

Procedure Note: Consultation and Adoption of S106 Agreements

Aim

The aim of this Procedural Note is to set out the protocol of the Council's planning and legal process when agreeing Section 106 planning agreements

Background

Since planning obligations may involve developers making financial and/or non-financial contributions to the Council, it is essential that such arrangements are operated in a way which is seen to be fair, open and reasonable, in order to retain public confidence in the fundamental principle that planning permission cannot be bought or sold

There is a legal requirement to publish S106 agreements on the planning portal before, decision notice publication, as highlighted by the recent Court of Appeal decision (*Greenfields (IOW) Ltd v Isle of Wight Council [2025]*). It underlines the importance of transparency in the planning process, to ensure that the public has access to critical documents to allow meaningful engagement in the planning process i.e. s106 agreements are not private contracts but matters of public interest. Failure to do so could render the planning permission unlawful.

Legislation

Historically, Circular 05/2005: Planning Obligations (paragraph 41), stated: *"The process of setting planning obligations policies and negotiating planning obligations should be conducted as openly, fairly and reasonably as possible and members of the public should be given every reasonable assistance in locating and examining proposed and agreed planning obligations which are of interest to them."* The legal framework is set out in Article 12(2)(b) of the Town and Country Planning (Development Management Procedure) (Wales) Order 2012/801, requiring that local planning authorities (LPAs) maintain a register containing key documents related to planning applications

Stages of the S106 Agreement Process

Pre Planning Resolution

- Planning Contributions Manager (PCM) informs Development Management (DM) of the S106 Heads of Terms (HoT)
- Planning case officer (DM) reviews HoT, raising any relevant queries to the PCM if necessary.
- DM informs applicant/agent of the S106 heads of terms (whilst 'flagging' the S106 agreement Procedure Note on the website and the relevant clause in the Planning Obligations SPG).

- DM includes detailed HoT in Officer Report and clarifies that they meet the relevant CIL tests.
- S106 Heads of Terms are agreed by Applicant and DM for inclusion in the Officer Report and clarify that they meet the relevant CIL tests. The sums and purpose of the contribution should be set out explicitly at this juncture.

Post Planning Resolution

- PCM sends legal instruction, with S106 Heads of Terms, to Legal to draft the S106 agreement (in co-ordination with Applicants solicitor).
- Legal send PCM and DM draft s106 legal agreement for comment/ review.
- Legal send PCM and DM agreed 'draft' agreement which has been approved by applicant.
- DM post finalised 'draft' S106 agreement on the planning portal page for the application (whilst also informing PCM, Legal and the Applicant) **but no decision is issued**. Diarise in calendar to check for any comments in a week.
- DM confirm to Legal that no comments have been received.
- Legal circulate engrossments for signature.
- DM place signed (but redacted) S106 agreement on the planning portal and issue the Decision Notice.

Challenge to s106 Agreement

- If comments are received within the 7 day period, discuss content with Area Manager or Planning and Development Manager and/ or Legal as appropriate to identify if something new has been raised that couldn't have been previously.
- If comments raise something new – do not issue the decision and advise Legal.
- If comments raise nothing new in substance, issue decision.

Notes:

Contrary to recent commentary, however, a failure on the part of the LPA to display the section 106 agreement prior to issuing a planning permission will not necessarily be fatal to the grant of permission. The Court of Appeal reiterated that the relevant question was the consequence of non-compliance with the statutory duty, rather than the mere fact of the breach of the duty, it having reached this conclusion having regard to the intention underlying the duty to publish the section 106 agreement.