

7.5 Great care should be taken in preparation, before executing a unilateral undertaking, so as to avoid any need to modify it subsequently. However, sometimes during the course of an appeal it becomes clear that changes are required to an executed unilateral undertaking to ensure that it will deliver what is intended. The strong preference is for this to be done by an agreement with the local planning authority as that can provide for the original unilateral undertaking to be superseded. If an application is made the original unilateral undertaking will remain in force (as it cannot be “withdrawn” or “superseded” other than by agreement with the local planning authority), but it will be for the local planning authority to secure enforcement of the preferred version.

8 Planning obligations and the provision of affordable housing

8.1 This section should be read alongside the relevant sections of the Law Society’s model section 106 agreement (second edition - June 2010).

8.2 If a planning obligation provides for affordable housing as part of the proposed development, the Inspector will need to be satisfied that:

- the type(s) of affordable housing which it is proposed to provide are satisfactorily defined;
- where there is a split between the different types of affordable housing it is justified and that there are arrangements to secure it;
- there are clear and specific provisions dealing with the distribution of the affordable housing;
- the covenants are drafted in a way which will ensure delivery of the proposed housing. The planning obligation should state who is to be responsible for the construction of the affordable housing;
- if the land to be used for affordable housing is to be transferred (e.g. to a Registered Provider), the relevant land is clearly identified on a plan, and there is a restriction on development until arrangements for the transfer are made as set out in the planning obligation or in a document annexed to it;
- if the Registered Provider is a party to the planning obligation, it includes positive covenants to ensure that the affordable housing will be constructed and (by a suitably worded provision) transferred to the Registered Provider (possibly with a cascading mechanism in case of default by the preferred Registered Provider);

- if none of the parties to the planning obligation is a Registered Provider (and assuming the applicant itself is not going to build the affordable housing), there are adequate and reasonable arrangements for securing a Registered Provider;
- the phasing arrangements for delivery of the affordable housing are satisfactory. The planning obligation should not allow most of the market housing to be sold before the affordable units are available for occupation. The provision/occupation of both types of housing should be appropriately synchronised;
- if the affordable housing is to be provided off-site, or a financial contribution made in lieu of provision, there is robust justification for this, and what is on offer is of broadly equivalent value;
- the planning obligation contains adequate controls to ensure that any affordable housing is retained as affordable for an unlimited duration;
- the arrangements for allocating the affordable housing (e.g. nomination rights involving use of the local authority's housing waiting list or allocations to qualifying persons by a Registered Provider) are satisfactory;
- if the planning obligation includes a cascade arrangement, there are adequate time-periods at each stage, especially before triggering any "fall-back" clause which would enable the affordable housing to revert to the developer for sale on the open market; and
- the proposed arrangements for managing the affordable housing are adequate.

9 Planning obligations for pooled contributions/tariffs

- 9.1 The Community Infrastructure Levy Regulations 2010, Regulation 123(3) as amended concerns limitations on the use of planning obligations in the determination of planning applications and appeals. Following the end of the transitional period on 6 April 2015, the requirements of the Regulation came into effect. The Regulations are available online. For further information please see planning practice guidance paragraphs 99-104.
- 9.2 Broadly, following the end of the transitional period, a planning obligation may not constitute a reason for granting planning permission where it provides for the funding or provision of an infrastructure project or type of infrastructure, and five or more separate planning obligations have previously been entered into on or after 6 April 2010 that already provide for the funding or provision of that project or type of infrastructure. Obligations requiring a highway agreement to be entered into are not limited in this way.
- 9.3 Planning practice guidance paragraph 24 outlines that local planning authorities are required to keep a copy of any planning obligation, together

with details of any modification or discharge of the planning obligation, and make these publically available on their planning register.

- 9.4 Where the local planning authority considers that a contribution/contributions secured by a planning obligation or obligations would be required to make the appeal proposal acceptable in planning terms, we ask that it should also clarify the number of planning obligations which have been entered into on or after 6 April 2010 which provide for the funding or provision of a project, or provide for the funding or provision of that type of infrastructure for which it is seeking an obligation in relation to the appeal proposal. This information is required for each obligation sought by the local planning authority.
- 9.5 The local planning authority (and the appellant) should inform us as a matter of urgency of any further changes in circumstances on this matter as the appeal progresses, i.e. if any further relevant obligations have been entered into as a result of the local planning authority granting permission and/or appeals being allowed. It is in the interest of both the local planning authority and the appellant to do so, as any failure to keep us informed could result in delays in the processing of the appeal and/or, at worst, unlawful appeal decisions being made.

Appendix 1 – Glossary of Legal and Technical Terms

Affordable housing	See Technical Advice Note (TAN) 02 – Planning and affordable housing
Agreement	A legal document executed and delivered by all the parties named. Must be between 2 or more parties.
Attorney	A person appointed by another to act in the latter's place.
Benefit	Something, for example an area of open space, a community facility, an item of infrastructure, or a financial contribution, which is provided by means of a planning obligation.
Certified copy	A copy of a legal document which has been signed and certified as a true copy by the person to whose custody the original is entrusted
Common seal	See Sealing below.
Completed	A legal document that has been executed and delivered to the other party or parties unconditionally.
Completion	The act of completing a legal document.
Condition precedent	A provision which delays the right or requirement to do something until another action or event has occurred.

Covenant	A binding promise given by one party to another to observe or perform an obligation.
Deed	A legal document that is executed as a deed.
Delivered	A deed is delivered at the point at which it takes effect, that is to say when it has been both executed and dated.
Discharge	Release from a planning obligation.
Enforceable /Legally enforceable	Binding in a legal sense and capable of being enforced if not complied with.
Estate contract	A contract by an owner of land to convey the land to another.
Evidence of title /Details of title	Documents which evidence ownership of property, (also sometimes referred to as Title Deeds – see below.)
Executed	See Appendix M.2 – Execution as a deed
Instrument / Legal instrument	A formal legal document.
[Legal] interest in land	An interest in land includes freehold ownership, leasehold interest, interest as a mortgagee, etc. Under section 106 it is a pre-requisite to entering into a planning obligation.
Landowner	Person holding a legal estate in land, e.g. a freeholder or leaseholder.
Liability	A duty or obligation enforceable by law.
Mortgagee	A person with security against a property usually by way of a loan.
Obligation/Planning obligation	An obligation in the strict sense is something which a party is legally bound to do (e.g. they may be bound by a section 106 agreement or unilateral undertaking to make a financial contribution towards educational facilities, lay out an access road, and so on). However the term “obligation” is also sometimes used as shorthand for “planning obligation”, which in this generic sense refers to both section 106 agreements and unilateral undertakings.
Option to purchase -	A right (made by agreement) to buy or not, within a certain time.
Power of Attorney	Legal document authorising a named person to sign documents on another’s behalf in specified circumstances.
Registered Provider	An organisation which is registered with the Homes and Communities Agency as a provider of social housing. This can include Housing Associations, Local Authorities and private companies.

Section 106 agreement	An agreement made under section 106 of the Town and Country Planning Act 1990, containing covenants from one or more parties (who must have a legal interest in the land) to another party (usually the local planning authority).
Sealing (of a legal document)	Method of signing a document by means of a corporate or common seal. See Appendix M.2 - Execution as a deed.
Successor(s) in title	Persons who are entitled to succeed the current holder(s) of a title to a property.
Title	A right to ownership of land or property.
Title Deed	A legal document which provides evidence of title to the land or property.
Unilateral undertaking	A planning obligation executed solely by the party or party giving the covenants and not by the party (usually the local planning authority) having the benefits of those covenants. In this way it differs from a section 106 agreement which is executed by all the parties including the local planning authority.
Witness/ witnessing	A document is witnessed if it is signed in the presence of one or more other persons – the witness(es) – who then also sign to indicate that they have witnessed the signature.

Appendix 2 - Execution as a deed

Section 106(9) of the Town and Country Planning Act 1990 (as substituted by section 12 of the Planning and Compensation Act 1991) states that a planning obligation may not be entered into except by an instrument [that is to say, a formal legal document] executed as a deed.

Execution of a deed can be fulfilled in the following ways:

1. Execution by an individual

Section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 provides that an instrument is validly executed as a deed by an individual if:

- (i) it is signed by him in the presence of a witness who attests the signature; (or, at his direction and in his presence and the presence of two witnesses who each attest the signature); and

(ii) it is delivered as a deed by him or a person authorised to do so, on his behalf.

Example

The above requirements are satisfied if:

The following words appear in the document: In Witness to the above the Owner has executed and delivered this Deed the day and year first above written.

And

The document is signed in the following manner:

Signed as a Deed by
A N Other
the presence of: } (A N O signs here) In

..... (Signature of witness)

..... (Name of witness in print)

.....
..... (Address of witness)

.....
.....

2. Execution by a company

Section 44 of the Companies Act 2006 provides that a document is executed as follows:

- (i) By the affixing of its Common Seal; OR
- (ii) By signature in accordance with section 44(2) that is, by any 2 authorised signatories.

Authorised signatories are defined as:

- every Director of the Company; and
- the Secretary (or any joint secretary) of the Company

OR

(iii) By a Director of the Company in the presence of a witness who attests the signature

Examples

The above requirements are satisfied in the examples below:

By Sealing

The following words should appear in the document: In Witness to the above the Company has affixed its Common Seal the day and year first above written.

And

The Common Seal of
J R Ltd was affixed
the presence of: } (Seal of JR LTD here) in

..... (Director)

[Usually a Director signs according to the rules of the Company but the presence of a seal is normally conclusive of the fact that the deed has been properly executed]

(ii) By signature

The following words should appear in the document: In Witness to the above the Company has executed and delivered this document as a Deed the day and year first above written. And

The document should be signed in the following manner:

Signed as a Deed by

J R Ltd } (signatures of authorised signatories² here) Acting by:

 (Signature) (Signature)

 (Name and position) (Name and position)
[IN PRINT]

(iii) By signature in the presence of a witness

The document should be signed in the following manner:

Signed as a Deed by }
 JR Limited } (signature of Director here) Acting by:
 (Signature) (Signature of witness)

 (Name and position) (Name of witness)
[IN PRINT]

3. Other scenarios

If it is proposed to execute a document in any other way, documentary evidence that the signatories are authorised to sign should be provided. For example:

- If a Company signs on behalf of an individual or another Company - section 44(8) of the Companies Act 2006 applies;

² See "Execution by a company" above for definition of "authorised signatories".

- If the office of Director or Secretary of a Company is held by an individual of a Firm (e.g. a firm of accountants or solicitors) – section 44(7) of the Companies Act 2006 applies;
- If a Building Society or Bank refers to “authorised signatories” who are not Directors or the Company Secretary.
- If a document is signed on behalf of a Trust by named Trustees.

