

A User Guide to Planning Obligations and Section 106 Agreements

Introduction

If you are making, or are about to make, a planning application, you may need to enter into a legal agreement with the Council. This User Guide should help to clarify the Council's requirements and also sets out the information which will be required from you as the applicant.

Planning Obligations under S.106 of the Town & Country Planning Act 1990 may be necessary to meet various planning requirements of both the District (CDC) and the County (WSCC) functions. Many of these planning requirements involve the payment of contributions – Infrastructure Contributions (as described in the Council's SPG "The provision of Service Infrastructure related to new Development in Chichester District" obtainable from the Council's website (www.chichester.gov.uk)) and Total Access Demand contributions (as described in the WSCC website (www.westsussex.gov.uk)). These are calculated by formulae, and the normal thresholds for residential schemes are briefly:

- 1-4 new units net No infrastructure or TAD requirements.
- 5-9 new units net Infrastructure Contributions required for Education Library Civic Amenity and TAD (all WSCC). The provision of 20% Affordable Housing (CDC) will also be required in accordance with the Council's Interim Statement of 28/9/2007.
- 10+ new units net As for 5-9 new units, plus Community Facilities contribution (CDC) and, depending on circumstances, Public Open Space/Play area provision and/or financial contribution (CDC). Affordable Housing at 40%.
- 25+ new units net As for 10+ new units and contribution towards Leisure facilities (CDC) may also be required.

There are similar thresholds in respect of commercial developments (detailed in the Council's SPG referred to above).

If Planning Obligations are required, a legal agreement between the Council and the landowner (who is often the applicant himself) and if necessary the County Council, and also sometimes other third parties such as mortgagees and/or tenants, will be necessary in order to make the Planning Obligations binding on the land. In certain circumstances (explained below) a "unilateral undertaking" signed only by the applicant may be given instead of a detailed agreement.

Negotiating the Planning Obligations/Agreement

The Council hopes that most applicants will have familiarised themselves with both the Council's and the County Council's requirements as contained in the documents listed above before any application is submitted. For complex applications, most developers will usually have had preliminary discussions with Council officers so that by the date the application is submitted the planning requirements will be known and informally agreed and the drafting of the required S.106 Agreement well advanced. The Council appreciates that preliminary discussions can be time-consuming and will seek to ensure prompt replies to correspondence and requests for meetings.

The Council is required to place great emphasis on dealing with all planning applications within the Government's target time periods (as set out in the Council's leaflet Help us to Speed Up Your Planning Application) and the Council therefore hopes for the co-operation of applicants in discussing any planning obligations which may be required prior to submitting their applications in order that work can be commenced on negotiating the agreement necessary.

Once the application is submitted, within a few days the planning case officer will advise all parties of the date by which the Agreement should be completed. This will usually be the 8/13 week date. If this deadline is not met, applicants should note that applications may be REFUSED because proper provision has not been made for the required infrastructure contributions. The case officer will try to give warning of such an outcome but this cannot be guaranteed.

The Council will notify applicants of the infrastructure requirements of consultees but applicants can save time by monitoring progress of their application online. In cases where preliminary meetings have not been held, this will give the applicant advanced warning of any required infrastructure contributions. For Major applications which are identified as suitable for a project management approach, detailed drafting timetables will be agreed.

The requirement for a Planning Obligation/Agreement will be formally set out in either the officer's report to Committee or the report for a delegated decision and the Council will pass a resolution to this effect either at Development Control Committee or by an Authorised Officer under Delegated powers. The case officer will then write formally to the applicant advising of the resolution and forwarding a set of draft conditions. It is hoped that, by this time, with the applicant's co-operation, the S.106 Agreement will either be signed and dated or, at the least, be agreed ready for signing.

Where substantial sums are required by the Agreement to be paid to the Council, the Council may insist on some form of guarantee (or Deposit or Performance Bond) being written into the Agreement

Types of Agreement/Undertaking

1. Simple Unilateral Undertaking

- at the Council's discretion, a simple Undertaking document signed by the applicant as landowner will be accepted
- ideal where the applicant owns the site and wishes to commence work immediately
- only suitable where a simple financial contribution is required for infrastructure costs to CDC or WSCC
- CDC or WSCC (as the case may be) to approve wording of the Undertaking
- usually less than £50,000 contribution
- Undertaking to be accompanied by a cheque(s) for the required amount(s) payable to either CDC or WSCC (or two cheques, as the case may be).
- the Council will not normally check Title.
- a specimen Unilateral Undertaking is attached to this guide.
- the signed Unilateral Undertaking and the contribution(s) must be delivered without delay following the resolution to grant permission, and certainly within the 8/13 week deadline.
- may sometimes be suitable for other cases, eg where the applicant is a contracted purchaser, or where development is not likely to commence immediately.
- not appropriate for Affordable Housing requirements.
- if in doubt, seek your own legal advice.
- A short Agreement for use when simple Undertakings are not appropriate eg where development is not to commence immediately
- where contributions are payable only to WSCC and follow a standard formula calculation (for example, TAD requirements or TAD/Education/Library),
- drafted by WSCC Legal Services in accordance with standard clauses attached herewith
- drafting should commence early in the process; ideally negotiations before submission will result in an agreed draft submitted with the application
- applicants to submit name of their solicitor as soon as possible
- Title to be produced to WSCC as early in the process as possible; normally at the same time as the submission of the application to CDC. Title number can be sent direct to WSCC Legal Services
- CDC will not enter into such an Agreement.
- the Agreements should be completed before the 8/13 week deadline
- applicant to pay the reasonable legal fees of WSCC
- if in doubt, seek your own legal advice.

2. S106 Agreement with WSCC

- A short Agreement for use when simple Undertakings are not appropriate eg where development is not to commence immediately
- where contributions are payable only to WSCC and follow a standard formula calculation (for example, TAD requirements or TAD/Education/Library)
- drafted by WSCC Legal Services in accordance with standard clauses attached herewith
- drafting should commence early in the process; ideally negotiations before submission will result in an agreed draft submitted with the application
- applicants to submit name of their solicitor as soon as possible

- Title to be produced to WSCC as early in the process as possible; normally at the same time as the submission of the application to CDC. Title number can be sent direct to WSCC Legal Services
- CDC will not enter into such an Agreement
- the Agreements should be completed before the 8/13 week deadline
- applicant to pay the reasonable legal fees of WSCC
- if in doubt, seek your own legal advice.

3. Full S106 Agreement with CDC/WSCC

- necessary if Affordable Housing is required
- necessary if requirements are complex or non-standard
- often necessary if infrastructure sums are payable to both CDC and WSCC and a Unilateral Undertaking cannot be entered into
- drafted by the Council's Legal Services or a firm of Solicitors instructed by the Council.
- applicants should submit name of their solicitor as soon as possible
- drafting should commence early in the process; ideally negotiations before submission will result in an agreed draft submitted with the application
- a basic draft is attached to this note.
- Title to be produced to the Council as early in the process as possible eg with the submission of the application. Title number can be sent direct to CDC Legal Services
- can be time-consuming to draft and agree, but the Council expect all parties to endeavour to complete it before the 8/13 week deadline or in accordance with an agreed timetable
- applicant to pay the reasonable legal fees of CDC/WSCC, or solicitors instructed by them
- if in doubt, seek your own legal advice.

Procedures after the Agreement

Once the Agreement has been signed and dated and the legal costs paid, the permission will be issued without delay in accordance with the committee/delegated resolution. This will normally be within 3 working days. CDC/WSCC Legal Services will register all planning obligations Agreements as a Local Land Charge.

Enforcement of the Planning Obligations will be by the Council to whom the obligation was given or the contribution was paid (i.e. to whom the contribution was due under the terms of the Agreement). Procedures are in place to ensure compliance with Agreements and Undertakings.

Appendices

THIS UNDERTAKING is made the * day of * 2003

By *

of * ("the Owner")

WHEREAS:

- 1) This undertaking (the terms of which are detailed in the Schedule below) is a planning obligation for the purpose of Section 106(1) of the Town and Country Planning Act 1990 ('the Act')
- 2) This undertaking relates to land at * shown for identification edged red on the attached plan ('the Land')
- 3) The Owner is registered at H M Land Registry as the Proprietor of the freehold with absolute title under title number WSX *
- 4) This undertaking is enforceable by the Local Planning Authority for the purposes of the Act for the area within which the Land is situate being Chichester District Council ('the Council')
- 5) The Council has passed a resolution to grant planning permission in respect of the Land for the construction of * under reference * subject to the Owner entering into an agreement under S.106 of the Act in respect of a contribution towards *(e.g. community facilities) for the area in which the Land is situate.

SCHEDULE

The Owner hereby undertakes with the Council that upon delivery of this undertaking to the Council the Owner shall pay to the Council the sum of * Pounds (£ *) as a contribution towards the provision of * (e.g. community facilities) in the area in which the Land is situate.

IN WITNESS whereof this undertaking has been executed as a Deed and Delivered on the day and year written above

The Common Seal of)
 *)
 was affixed in the presence of)

Director/Secretary
 * Please complete as appropriate

THIS DEED is made the _____ day of _____ 200[]

BETWEEN:

(1) **CHICHESTER DISTRICT COUNCIL** of East Pallant House East Pallant Chichester West Sussex PO19 1TY (“the Council”)

(2) **WEST SUSSEX COUNTY COUNCIL** of County Hall West Street Chichester West Sussex PO19 1RQ (“the County Council”) and

(3)

(“the Owner”)

DEFINED TERMS used in this Agreement:

The Act	Town and Country Planning Act 1990 as amended
Application	
First Occupation	Beneficial occupation for any use for which the Proposed Development was designed other than occupation for the purposes of construction or fitting out
Highway Authority	The County Council acting in its capacity as Highway Authority
Highway Contribution	The sum of _____ pounds (£)
Highway Works	The date of commencement of the Proposed Development by the carrying out of a material operation on the Land within the meaning of Section 56 of the Act

Operative Date	The date of commencement of the Proposed Development by the carrying out of a material operation on the Land within the meaning of Section 56 of the Act
The Permission	A planning permission for the Proposed Development in the form of the draft annexed hereto
Planning Authorities	The Council and the County Council
Planning Obligations	The obligations conditions and stipulations set out in the First Schedule to this Agreement
Proposed Development	
Site	ALL THAT piece or parcel of freehold land situated at and known as Which is shown (for the purpose of identification only) edged red on the plan annexed hereto and registered with Absolute title at HM Land Registry under Title WSX ????

BACKGROUND

1. The Council and the County Council are the local Planning Authorities and the County Council is the Highway Authority for the area within which the Site is situated and are the authorities by whom the Planning Obligations contained in this Deed are respectively enforceable

2. The Owner is the owner in fee simple of the Site free from encumbrances save only as mentioned in the registered title to the Site
3. The Developer has an interest in the Site by virtue of
4. The Owner has by the Application sought planning permission from the Council for the Proposed Development and for the uses specified in the Application
5. The Council is prepared to grant the Permission subject to the Owner entering into the Planning Obligations and the Owner has indicated willingness to enter into such Obligations upon the terms set out in this Agreement

NOW THIS DEED WITNESSES as follows:

The Planning Obligation

1. This Agreement is made pursuant to the provisions of Section 106 of the Act and Section 111 of the Local Government Act 1972 and all other powers so enabling and the Planning Obligations contained in the First Schedule to this Deed are Planning Obligations for the purposes of Section 106 of the Act and are:
 - 1.1 enforceable by the Planning Authorities
 - 1.2 local land charges and shall be registered as such by the Council
 - 1.3 to come into effect upon the Operative Date
2. Nothing in the Planning Obligations shall be construed as restricting the exercise by the Planning Authorities of any powers exercisable by or pursuant to the Act or any amendment or re-enactment thereof

Commencement

3. The Planning Obligations herein contained shall take effect upon the Operative Date but not otherwise and if the Permission shall expire prior to the Operative Date then the provisions of this Deed shall cease to have further effect save for the undertakings as to costs contained herein which shall be effective on the date of completion of this Deed

4. The Council undertakes that upon completion of this Deed and payment of its legal costs and those of the County Council as provided below it will forthwith issue the Permission

Covenants

5. The Owner hereby **COVENANTS** with the Council and the County Council (as the case may be) to perform the Planning Obligations and each and every term and condition thereof set forth in the First Schedule
6. Without prejudice to liability for any subsisting breach of the Planning Obligations the Owner shall not be liable for breach of a Planning Obligation after the Owner has parted with all interest in the Site or the part in respect of which such breach occurs
7. At any time after fulfilment of the Planning Obligations herein contained (or each of them if more than one) the Council or the County Council (as appropriate) will upon the written request of the Owner issue to the Owner a certificate confirming compliance with and fulfilment of such obligations(s)
8. The County Council hereby **COVENANTS** with the Owner to perform the obligations set forth in the Second Schedule

Waiver

9. No waiver (whether express or implied) by the Planning Authorities in respect of any breach or default by the Owner in the performance or observation of the Planning Obligations in whole or in part shall constitute a continuing waiver or prevent the Planning Authorities or either of them from enforcing any of the obligations or conditions contained in the Planning Obligations or acting upon any subsequent breach or default in respect thereof by the Owner

Future Permissions

10. Save as expressly provided herein (if at all) nothing in this Deed shall be implied to prohibit or restrict the future development of the Site (or any part thereof) in

accordance with any planning permission granted after the date of the Permission

Arbitration

11. Any dispute or difference arising between the parties with regard to their respective rights and obligations as to any matter or thing arising out of or connected with this Deed shall be referred to the decision of a single arbitrator (acting as an expert and not as an arbitrator) to be agreed by the parties or failing agreement between them to be nominated by the President for the time being of the Royal Institution of Chartered Surveyors and any such reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act 1996 or any statutory modification or re-enactment for the time being in force

Interpretation

12. Except where the context renders it absurd or impossible every reference to any party to this Deed shall include the successors to the statutory functions of such party its or their successors in title assigns and personal representatives, by and against whom this agreement shall be enforceable as if they had been originally named as parties
13. In this Deed:
 - 13.1 words expressed in any gender shall where the context so requires or permits include any other gender
 - 13.2 words importing persons shall include bodies corporate and partnerships and other incorporated bodies and vice versa
 - 13.3 words expressed in the singular shall where the context so requires or permits include the plural and where any party is more than one person:
 - 13.3.1 that the party's obligations in this Deed shall take effect as joint and several obligations

13.3.2 anything in this Deed which applies to that party shall apply to all of those persons collectively and each of them separately

13.3.3 the benefits contained in this Deed in favour of that party shall take effect as conferred in favour of all of those persons collectively and each of them separately

13.4 The headings to clauses are inserted for ease of reference only and shall not affect the construction of the Deed

13.5 References in this Deed to anything which any party is required to do or not to do shall include its acts, defaults and omissions, whether direct or indirect on its own account; or for or through any other person; and those which he permits or suffers to be done or not done by any other person

14. The effect of all obligations affecting the Owner under this Deed is cumulative and no obligation shall be limited or modified by any other of those obligations unless there is in this Deed an express limitation or modification

Third Party Rights

15. This Deed is not intended to (nor does it) enable any rights under the Contracts (Rights of Third Parties) Act 1999

Costs

16. The Owner undertakes with the Council to forthwith pay the Council's and the County Council's reasonable legal costs incurred in connection with the preparation and completion of this Deed

Severance

17. If any provision in this Agreement shall in whole or in part be held to any extent to be illegal or unenforceable under any enactment or rule of law such provisions shall to the extent required be severed from this Agreement and rendered ineffective as far as possible without modifying the remaining provisions of this

Agreement and shall not in any way affect any other circumstances or the validity or enforcement of this Agreement and in the event of any such deletion the parties shall negotiate in good faith in order to agree the terms of a mutually acceptable and satisfactory alternative provision in place of the provision so deleted

IN WITNESS whereof the parties hereto have caused this document to be executed as a Deed the day and year first before written

FIRST SCHEDULE

The Planning Obligations

SECOND SCHEDULE

The County Council's Obligations

The COMMON SEAL of CHICHESTER)
DISTRICT COUNCIL was hereunto affixed)
to this Deed in the presence of:-)

Authorised Signatory

The COMMON SEAL of WEST SUSSEX)
COUNTY COUNCIL was hereunto affixed)
to this Deed in the presence of:-)

Authorised Signatory

This DEED is signed by the said
in the presence of

Dated

200[]

CHICHESTER DISTRICT COUNCIL (1)

and

WEST SUSSEX COUNTY COUNCIL (2)

and

(3)

PLANNING AGREEMENT
under Section 106 of the Town and Country Planning Act 1990

relating to

West Sussex

M.J. Kelley,
District Solicitor,
Chichester District Council
East Pallant House,
East Pallant,
Chichester,
West Sussex.
PO19 1TY