Section 106 Planning Obligations
Good Practice Guide

This good practice guide explains the use of, and procedures for, the preparation of section 106 planning obligations in Tunbridge Wells and gives an indication of the associated costs.

Who is this Practice Guidance for?
This guidance note is for applicants who intend to carry out development within the Tunbridge Wells Borough Council area for which the Council may require a “planning obligation” as part of the planning process.

The guidance explains:

- What a planning obligation is
- The type of development which may need one
- How the obligation can be prepared to avoid unnecessary delays
- The likely associated costs

This is intended as a ‘living ‘document and will be regularly reviewed to ensure latest best practice is adopted. Users of this note are therefore advised to check the Council’s website for the latest version which will be used in negotiations.

What are section 106 planning obligations?
Section 106 of the Town and Country Planning Act 1990 , as amended, established that a person with an interest in the land on which a development is proposed may enter into a legally binding planning obligation, commonly known as a section 106 obligation. Normally, therefore, all persons with an interest in the land who would be affected by the obligation, including freeholder(s), leaseholder(s), holders of any estate contract(s) and any mortgagees, must be party to the obligation where such is required..

Planning obligations may constitute a legal agreement between the owner (and/or other persons as cited above) and the Local Authority and be signed by all parties or be offered by interested persons as a Unilateral Undertaking without the Local Authority signing up to the document.

The range of planning obligations can be varied but the more usual forms of obligation would be to –

- Restricting the development or use of land in any specific way
- Requiring specified operations or activities to be carried out on the land
- Requiring the land to be used in a specific way
- Requiring a sum or sums to be paid to the Local Authority on a specified date for an agreed purpose

Core Policy 1 of the adopted Core Strategy sets out the policy context for the delivery of development which includes the need for development contributions towards infrastructure

provision. Further details on more specific issues are set out in the saved policies of the Local Plan.

Planning obligations cannot be used to prevent the sale of land or require the sale/purchase of additional land; they can only be used to regulate the use of land or uses within a building or be used to restrict these until certain events happen.

Planning permission can be granted subject to planning conditions and/or planning obligations enabling proposals to go ahead which might otherwise be refused.

Why have planning obligations?
Planning obligations are used when it is considered that a development will have a negative impact on the local area that cannot be mitigated by means of planning conditions alone and the intent is that the planning obligations aim to offset the extra pressure created by a development or mitigate against a negative impact which would then allow permission to be granted.

Central Government guidance on the use of Section 106 is now set out in the Community Infrastructure Levy Regulations 2010, as amended and confirmed in the National Planning Policy Framework 2012. (NPPF)

The use of planning obligations is strictly governed by the basic premise that planning permission cannot be bought or sold but, since planning obligations may involve applicants making a financial contribution to the Local Authority, 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 process. Negotiations over the levels of planning obligations must also take into account market conditions and development viability.

When may Planning Obligations be used?
Government policy (Paragraphs 203-206 of the NPPF) sets out the principles for use of planning conditions and obligations where their use can make otherwise unacceptable development acceptable. It is made clear that planning obligations, which are legal enforceable agreements, should only be used where planning conditions are insufficient to address unacceptable concerns.

Three tests need to be met for their use, and all 3 must be met:-

- Necessary to make the development acceptable in planning terms:
- Directly related to the development;
- Fairly and reasonably related in scale and kind to the development.

These 3 tests replace the previous 5 tests set out in Circular 02/2005 which is no longer relevant.

A vital test of proposed planning obligations is therefore that they must be *necessary* to make a proposal acceptable in land-use planning terms. They should not be sought where the connection does not exist or is too remote.

Acceptable development should never be refused because an applicant is unwilling or unable to offer benefits. Likewise, unacceptable development should never be permitted because unnecessary or unrelated benefits are being offered.

It may also be necessary to reconsider planning obligations entered into where market conditions have changed to prevent applications unnecessarily stalling.

What can be included in a planning obligation?
Planning obligations may relate to many matters, provided they satisfy the 3 tests, as described above. In some cases those signing the obligation agree directly to provide certain facilities or to refrain from certain activities. For example, the obligation may involve an agreement to restrict the use of certain premises within a Use Class such as a holiday let; it may be to incorporate affordable housing in new residential developments; to provide crèche facilities in a shopping development or undertake other site works prior to a development coming into use such as a new access point .

Alternatively, an obligation may involve payment by an applicant of a sum of money to be used by a local authority to overcome a genuine potential reason for refusal of a planning application. Common examples of this type of planning obligation arise when a proposed development creates additional demand for public open space, school spaces, transportation infrastructure or local traffic calming measures. In such cases, payment of an appropriate sum of money to the local authority can enable the authority or other infrastructure provider to provide the new or replacement facilities or undertake works on land, which are all outside the developer's control.

How will an applicant know if a planning obligation is required?
Applicants are encouraged to enter into pre-application discussions before an application is submitted particularly for more significant or complex developments. This allows many issues to be discussed and resolved and will also identify if a planning obligation would be required at an early stage thus avoiding unnecessary delays and setting a clear time frame for completion. The Council will be making a charge for the pre-application service from 1st April 2013. Applicants notified of the need for a planning obligation should submit a draft obligation alongside their application and include details of their Solicitor and those who own the title to the land in question and those who need to be party to the agreement at this stage to avoid a delay.

Where pre-application advice is not sought or insufficient detail has been received, applicants will be informed as soon as possible after submission of a planning application, if it is likely that there is a potential reason for refusal, which could be overcome through entering into a planning obligation. This should occur before the application is determined, in order to allow applicants to express their willingness or otherwise to enter into an agreement.

Timing of Planning obligations and Decision notices
When the Council regards a planning obligation as essential to the grant of planning permission, no decision notice will be issued before confirmation that the planning obligation has been signed or sealed as a deed by all relevant parties and dated. It is thus important that the planning obligation is completed as early in the process as possible.

If a planning obligation is considered as essential to make a proposed development acceptable in planning terms and there is an unwillingness to enter into a legal agreement then the planning application will be refused stating clearly the planning objections that the agreement is needed to overcome (and any other relevant matters). This will normally

happen within the prescribed determination period (8 weeks or 13 weeks for major developments).

The applicant may choose to submit a Unilateral Undertaking, which will be taken into consideration when determining the application. However if the details do not meet the Council's minimum requirements and the proposed development is unacceptable, the planning application would be refused. If an alteration to the Unilateral Undertaking would overcome the reason for refusal then the Council will advise the applicant of this option.

Contributions towards Legal and Monitoring Costs
The Council will require the applicant to contribute towards the Council's legal costs of preparing or reviewing the planning obligation.

The Council also require the applicant to pay a monitoring fee.

There are currently two charging levels for monitoring of planning obligations:-

- **Agreements with non financial obligations** - £500 fixed fee. These may include planning obligations such as occupancy restrictions, affordable housing, non fragmentation clause, parking restrictions, landscape management or travel plan..
- **Agreements with financial contributions** 5% of the total cost of the financial contributions payable by the applicant in respect of the planning obligations

A guide to the legal and monitoring costs are set out in Appendix A . The exact amount charged will depend upon the nature and scale of the development and will be subject to guidance in paragraph 203 -206 of the NPPF

What is the procedure for financial contributions?
Where planning obligations involve the payment of a financial contribution to the Council applicants will be made aware of the level of the likely contribution by the case officer, and the reason for the contribution, during negotiations and well in advance of the application being determined. This is most likely to occur where a development is creating a need for, or placing an additional strain on, local infrastructure and facilities such as, transport infrastructure, public transport, public open space or children's play areas. Applicants may also be required to enter into a planning obligation in relation to services provided by a third party such as Kent Council or the Environment Agency, for example the provision of school places, highway matters or flood alleviation.

The need for and the calculation of financial contributions should be applied consistently but may, in very exceptional circumstances, be subject to negotiation with the case officer dealing with your application. Where any departure from standard practice is being contemplated, this will be made explicit and fully justified.

Where an applicant proposes to submit a Unilateral Undertaking, it will be expected that any undertaking will meet the requirements outlined in this Guidance Note. Therefore, the Council may require alterations to the Undertaking if this is necessary or appropriate.

Planning Obligations secured by way of a Section 106 agreement or Unilateral Undertaking are binding on the land and are therefore enforceable against all successors in title. The land charge will remain active until all of the planning obligations have been satisfied or the

planning permission for which the Section 106 agreement or Unilateral Undertaking relates to has expired.

It is accepted that the level of planning obligation may sometimes affect the viability of a site or proposal. In such circumstances full 'open book' viability reports will be expected and will be considered. The applicant will be expected to cover the reasonable cost of the Council if it is necessary to seek an independent third party opinion on a submitted viability report.

Making Payments
Payment of contributions may involve a phasing agreement with appropriate trigger points. Phasing will depend on the needs of the development, the type and scale of the proposal and the impacts it would have.

Applications requiring a unilateral undertaking or a straightforward Section 106 agreement (so termed under the 'Basic Agreement' set out above) will be expected to pay contributions on the commencement of development. Where necessary financial contributions will be index-linked using the RPI or the BCSI index.

All legal fees will be paid as requested and normally before the completion of a S106 or Unilateral Undertaking (or at the point of a decision by the applicant that the agreement or undertaking is not to proceed to completion). It should be understood that planning obligations which do not reach completion will still incur a charge for the Council's Legal costs.

Up-front payments
In certain circumstances where the planning obligation would be purely financial, applicants are encouraged to make a payment to the Council upfront once a resolution to permit the planning application has been agreed payment in lieu of a planning obligation. Should this option be appropriate you will be advised by your case officer and the amount, together with an administration and monitoring fee which is currently set at £60. Once payment is received and cleared a formal receipt will be issued.

A final decision will not be made on the application until the contributions as well as the administration and monitoring fee have been paid in full and a receipt issued. Applicant's are advised that this process could take up to two weeks.

How long does the Council have to spend the financial contributions?
Planning obligation contributions may sometimes be limited to being spent within a certain timeframe from the date of payment to the Local Authority. If the contributions have not been spent within this timescale then they can be reclaimed by the applicant. If the sum of money in question has already been passed by the Council to a third party, for works under their statutory responsibilities, repayments will need to be made by these third parties.

Who can see the details of planning obligations?
Once signed, Planning obligations documents, including Unilateral Undertakings, form part of the planning permission. They are a public document and anyone may see a copy of it and any correspondence connected to it by viewing the documents on Public Access.

To increase transparency and maintain public confidence in the system for collecting and spending sums acquired through planning obligations reports are regularly presented to the elected Members, summarising the number and types of planning obligations which have

been connected to planning permissions up to that time, money received within that period and the ways in which any financial contributions have been spent.

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For more information regarding this good practice guide or general enquiries regarding planning obligations, contact:

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APPENDIX A

Types of Planning Obligation and their suitability

	Section 106 Agreement	**Unilateral Undertaking**	**Up Front Payment**
Has to be completed before 8/13 week deadline.	Yes	Yes	Yes
Secures financial planning obligations	Yes	Yes	Yes
Secures non financial obligations and/or any restrictions that are NOT binding on the Council	Yes	Yes	No
Secures non financial planning obligations (i.e. affordable housing) and/or any restrictions on use that are binding on the Council	Yes	No	No
Defers payment of financial obligations until prior to commencement of development	Yes	Yes	No
Council Solicitors draft the agreement	Yes (preferred)	No	N/A
Legal Costs	Hourly rate currently £195	A minimum charge of £195 then hourly rate	£195 per hour
Monitoring /Administration Fee	Non financial obligations £500 (Financial obligations at 5% of total cost of financial contributions	Non financial obligations £500 Financial obligations at 5% of total cost of financial contributions	£60