

South Somerset District Council

- ▶ Section 106 Agreements –
Discharge of Planning Obligation
(DPO)

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Section 106 – Discharge or Modifying of Planning Obligations

Management Summary

Planning obligations under Section 106 of the Town and Country Planning Act 1990 (as amended), commonly known as s106 agreements, are a mechanism which make a development proposal acceptable in planning terms, that would not otherwise be acceptable. They are focused on site specific mitigation of the impact of development. S106 agreements are often referred to as 'developer contributions' along with highway contributions and the Community Infrastructure Levy.

<http://www.legislation.gov.uk/ukpga/1990/8/section/106>

The common uses of planning obligations are to secure affordable housing, and to specify the type and timing of this housing; and to secure financial contributions to provide infrastructure or affordable housing. However these are not the only uses for a s106 obligation. A s106 obligation can:

- restrict the development or use of the land in any specified way
- require specified operations or activities to be carried out in, on, under or over the land
- require the land to be used in any specified way; or
- require a sum or sums to be paid to the authority on a specified date or dates or periodically.

A planning obligation can be subject to conditions, it can specify restrictions definitely or indefinitely, and in terms of payments the timing of these can be specified in the obligation. If the s106 is not complied with, it is enforceable against the person that entered into the obligation and any subsequent owner. The s106 can be enforced by injunction.

In case of a breach of the obligation the authority can take direct action and recover expenses. The planning obligation is a formal document, a deed, which states that it is an obligation for planning purposes, identifies the relevant land, the person entering the obligation and their interest and the relevant local authority that would enforce the obligation. The obligation can be a unitary obligation or multi party agreement. The obligation becomes a land charge.

The legal tests for when you can use a s106 agreement are set out in regulation 122 and 123 of the Community Infrastructure Levy Regulations 2010 as amended. The tests are:

- necessary to make the development acceptable in planning terms
- directly related to the development; and
- fairly and reasonably related in scale and kind to the development.

2013 Statutory Framework.

Although section 106 Town & Country Planning Act 1990 allows the Local Planning Authority to require and enforce these payment and infrastructure obligations, the 1990 Act also contains a provision that entitles the other party to apply to the Local Planning Authority (LPA) to vary or discharge the section 106 obligations. Although the Act originally provided that the LPA did not need to consider any application if it was submitted within 5 years of the agreement being completed, case law effectively meant that any application submitted at any time needed to be at least properly considered by the LPA. It was also possible for both sides to reach an agreement to vary any obligations at any time.

A recent change to legislation in 2013 means that S106 owners can now apply under the statutory framework to have obligations varied or discharged which are contained in agreements entered into on or before 6th April 2010. More recently the 1990 Act has also been amended to include additional provisions which introduce a new application and appeal procedure specifically for the review of planning obligations on planning permissions which relate to the provision of affordable housing. Obligations which include a "requirement relating to the provision of housing that is or is to be made available for people whose needs are not adequately served by the commercial housing market" are within scope of this new procedure.

The new application and appeal procedures do not, in any way, replace existing powers to renegotiate Section 106 agreements on a voluntary basis at any time. The application and appeal procedure will assess the viability of affordable housing requirements only. It will not present the LPA with the opportunity to reopen any other planning policy considerations or reconsider the planning merits of the permitted scheme to which the obligations relate. The Department for Communities and Local Government has provided guidance on how the Government expects these new provisions to be applied and specifically what factors to take into account in assessing viability in the cases to which these new provisions relate. It is important to appreciate that any affordable housing obligations on sites granted in accordance with a Rural Exceptions Site policy are exempt from this specific procedure.

The current process as adopted by South Somerset District Council for considering any applications to vary or discharge obligations requires that the developer pays for an independent assessment of their viability case. This assessment is carried out by a specialist valuer from the District Valuer's Office who then issues the Council with a formal written report and set of recommendations. Agreeing to a reduction in the obligations should always be the last resort and officers are required to consider other options first as approved by the District Executive report in April 2011.

In the event that a reduction in contributions is the only option to ensure the development can still go ahead, then as that reduction is based on market forces and costs at that time, a new agreement is entered into with the developer requiring additional payments to the Council should market conditions improve in the intervening period up to the amount secured by the original obligations (overage clauses).

All applications which require a material change in contributions must be determined by the relevant Area Committee. Whilst some of the information that is considered may be commercially sensitive and not for public view on that basis, members can determine what information they require in order to make the decision. It would be possible for the Committee to go into confidential session to consider the most sensitive information whilst at the same time ensuring that as much of the information and process is open to the public as is reasonably possible.

Members are faced with a fine balancing act between ensuring that enough money is recovered to put in the infrastructure generated by the new development whilst at the same time ensuring sites are viable enough to enable the development to proceed within a realistic timescale. If the Council refused an application or did not agree to the full amount of the variations requested then the applicant has the ability to appeal to the Secretary of State.

Summary of Significant Corporate Risks

The following table records the inherent risk (the risk of exposure with no controls in place) and the manager's initial assessment of the risk (the risk exposure on the assumption that the current controls are operating effectively) captured at the outset of the audit. The final column of the table is the Auditors summary assessment of the risk exposure at Corporate level after the control environment has been tested. All assessments are made against the risk appetite agreed by the SWAP Management Board.

Areas identified as significant corporate risks, i.e. those being assessed as 'high' or 'very high' risk areas in line with the definitions attached should be addressed as a matter of urgency.

Risks	Inherent Risk Assessment	Managers Initial Assessment	Auditors Assessment
1. The Council fail to properly review, challenge and verify applications for discharge or modification of a S106 Agreement resulting in financial and reputational loss.	High	Low	Low
2. Other stakeholders; County, Parish, Town Councils and the Community incur unplanned expenditure or loss of community development without their consultation and involvement in the process.	High	Low	Low
3. All stakeholders including the public are not suitably informed of the decision and justification to allow a developer to modify or discharge their S106 Obligation, resulting in the Councils reputation being damaged.	Medium	Low	Low

Summary of Significant Findings

The following were identified as key findings for the service and therefore categorised, in accordance with the definitions attached, as a level '4' or '5' priority in the action plan.

- There were no significant findings identified during this review.

Further details of audits' findings can be viewed in the full audit report, which follows this Management Summary.

Conclusion and Audit Opinion



I am able to offer substantial assurance as the areas reviewed were found to be adequately controlled. Internal controls are in place and operating effectively and risks against the achievement of objectives are well managed.

The purpose of this audit was to verify that all DPO applications are dealt with care and agreed procedures are followed. All of the areas reviewed were found to be working in a satisfactory manner. The Council have to date received eleven DPO applications seeking to discharge/modify S106 agreements in relation to financial obligations. All cases have followed the agreed process for handling these types of application and have gone to the relevant Committee for final determination. All cases have been on grounds of financial viability with the developer able to show that their scheme is unable to make part of obligations detailed within their relevant S106 agreement. Eight applications were approved by committee in line with officer recommendation, three were refused and one is live.

The process is very collaborative and involves all the major stakeholders of the original agreement being part of the internal negotiating stage. All parties are engaged to put forward innovative ideas to deliver the best possible outcomes, before being presented to the appropriate Area Committee for the final determination of the DPO application.

Detailed Audit Report

Objectives & Risks

The key objective of the service and risks that could impact on the achievement of this objective were discussed and are identified below.

Objective: To ensure that discharging or modifying financial planning obligations within section 106 agreements are justified and only approved in-line with agreed legislation, policies and procedures

Risks:

- 1. The Council fail to properly review, challenge and verify applications for discharge or modification of a S106 Agreement resulting in financial and reputational loss.
- 2. Other stakeholders; County, Parish, Town Councils and the Community incur unplanned expenditure or loss of community development without their consultation and involvement in the process.
- 3. All stakeholders including the public are not suitably informed of the decision and justification to allow a developer to modify or discharge their S106 Obligation, resulting in the Councils reputation being damaged.

Method & Scope

This audit has been undertaken using an agreed risk based audit. This means that:

- the objectives and risks are discussed and agreed with management at the outset of the audit;
- the controls established to manage risks are discussed with key staff and relevant documentation reviewed;

- these controls are evaluated to assess whether they are proportionate to the risks and evidence sought to confirm controls are operating effectively;
- At the end of the audit, findings are discussed at a close-out meeting with the main contact and suggestions for improvement are agreed.

Findings

The following paragraphs detail all findings that warrant the attention of management. The findings are all grouped under the objective and risk that they relate.

- 1. Risk:** The Council fail to properly review, challenge and verify applications for discharge or modification of a S106 Agreement resulting in financial and reputational loss
 - 1.1 There are no significant findings to report.
- 2. Risk:** Other stakeholders; County, Parish, Town Councils and the Community incur unplanned expenditure or loss of community development without their consultation and involvement in the process
 - 2.1 There are no significant findings to report.
- 3. Risk:** All stakeholders including the public are not suitably informed of the decision and justification to allow a developer to modify or discharge their S106 Obligation, resulting in the Councils reputation being damaged.
 - 3.1 There are no significant findings to report.





The Agreed Action Plan provides a formal record of points arising from this audit and, where appropriate, the action management has agreed to take and the timescale in which the action will be completed. All findings have been given a priority rating between 1 and 5, where 1 is low and 5 is high.

It is these findings that have formed the opinion of the service's control environment that has been reported in the Management Summary.

Finding	Recommendation	Priority Rating	Management Response	Responsible Officer	Implementation Date
<p>Objective: To ensure that discharging or modifying financial planning obligations within section 106 agreements are justified and only approved in-line with agreed legislation, policies and procedures</p>					
<p>1. The Council fail to properly review, challenge and verify applications for discharge or modification of a S106 Agreement resulting in financial and reputational loss.</p>					
<p>1.1 There are no significant findings to report.</p>					
<p>2. Other stakeholders; County, Parish, Town Councils and the Community incur unplanned expenditure or loss of community development without their consultation and involvement in the process.</p>					
<p>2.1 There are no significant findings to report.</p>					
<p>3. All stakeholders including the public are not suitably informed of the decision and justification to allow a developer to modify or discharge their S106 Obligation, resulting in the Councils reputation being damaged.</p>					
<p>3.1 There are no significant findings to report.</p>					

Audit Framework Definitions

Control Assurance Definitions

Substantial		I am able to offer substantial assurance as the areas reviewed were found to be adequately controlled. Internal controls are in place and operating effectively and risks against the achievement of objectives are well managed.
Reasonable		I am able to offer reasonable assurance as most of the areas reviewed were found to be adequately controlled. Generally risks are well managed but some systems require the introduction or improvement of internal controls to ensure the achievement of objectives.
Partial		I am able to offer Partial assurance in relation to the areas reviewed and the controls found to be in place. Some key risks are not well managed and systems require the introduction or improvement of internal controls to ensure the achievement of objectives.
None		I am not able to offer any assurance. The areas reviewed were found to be inadequately controlled. Risks are not well managed and systems require the introduction or improvement of internal controls to ensure the achievement of objectives.

Categorisation Of Recommendations

When making recommendations to Management it is important that they know how important the recommendation is to their service. There should be a clear distinction between how we evaluate the risks identified for the service but scored at a corporate level and the priority assigned to the recommendation. No timeframes have been applied to each Priority as implementation will depend on several factors however, the definitions imply the importance.

Priority 5: Findings that are fundamental to the integrity of the unit's business processes and require the immediate attention of management.

Priority 4: Important findings that need to be resolved by management.

Priority 3: The accuracy of records is at risk and requires attention.

Priority 2: Minor control issues have been identified which nevertheless need to be addressed.

Priority 1: Administrative errors identified that should be corrected. Simple, no-cost measures would serve to enhance an existing control.

Definitions of Corporate Risk

Risk	Reporting Implications
Low	Issues of a minor nature or best practice where some improvement can be made.
Medium	Issues which should be addressed by management in their areas of responsibility.
High	Issues that we consider need to be brought to the attention of senior management.
Very High	Issues that we consider need to be brought to the attention of both senior management and the Audit Committee.