



# IT'S THE LAW: s106 Agreements

This will take you approximately 5 minutes and 36 seconds to read and will give you an overview of s106 Agreements. During that time, on average, 5.42 planning permissions will be granted in England and Wales.

## Back to basics

S106 Agreements sit alongside planning permissions and can include a whole range of different obligations. They are designed to make a proposed development, for which a planning application has been submitted, more palatable to the planners. So, rather than refusing permission, the planners can give the go-ahead – but subject to a whole host of obligations which aim to mitigate any adverse impact the development may have.

## The law bit

The concept of Planning Obligations is set out in s106 of the Town and Country Planning Act 1990 – hence the common name of s106 Agreements.

S106 says that a person interested in land can agree with the council:-

- to restrict the development or use of the land;
- to carry out operations or activities on the land;
- to use the land in a particular way;
- to pay the council money.

Common (and less common) examples include:-

- Requiring a number of residential units to be used for affordable housing.
- Providing parking spaces for a car club.
- Carrying out works to upgrade a play park.

- Moving a community of slow worms.
- Requiring payments to be made to the council to help them fund anything from schools to swimming pools.
- Installing communal heat and power systems.

## Time for a test

The legal test for when the planners can require a s106 Agreement is set out in Regulations 122 and 123 of the Community Infrastructure Levy Regulations 2012. There are three conditions that must be met in relation to each proposed obligation and these are:-

- the obligation must be necessary to make the proposed development acceptable in planning terms;
- it must be directly related to the proposed development; and
- the obligation must be fairly and reasonably related in scale and kind to the development.

## Legalised bribery?

Well, you might say that – particularly if you've just been told that you have to make a £100,000 contribution to fund education. But it really isn't like that, honest. The use of Planning Obligations is strictly governed by the principle that you can't buy or sell planning permission. They are only allowed where they are mitigating the effect of a proposed development.



**Neil Toner**

Partner, Head of Real Estate  
020 7065 1823  
neil.toner@devonshires.co.uk



**Triya Maicha**

Partner  
020 7065 1805  
triya.maicha@devonshires.co.uk



**Elad Yasdi**

Partner  
020 7880 4314  
elad.yasdi@devonshires.co.uk

## Obligation vs condition

If you've ever seen a planning permission for a development of any significant size you will have noticed that there are usually pages of conditions attached. Are these Planning Obligations you might ask? No, they aren't. So what's the difference you might ask? Well, that's a very good question and the subject of many long and learned opinions from our judicial brethren. Suffice to say – it's complicated. And not very clear cut. Our incredibly simplistic summary would be that Planning Obligations in s106 Agreements ought only to be used where the obligation in question is complicated and requires detailed drafting (or requires the local authority to do something) and in other circumstances a planning condition is more appropriate.

## Still interested?

As referred to above, s106 of the Planning Act says that a person 'interested' in the land can enter into a Planning Obligation. Irritatingly, 'interested' isn't actually defined. It clearly means more than being interested in the way that you might be interested in Buckingham Palace (entrance ticket to the State Rooms £19). It clearly does include the freehold or a leasehold owner. But what about someone who has exchanged contracts to buy the land? Some councils take the view that those people are interested and so can enter into a s106 Agreement. Such councils are, however, skating on some very thin ice on that one – and the Planning Inspectorate for one is of the view that just because someone has exchanged contracts doesn't give them the ability to enter into a binding Planning Obligation.

## Chicken and/or egg

The fact that only a person 'interested' in the land can give a Planning Obligation can result in head scratching when negotiating a contract to purchase land conditional on planning. The buyer will not want the purchase contract to become unconditional until planning has been granted (and the 6 week Judicial Review period has come to an end without challenge). The planners will resolve to grant planning – but won't usually actually grant planning until the s106 Agreement has been entered into. The seller will be reluctant to enter into an agreement imposing a whole host of obligations. The head scratching sometimes turns into head banging (against a brick wall) when the seller is the council itself. How councils deal with this issue varies and needs to be negotiated on a case by case basis. Possibilities include:-

- Some councils ignore what the Planning Inspectorate say and allow the buyer to enter into the s106 Agreement.

- The seller may be persuaded to enter into the agreement as long as it's clear that it doesn't bite until the planning permission is implemented and it contains a full release of their liability once they transfer the land. They are also likely to want an indemnity.
- Some councils grant planning but try to impose a contractual obligation on the buyer to enter into the s106 Agreement as soon as they acquire the land.
- Some councils grant the planning without a s106 Agreement being in place – but with a condition stating that implementation can't take place until the required Planning Obligations are given. For various reasons if this route is adopted, what's known as a Unilateral Undertaking should be used.

## Unilateral Undertakings

Planning Obligations are usually contained in a s106 Agreement, that is an agreement entered into by both the person giving the obligations and the council. But there is a thing called a Unilateral Undertaking – where just the person giving the obligations executes it. These are most commonly used in the situation referred to above or where for some reason the council isn't being cooperative – for example, where a planning refusal is being appealed.

## Long arm of the law

The funny thing about Planning Obligations is that they bind successors in title. So a s106 Agreement binds not only the person who enters into it – but also anyone who buys the land from them. That's unusual in English law – where a positive obligation to do something (as opposed to a restriction not to do something) doesn't usually 'run with the land'.

In view of that, when negotiating a s106 Agreement it is wise to specifically carve out certain people from the obligations – for example owners of individual flats or utility companies. In particular, mortgagees will expect not to be bound by affordable housing obligations.

## The tiny print

This is one of a series of leaflets published by Devonshires Solicitors LLP's Real Estate & Projects Department aimed at our property owning clients. No action should be taken on the matters covered by this leaflet without taking specific legal advice.

Find out more

Neil Toner  
Partner, Head of Real Estate  
020 7065 1823  
[neil.toner@devonshires.co.uk](mailto:neil.toner@devonshires.co.uk)