South Gloucestershire Council

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South Gloucestershire Council Community Infrastructure Levy (CIL) & Section 106 Planning Obligations Guide

Supplementary Planning Document

Adopted March 2021

www.southglos.gov.uk

Community Infrastructure Levy (CIL) & Section 106 Planning Obligations Guide Supplementary Planning Document

Adopted 11th March 2021

This Supplementary Planning Document was initially adopted in 2015 after the introduction of the Community Infrastructure Levy Charging Schedule. This SPD provides guidance on the different types of planning obligations and how each will be dealt with by South Gloucestershire in implementing CS6 of the Council's Core Strategy

Since adoption of this SPD, CIL legislation has been updated; most notably in 2019 when the following amendments were enacted:

- Removal of the regulation 123 list;
- Removal of the restrictions of pooling S106 infrastructure contributions; and
- Clarification regarding penalties and indexation.

This revised SPD brings together these amendments, and provides guidance as to how the increased flexibility in the use of S106 obligations and CIL will operate.

Please note this SPD **does not** amend the existing Charging Schedule which was adopted in 2015.

CONTENTS

INTRODUCTION

The cumulative effects of existing and planned new growth often creates a need for improved infrastructure, without which there could be a detrimental effect on the quality of life and environment. The CIL and Section 106 planning obligations help ensure that new developments contribute towards the provision of the necessary infrastructure required to mitigate its impact.

Whilst local authorities have been using Section 106 (S106) planning agreements for many years, the Community Infrastructure Levy (CIL) was introduced by Government in 2010 and is a charge that local authorities can choose to levy on new developments in their area. The charge is levied depending on specific types of development highlighted in the CIL Charging Schedule [1]. The main purpose of the introduction of CIL was to simplify and make fairer the means by which development contributes towards the cost of supporting infrastructure.

The Council commenced implementing CIL and became a 'charging authority' in August 2015. The Council's Core Strategy[2] (adopted December 2013) at Policy CS6 and supporting text (paragraph 6.17) provides the policy framework for securing developer contributions for infrastructure including CIL payments and section 106 obligations. The CIL is not intended to fund the entirety of the cost of new infrastructure required to support new and existing communities, but provides an additional source of funds alongside other local and national infrastructure funding streams, including S106 planning obligations. The legislative framework for CIL is set out in the Planning Act 2008 and the Community Infrastructure Levy (CIL) Regulations 2010 (as amended by the CIL (Amendment) Regulations 2011, 2012, 2013 & 2014, 2015, 2018 and 2019).

The Government has also produced **National Planning Practice Guidance** regarding the Community Infrastructure Levy [3]. It is recommended that the full guidance and legislation is referred to.

The objective of this SPD is to provide a guide for developers, stakeholders and local communities regarding how CS6 will be implemented and the basis on which CIL & S106 contributions will be sought and administered in South Gloucestershire.

1 SGC's CIL Charging Schedule https://beta.southglos.gov.uk/wp-content/uploads/CIL-Charging-Schedule-March-15.pdf

2 South Gloucestershire Council Core Strategy - https://beta.southglos.gov.uk/core-strategy-2006-2027/

3 NPPG Guidance on Viability - https://www.gov.uk/guidance/community-infrastructure-levy

This SPD is divided into various sections, as outlined below;

- **Section 1** of this SPD deals with the updated use of CIL and S106 in South Gloucestershire;
- **Section 2** deals specifically with CIL and the updated regulations;
- **Section 3** deals specifically with S106 planning obligations; and
- **Section 4** briefly highlights Grampian conditions.

SECTION 1. UPDATED CIL LEGISLATION (2019) AND S106 IMPLICATIONS

Under the previous CIL regulations the Council was required to maintain an infrastructure list to which its CIL receipts would be applied, known as the Regulation 123 list. In implementing policy CS6 these regulations prevented S106 obligations from making provision for any financial contributions towards any infrastructure on the Council's infrastructure list. In addition there was a cap on the number of S106 obligations that a council could enter into in relation to infrastructure not on its list. There was a limit of no more than five S106 obligations making contributions towards infrastructure not on the Council's list.

In September 2019, these restrictions were removed. There is no longer a requirement for a Council to maintain a (Regulation 123) infrastructure list. In implementing CS6 financial contributions via S106 obligations can be provided for any infrastructure provided the tests in regulation 122 are met. There is also no longer any limit on the number of S106 obligations that can be used for any particular infrastructure provided the regulation 122 tests are met.

In implementing CS6 regulation 122 of the CIL regulations limits the use of S106 planning obligations to obligations that are:

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

CIL is payable on a pound per metre square basis (of net new development) as set out in the charging schedule and subject to a number of exemptions. The receipts can be applied to provide infrastructure not related to the particular development making the payments. In South Gloucestershire, most new major developments will therefore pay the CIL and make payments under S106 obligations.

Prior to the recent changes to the regulations and since becoming a CIL charging authority, S106 planning obligations have typically been used to make provision for Affordable Housing, essential on-site and local site access and transport requirements (such as Public Open Spaces and local highway safety works). Following the recent changes to the CIL regulations referred to above, S106 obligations can also now be used to fund all infrastructure requirements (provided that they meet the regulation 122 test) including:

- roads and other transport facilities;
- flood defences;
- schools and other educational facilities;
- medical facilities;
- sporting and recreational facilities; and
- open spaces,

CIL receipts can also be applied towards such infrastructure **providing there is no double recovery** in relation to any item of infrastructure.

The Council will therefore continue to collect a CIL receipt for the types of development in the areas identified that are subject to charges in its Charging Schedule but also seek S106 obligations on infrastructure that meets the regulation 122 test, subject to viability.

Accordingly, on a site by site basis the Council will seek to agree with developers what CIL payments and S106 obligations will be used to deliver development, respectively.

This represents a significant change in practice. As such it is intended to be implemented in a phased way to enable time for the new practices to embed. Details will be provided on our website as to how this will work. Consideration will be given to the number and practical handling of additional S106 agreements, scale of development and relative impact, viability evidence and impact on developer partners. It will thus be kept under review.

Additionally, as a replacement to the Reg 123 infrastructure list, the Council is now required to produce annually an Infrastructure Funding Statement (IFS). This statement will identify:

- the infrastructure needs of the area;
- the total cost of the infrastructure, anticipated funding from developer contributions; and
- how those contributions will be used.

In preparing the statement the Council will consider known and expected infrastructure costs and potential sources of funding to identify the infrastructure funding gap. It will set out how much it has received and how much it has spent and intends to spend using CIL & S106 receipts. This is to improve transparency within the system and also enables, in time, prospective developers to gauge likely CIL and S106 requirements.

SECTION 2: COMMUNITY INFRASTRUCTURE LEVY (CIL)

2.1 What development will be liable to pay CIL?

The following development types will be liable *in principle* to pay the CIL:

- Development comprising 100m² or more of new build floorspace
- Development of one or more dwellings[4]
- The conversion of a building that is no longer in lawful use

Where planning permission is granted for a new development that involves the extension or demolition of a building in lawful use, the level of CIL payable will be calculated based on the **net** increase in floorspace. This means that the existing floorspace contained in the building to be extended or demolished will be deducted from the total floorspace of the new development, when calculating the CIL liability.

The definition of lawful use is contained in Regulation 40(10) of the CIL Regulations 2019 which states the following:

'contains a part [of the relevant building] that has been in lawful use for a continuous period of at least six months within the period of three years ending on the day planning permission first permits the chargeable development'

4 Including development of less than 100m² that results in the creation of a dwelling unit.

2.2 Exemptions

The CIL regulations provide for certain types of development to be exempt from paying CIL, as follows:

- Development of less than 100m² of new build floorspace, provided that it does not result in the creation of a new dwelling.
- The conversion of a building in lawful use, or the creation of additional floor-space within the existing structure of a building in lawful use.
- Development of buildings and structures into which people do not normally go (e.g. roads, pipelines, pylons, wind turbines, electricity sub stations, buildings or parts of buildings into which people go only intermittently for the purpose of inspecting or maintaining fixed plant or machinery, e.g. power station turbine rooms etc).
- Vacant buildings brought back into the same use (see Appendix 1).
- Dwellings which are built by self builders.
- Residential annexes and extensions.
- Specified types of development which local authorities have decided should be subject to a 'zero' rate and specified as such in there charging schedules.

'CIL Relief' also applies to certain kinds of development. See section below.

2.3 Who is liable to pay CIL?

CIL will be paid by the owner of land where CIL liable development is to be carried out, unless another party volunteers to pay the CIL by assuming the liability, e.g. the developer. Anyone who wishes to pay the CIL can come forward and assume CIL liability for the development. Where no one assumes liability to pay CIL, the liability will automatically default to the owners of the relevant land and payment becomes due immediately upon commencement of development. CIL is payable on all liable / chargeable development whether subject to a planning permission or not (see part 9 below).

2.4 What is the process of payment?

The process of payment is set out below:

Step 1: Before any development is commenced, **a notice of chargeable development** must be submitted to the Council (Regulation 64) with confirmation of the person or organisation who is assuming liability or joint liability (Regulation 31).

Step 2: A **CIL Liability Notice** will then be issued by the Council (Regulation 65) confirming the amount of CIL and who is liable to pay the charge.

Step 3: At least one day prior to commencement of development, a **Commencement Notice** must be submitted to the Council (Regulation 67).

Step 4: In response to the Commencement Notice the Council will issue a **Demand Notice** (Regulation 69).

In the event of failure to serve the relevant notices, additional surcharges will be payable (Regulations 80-83). Where a development has a party who has assumed liability, they will be entitled to a payment window and possibly payment through instalments or payments in kind (see Instalments & Payments in Kind Policies [5]) provided other CIL procedures such as the commencement notice are followed.

2.5 How is CIL Calculated?

CIL charges are calculated in accordance with Regulation 40 and the provisions set out in Schedule 1 of the CIL Regulations 2019

The amount of CIL you will be liable to pay ('the chargeable amount') depends on the size, type and land use(s) of your development. CIL is levied as a charge per square metre of net additional floorspace. The Council is responsible for calculating the charge based on information provided to it.

Simply put, the **CIL Charge = Gross internal area of the development minus (the gross internal area of any building in lawful use + the gross internal area of any dwellings that qualify as social housing) x Levy Rate x Inflation Index.**

5 Instalments & Payment in Kind - https://www.planningportal.co.uk/info/200126/applications/70/community_infrastructure_levy/4 and https://beta.southglos.gov.uk/wp-content/uploads/CIL-INSTALMENT-POLICY-2019.pdf

CIL charges are index linked to the Building Cost Information Service (BCIS) All-in Tender Price Index from the date the Council commences charging the CIL. The base rate for indexation is 261 as published by BCIS on 1st April 2015 when CIL was adopted by SGC.

Where the CIL charge is calculated to be less than £50 no charge will be levied.

2.6 What is included as CIL chargeable floorspace?

Generally, any water tight structure (into which people normally go), with walls and a roof is considered to be "internal" floorspace and therefore chargeable. All new build floorspace, measured as gross internal floorspace (i.e. the internal area of the building, including circulation and service space such as corridors, storage, toilets, lifts etc). It includes attic rooms that are useable as rooms, but excludes loft space accessed by a pull-down loft ladder. It includes domestic garages, but excludes car ports.

2.7 What happens with planning applications that pre-date the date that new CIL charges come into effect in South Gloucestershire?

The Regulations require CIL to be applied to all **new** planning consents[6] **granted after** the date that the charging schedule comes into effect. The date at which the application was made is not relevant, neither is the date of the officer's recommendation nor the date at which a planning application was considered by committee. The levy will also apply to any planning consents issued by a Planning Inspector as a result of a successful appeal after the introduction of the new levy.

2.8 Is CIL payable if planning permission is not required for a development?

Yes, development commenced under 'general consent' will be liable to pay CIL. 'General consent' includes permitted development rights granted under the General Permitted Development Order 1995, and developments permitted through a Local Development Order.

6 Reserved Matters associated with an Outline Consent granted before the CIL came into effect are not liable.

If development under general consent is intended then a 'Notice of Chargeable Development' must be submitted to the Council before the development is commenced. Such a notice is not required if the development is less than 100 square metres of new floorspace and it does not comprise one or more new dwellings.

2.9 CIL Relief

The CIL Regulations (41-58) make a number of provisions, some compulsory, others non compulsory, for charging authorities to give relief from CIL. 'Community Infrastructure Levy relief' means any exemption or reduction in liability to pay the levy.

Detailed information regarding CIL relief is contained in the Ministry of Housing, Communities and Local Government's webpage [7].

Mandatory relief

Development that is entitled to Mandatory Relief from CIL (subject to conditions which apply):

- Development on land owned by a registered charity, and that is used wholly or mainly for charitable purposes (Regulation 43 of the CIL Regulations 2019), so long as the relief does not constitute state aid.

- Those parts of a development which are to be used as social housing (often called Affordable Housing), as set out in Regulation 49 of the CIL Regulations 2019 as amended by The Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2020 no. 1226

Discretionary relief

Charging Authorities can choose to offer discretionary relief[8] for:

1. Charities investment activities (Regulation 44), and

2. Exceptional Circumstances (Regulation 55)

3. Discretionary Social Housing Relief (Regulation 49A) as amended by The Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2020 no. 1226

7 https://www.gov.uk/guidance/community-infrastructure-levy

8 https://www.gov.uk/guidance/community-infrastructure-levy#relief-and-exemptions

2.10 What will CIL funds be spent on?

The regulations require CIL funds to be spent on the provision, improvement, replacement, operation or maintenance of 'infrastructure'. Infrastructure is defined at section 216 (2) of the Planning Act 2008, as including (but not exclusively):

a) roads and other transport facilities;

b) flood defence;

c) schools and other educational facilities;

d) medical facilities;

e) sporting and recreational facilities; and

f) open spaces.

This definition allows the levy to be used to fund a very broad range of facilities such as play areas, parks and green spaces, cultural and sports facilities, district heating schemes and police stations and other community safety facilities. This gives local communities flexibility to choose what infrastructure they need to deliver their development plan.

The CIL amendment regulations 2013 establish that a proportion of CIL Receipts are passed to the local communities where it was raised:

- 15% (capped at £100 per existing 'council tax' property per year) where there is no Neighbourhood Plan in place, or,

- 25% of receipts (uncapped) where a locality has a Neighbourhood Plan,

Parish & Town Councils will also have to spend the funds on the provision, improvement, replacement, operation or maintenance of infrastructure, *or anything else that is concerned with addressing the demands that development places on an area*. This can include spending on Affordable Housing and the development of a Neighbourhood Plan. Where there is no Parish or Town Council the District Council (as the charging authority) is required to spend the CIL receipts derived in those areas in consultation with those communities. Parish & Town Councils should work closely with the Council and their neighbouring councils to agree on spending priorities.

The District Council may also reclaim CIL receipts spent inappropriately or not within 5 years by Parish & Town Councils. It must then spend the reclaimed receipts in that parish or town council area. Parish & Town Councils may also pass back CIL receipt to the District Council for spending on strategic infrastructure.

The Council and Parish & Town Councils are required to produce a report for each financial year detailing how much CIL funding was raised and what it was spent on (Regulation 62).

The Council may also, use up to 5% of CIL collected to cover administrative expenses incurred in establishing CIL procedures and collecting the levy.

2.11 Review of CIL

Changes to the adopted charging schedule are subject to consultation and Independent Examination. Charges are also indexed. It is therefore not necessary or practical to amend the charging schedule frequently. It is however acknowledged that fluctuations in residential and commercial development markets and changes in construction costs may have significant impact on development viability. Should the Council be concerned that adopted charges are leading to increased viability issues or the charges are becoming out-of-date due to new building regulation requirements or planning policy for example, it will instigate a review of market and build cost indicators in order to assess if a full review is required.

Given the increase in flexibility with S106, the removal of pooling restrictions and the COVID-19 pandemic, the review of CIL has been put on hold, in order to allow the economic markets to recover.

SECTION 3: SECTION 106 PLANNING OBLIGATIONS

3.1 Introduction

CS6 is implemented through planning obligations, also known as Section 106 Agreements, which are legally binding agreements entered into between a Local Authority and a developer. In addition to the CIL, they provide the mechanism by which measures are secured to mitigate the impact of development under CS6.

This section comprises two parts:

Part One sets out the Council's overall approach to planning obligations. It shows how the SPD complies with national and local policy and explains procedural matters relating to the drafting and enforcement of Section 106 Agreements.

Part Two sets out the types of planning obligation that the Council may seek to secure from development under policy CS6 It identifies the specific policy framework the enables the infrastructure sought through a s. 106 and the usual method / process by which the obligation will be sought. It specifically covers the following measures and infrastructure, provided for under CS6 and other relevant policies, and explains the obligations that will be sought to achieve them:

- Local Transportation & Highway Works
- Public Open Space & Landscape Schemes, and
- Other Site Specific Measures (education, community buildings, health facilities, ecology, heritage, public rights of way & public art)

PART 1

3.2 National Policy Context

The legislative framework for planning obligations is set out in Section 106 of the Town & Country Planning Act 1990, as amended by Section 12 of the 1991 Planning and Compensation Act. Further legislation is set out in Regulation 122 of the Community Infrastructure Levy (CIL) Regulations 2010, and the CIL (Amendment) Regulations 2011 and 2019.

Regulation 122 sets out the following tests that must be satisfied in order for obligations to be required in respect of development proposals:

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

Following amendments to the CIL Regulations (Sept 2019) and the deletion of regulation 123, the Council is no longer prevented from seeking financial contributions through section 106 obligations for items of infrastructure that were listed on its Reg. 123 List, or from pooling five or more of these contributions together to contribute towards one type of infrastructure that is not on the list. Any financial contributions which are sought through planning obligations would still need to satisfy the regulation 122 tests (i.e. be necessary, reasonable, and directly related to the development) in order to be taken into account as a material consideration. However, providing that these tests are met and there is no double recovery[9] with the CIL receipts that would be due from that development, the Council can use planning obligations to provide additional funding towards infrastructure needs in implementing policy CS6. If the Council's approach gives rise to genuine viability issues, this eventuality is recognised in policy CS6, and the applicant has the opportunity to demonstrate a lack of viability under CS6 and in accordance with paragraph 57 of the NPPF.

9 Double Recovery means whereby CIL and S106 funds are being sought to fund the same piece of infrastructure. The Council will set out through either or a combination of the planning report, S106 agreement and IFS what the CIL and S106 receipts will be used to respectively fund.

The National Planning Policy Framework (NPPF – March 2019), promotes sustainable development. Paragraph 54 states that, *'Local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations. Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition,'*

Paragraph 56 goes on to state that, *'Planning obligations should only be sought where they meet all of the following tests:*

- *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.'*

3.3 Local Policy Context

Policy CS6 – Infrastructure & Developer Contributions, of the Core Strategy requires development to contribute towards infrastructure in order to mitigate impact on existing communities and provide for the needs of new occupants arising as a consequence. The policy is also clear that CIL & S106 may be used to fund infrastructure. This SPD explains how that will be achieved.

The council's service departments who support infrastructure delivery e.g. education, transport, libraries and community buildings, parks and open spaces, will be responsible for identifying provision as a result of new development. This information is particularly relevant where new development proposals are of a scale that such amenities may be required onsite to provide for the needs of the new occupants. Most medium and small-scale developments however, are rarely required to provide for on or near site infrastructure items other than:

- Affordable Housing;
- local highway enabling works;
- ecological mitigation, landscape works, open space, outdoor sport facilities and play equipment;
- public art;
- where appropriate works to listed buildings;
- public rights of way; **and**
- other identified and justified site specific measures.

CIL receipts will thus be used to fund wider infrastructure requirements. The utilisation of S106 to fund more strategic needs, such as local schools, strategic transport infrastructure and health and community buildings etc will be considered on a case by case basis depending on the context, existing capacity and impact. The Council will also review from time to time and set out on its website, development thresholds whereby it will not pursue wider S106 contributions (beyond those stated above).

Affordable Housing (AH) will continue to be sought via S106 and is dealt with by its own SPD.

Proposals for development that may require the provision of planning obligations should be made in accordance with the relevant policies of the adopted Development Plan, which currently comprises the Core Strategy and the Policies, Sites & Places DPD. This SPD which supports the Core Strategy & PSPDPD, therefore constitutes an important material consideration in the decision making process. This SPD supplements, in particular, policy CS6 – Infrastructure and Developer Contributions of the Core Strategy.

3.4 Council approach to location of provision through obligations

Wherever possible, provision should be made on-site for facilities (**including land**) required through a planning obligation. However, there will be cases where this is neither practicable nor appropriate, such as for local highway enabling works. In these instances, the Council will require financial contributions towards the provision of necessary measures to mitigate the impact of the development.

The Council will consider the issue of whether facilities are to be provided on or off-site, on a case-by-case basis. However, it is expected that where Affordable Housing obligations are required, provision will be on-site, unless in exceptional circumstances a financial contribution is agreed.

In cases where a number of developments are proposed in close proximity to each other and the cumulative effect will result in the need for a specific mitigating measure, the Council may also pool contributions from each of the developments, in order to fund the necessary measure in an equitable way.

3.5 Drafting of Agreements

The Council encourages the use of a standard form of S106 agreement to ensure a consistent approach.

A copy of the basic model agreement can be provided upon request. The Council expects the agreement to be prepared by its own Solicitors, and that the final ongoing version is produced on its own I.T. system. (This enables the Council to store electronically the final agreement and in the future produce and deliver copies electronically).

For the same reasons, the Council is developing standard requirements for the size and format of agreements.

Unilateral Undertakings

A Unilateral Undertaking is a simplified version of a Planning agreement and is only entered into by the Landowner. There may be occasions when the use of a Unilateral Undertaking (where it benefits both the applicant and the Council) can assist in ensuring that planning permissions are granted expediently.

Costs

The Council will recover the following costs associated with the preparation, implementation and monitoring of the S106 Agreement:

- All reasonable legal costs and any other specialist costs in negotiating and drafting an Agreement and any subsequent agreements required under the S106 agreement;
- Officer costs in negotiating an agreement will be recovered through a Planning Performance Agreement and which will only be sought on large scale schemes);
- Costs in supervising 'public' works, i.e. works to be adopted by the Council (e.g. roads, open spaces etc);
- Administrative, inspection and related costs of implementing the agreement and in monitoring compliance with the planning obligations (i.e. routine visits or ad hoc requests seeking information from the Developer etc).

An estimate, or basis of fee/cost calculation can be provided.

Monitoring Fee

The references above to the supervision of public works and to administrative, inspection, implementation and compliance monitoring costs, all comprise monitoring activities to be covered by a monitoring fee.

Where the public works are highway works agreed under the Highways Act 1980 then the monitoring costs of those works will be recovered under those highway agreements not under S.106 agreements to ensure there is no double recovery of a monitoring fee by the Council.

The PPG provides guidance on how monitoring fees are to be calculated and states that monitoring fees can be a fixed percentage of the total value of a section 106 agreement or individual obligation whilst requiring that in all cases the fees must be both proportionate and reasonable and reflect the council's estimate of the cost of monitoring over the lifetime of the planning obligations. This is to ensure no unjust enrichment to the Council. It also states that authorities can consider setting a cap to ensure that any fees are not excessive.

In light of this guidance the Council is proposing to implement a monitoring fee equivalent to 1% of the total financial contributions contained within the agreement, with a cap of £40k for agreements with a total value of less than £10m. Before any such fee is sought the Council will carry out a sense check to ensure that the monitoring fee will not be in excess of the estimated cost of monitoring the obligations in the agreement. For agreements with a total value greater than £10m the monitoring fee will be negotiated on a case by case basis by applying the approach that the fee needs to be both proportionate and reasonable and not exceed the estimated costs of monitoring over the lifetime of the planning obligations.

It is also proposed to introduce the standard charge of £200 per non-financial agreements to cover administration and ongoing monitoring costs

The timing of payment of monitoring fees will depend on the duration of the monitoring. Where monitoring is likely to be required for up to a year it will be paid on the signing of the agreement although in some instances it may be appropriate for it be paid on commencement of development. Where monitoring is likely to take place over several years payments of the monitoring fees will be phased.

Further information can be obtained from the Council's S106/CIL Officer.

3.6 Transfer of Land

Whilst a Council cannot require the transfer of land if alternative means of securing a planning obligation can be provided and is offered, occasionally obligations will require land to be transferred to the Council, usually in respect of public open space obligations. The cost of transferring the land will be a cost associated with implementing the planning obligation and in such cases, developers will be required to pay the Council's legal costs in respect of the land transfer.

3.7 Financial Contributions

Financial contributions will be payable at specific stages in the development process, reflecting the timing of the activities that give rise to those costs. Accordingly, the phasing of payments may be appropriate to reflect that particularly in relation to large scale schemes, in order to match the proportional impact of each phase of the development. Trigger dates for the payment of financial contributions will be included in the S106 Agreement.

3.8 Index Linking

Financial contributions will be index linked. The appropriate indexation and start date will be agreed as part of the S106 agreement process.

3.9 Monitoring and enforcement of Obligations

Monitoring of obligations will be undertaken by the Council to ensure all obligations entered into are complied with on the part of both the developer and the Council.

The Council will work with developers to find solutions in cases where there is difficulty in making provision or payments at the trigger set out in the Agreement. This could be through agreeing payment or provision of obligations at a later stage of the development process, or agreeing payments by instalments. However, where it is imperative that the relevant measure is in place prior to a development being occupied, the obligations to fund it will always become payable on commencement of the development.

Where the Council considers a serious breach of the agreement has occurred it will enforce obligations through the relevant legal channels. In such cases, the Council will seek to retrieve its legal costs in taking action from the party that is in breach of its obligations.

3.10 Viability

The Council accepts, and as explained above policy CS6 recognises, that there may be occasions where development proposals are unable to meet all the relevant policy requirements and still remain viable. Where the Council is satisfied that an otherwise desirable development cannot be fully policy compliant and remain viable, a reduced package of planning obligations may be recommended provided the S106 package is still sufficient to satisfactorily mitigate development to the extent that it is acceptable in planning terms (Reg 122 of the CIL regulations 2010).

In order to enable the Council to assess the viability of a proposal, the applicant will be required to provide any necessary cost and income figures to the Council, and pay the Council's full costs in appointing consultants to undertake a viability assessment.

Furthermore, in line with the amended regulations, in cases where the council accepts that a viability assessment is justified, that assessment will be made publically available, in line with the national guidance. Guidance on viability assessments is set out in the NPPG[10] .

10 NPPG Viability Guidance- https://www.gov.uk/guidance/viability

PART 2

3.11 Infrastructure types

The items below constitutes infrastructure that S106 is most regularly utilised for where they meet the CIL tests set out at Regulation 122. S106 will also be used to deliver other infrastructure to mitigate the impacts of that development where the site is of sufficient scale to require provision on or in the immediate locality of the site. Affordable Housing is dealt with in its own SPD, and an Education Technical Advice Note relating to S106 contributions will be published in due course.

3.12. Local Transportation & Highway Works

Policy Background

The justification for requiring obligations in respect of Transportation & Highway Infrastructure Works is set out in Policies CS1, CS6, CS7 & CS8 of the Council's Core Strategy and policies PSP10, PSP11, PSP13, PSP14 and PSP15 of the Policies, Sites & Places Development Plan Document.

S106 obligations in respect of Highway Infrastructure & Transportation works will normally (but not always) be restricted to localised enabling works, and be required where there is a requirement to improve existing, or construct new, highway infrastructure in order to access the development in a safe and appropriate manner. The extent of these works will be dependent upon the scale of the development. Consequently, there is no trigger below which a transportation or highway infrastructure obligation will not be required and there are no types of development that would be exempt from Highway and Transportation Infrastructure obligations.

Required measures could range from small-scale footway reinstatement, kerb build-outs, provision of pedestrian crossings and bus shelters, to the construction of new junctions or access roads. Highway and Transportation Infrastructure Works will be secured through one of two routes, as follows:

1. Where other obligations necessitating a full Section 106 Agreement are required, Highway Infrastructure Works will be incorporated in the agreement. In addition, where the Highway Infrastructure Works are complex in nature they will also be secured through a Section 106 Agreement, as it is important that the scope of such works are agreed prior to the granting of a planning consent.

2. Where there are no other obligations or the other obligations only require a simple Unilateral Undertaking, and the required Highway Infrastructure Works are straightforward, they can be secured using a "Grampian" condition. This will enable a planning consent to be granted more quickly but will require the developer to enter into a Section 278 Highways Agreement prior to commencing their development.

Highway & transportation obligations may also include the requirement for traffic regulation orders, stopping up orders, routing controls, traffic light re-phasing, travel plans and safeguarding land for specific transportation purposes, e.g. mass transit.

Specific details regarding the processes for undertaking Highway Infrastructure Works will be set out in the relevant Section 106 or 278 Agreement.

Unless a bond is already provided as part of a Highways Agreement, developers will be required to enter into a bond for an amount specified by the Council, to ensure the Council's position is protected should the developer default in any way with regard to the Highway Infrastructure Works. This bond can take the form of a formal bond entered into with an approved surety, or a cash deposit held by the Council.

The Council also charges a fee if a development is required to enter into a TRO obligation as part of a scheme of Highway Infrastructure Works. This covers the Council's Legal and Traffic Management costs in processing the TRO. The costs of implementing the relevant lining and signs associated with the TRO will be borne by the developer as part of their Highway Infrastructure Works.

In addition developers will also be required to pay fees to cover the Council's costs incurred in approving the detailed engineering drawings, inspecting the Highway Infrastructure Works and issuing the Certificates.

The fees referred to above will either be recovered under the section 106 agreement or under a section 278 Highways Agreement but not both, to ensure that there is no double recovery.

Advice with regard bonds and fees associated with traffic and highway works should be sought from the Transportation Team.

3.13 Public Open Space

Policy Background

The justification for requiring obligations in respect of the provision of Public Open Space (POS) & Landscaping Schemes is set out in Policies CS1, CS2 and CS24 of the Core Strategy Policy PSP2 of the Policies, Sites & Places Development Plan Document.

Policy CS2 sets out principles for the protection and conservation of existing green infrastructure and the delivery of new open space and landscaping. Policy CS24 sets out minimum standards for open space provision with new development for the following categories:

- Informal Recreational Open Space
- Natural / Semi-Natural Open Space
- Outdoor Sports Facilities
- Provision for Children and Young People
- Allotments

CS24 requires that provision is on-site, unless it is demonstrated that partial or full off-site provision or enhancement creates a more acceptable proposal. The location of the development, proximity to existing open space and type of development and dwellings proposed will be considered in assessing the need for new POS & landscaping. In general, this type of obligation will be used in the following circumstances:

- where POS and landscaping is required onsite to serve the needs of the new occupants

- where a landscaping scheme is required to screen a development or integrate it into the surrounding area;

- where on-site constraints are such or that it makes practical sense for a new development to contribute financially towards to the provision or improvement of an existing nearby local open space and ancillary equipment & amenities. In such instances the S106 will, where achievable, be specific about where the contribution will be used and / or where necessary such other locations as may be appropriate. Usually, in order to ensure that the contributions are spent effectively, the Council will need to seek expressions of interest from potential projects in the locality and agree a reporting process to finalise decisions around where contributions are spent nearer the time when they become payable.

POS will normally only be required onsite on major[11] residential and commercial development proposals. Priority for on site provision of the different categories will be dependent on the nature of the scheme, proximity of the site to existing provision and local surplus or deficit in provision.

The requirement for providing POS is usually fulfilled in one of two ways:

i. *Provided by the developer and maintained by a management entity such as a company (including a residents management company), a trust or other body established by the owner or developers or contracting of an established trust or other body.*

In this case the developer will be required to make provision of a POS to adoptable standards (to a design and specification agreed by the Council) prior to conveying the POS to the management entity. The development is therefore not to commence until the developer has submitted to, and received written approval of the POS scheme, from the Council. Should this option be taken this will be on an in-perpetuity basis.

11 Major development - is defined in terms of residential development as erection of 10 or more dwellings and/or site area of over 0.5ha. Other forms of development or change of use (offices, industry, retail etc) over 1,000m^2 and/or over 1ha in site area

The Council will also require that the private management arrangements (relationship with residents) is agreed prior to first occupation. Private management arrangements should ideally ensure that the development's management entity is legally obliged to seek representation on its board (or similarly constructed formal arrangement) from the residents and take account of residents' views in terms of the management regime and charge setting.

The developer is to implement the POS scheme, and will ideally arrange and fund joint site inspections with the relevant Council officer(s) at regular periods during the implementation of the scheme.

ii. *Provided by the Developer & maintained by the Council or Parish / Town Council*

In this case the requirement will be for the developer to design and implement the POS scheme to adoptable standards (design and specification agreed by the Council). It will then be transferred to the Council or by agreement, to a Parish Council once it is in an adoptable condition, after an agreed period of maintenance. Upon adoption or transfer (whichever is the soonest), a maintenance contribution will be required to cover the first 15 years of maintaining the POS.

The arrangements will be as follows:

- Development is not to commence until the developer has submitted to, and received written approval of the POS scheme, from the Council.

- The developer is to implement the POS and will ideally arrange and fund joint site inspections with the relevant Council officer(s) at regular periods during the implementation of the scheme. The developer will pay inspection fees of the Council upon completion. When the Council is satisfied that the scheme is acceptable a Certificate A will be issued and a 12-month maintenance period will commence.

- The developer will retain responsibility for maintenance during the maintenance period. At the end of the maintenance period a further joint site inspection will be undertaken and subject to any defects being satisfactorily remedied, a certificate of adoption will be issued. Upon the issue of this Certificate at transfer, the POS scheme will be transferred to the Council and a maintenance contribution will become payable. The level of the commuted maintenance contribution will vary from site to site depending upon the type of hard and soft landscaping features contained in the POS scheme. The maintenance payment will be to cover a period of 15 years and will be calculated using the maintenance cost for the 15 year period in place at the time of completion of the S106 agreement. These rates will be set out in the S106 agreement. The maintenance payment will be index linked to take into account inflation that may occur prior to the receipt of the payment.

The developer will also be required to pay fees to cover the Council's legal and specialist advice costs incurred in approving the POS management and maintenance arrangements, undertaking inspections of the POS & landscaping scheme and issuing the Certificates. Advice should be sought from the Community Spaces or Major Sites Team with regard these costs.

3.14 Other Site Specific Measures

Site-specific measures are those obligations required to mitigate the impact of a particular development. Site specific obligations could be required from any development type, irrespective of size, and consequently there is no threshold below which an obligation will not be required. The determining factor is whether the development creates an impact that requires mitigation. **In such instances the S106 obligation must meet the CIL tests and thereby must be specific about where & what mitigation & enhancement works are required or what specific project the funding contribution will be utilised for.** The following examples cannot be considered to be exhaustive but give an indication of the types of obligation that may be required.

- Works or funding for the management and conservation of ecological measures where a development has an adverse impact on local habitats and ecology, or the provision of alternative habitats to compensate for any loss.
- Works or funding for the management and conservation archaeological interests where a development has an adverse impact.
- Works or funding for the restoration, conservation / enhancement of listed buildings, buildings of local importance and monuments.
- Works or funding for the diversion and or enhancement of Public Rights of Way
- Works for production and delivery of site-wide Public Art Strategy and/or Public Art Plan.
- Land, works and funding for education, community and health facilities.
- Land for the provision of necessary strategic infrastructure.
- Other identified and justified site specific measures

SECTION 4: GRAMPIAN/ PRE-COMMENCEMENT CONDITIONS

The PPG states that 'Care should be taken when considering pre-commencement conditions that prevent any development authorised by the planning permission from beginning until the condition has been complied with. …. Such pre-commencement conditions should only be used where there is a clear justification, which is likely to mean that the requirements of the condition (including the timing of compliance) are so fundamental to the development permitted that it would otherwise be necessary to refuse the whole permission'. (paragraph 009 Reference ID: 21a-009-20140306)

The PPG also states that 'Conditions requiring works on land that is not controlled by the applicant, or that requires the consent or authorisation of another person or body often fail the tests of reasonableness and enforceability. It may be possible to achieve a similar result using a condition worded in a negative form (a Grampian condition) – ie prohibiting development authorised by the planning permission or other aspects linked to the planning permission (eg occupation of premises) until a specified action has been taken (such as the provision of supporting infrastructure). Such conditions should not be used where there are no prospects at all of the action in question being performed within the time-limit imposed by the permission.' (paragraph 007 Reference ID: 21a-009-20140306)

Therefore, such conditions will only be imposed where the circumstances justify in accordance with this guidance.

APPENDIX 1: VACANT BUILDING CREDIT AND THE COMMUNITY INFRASTRUCTURE LEVY (CIL)

CIL is charged to provide money for infrastructure. The charges are paid per square metre of net new floorspace, whereby any existing building/floorspace in lawful use is subtracted from the total charge. This recognises the existing impact of the lawful use and therefore the need only to mitigate the impact of the additional, new use. Where that existing lawful use has ceased, i.e. where it has not been in use for a continuous period of at least six months in the preceding three years, then the charge becomes liable on the gross floorspace, with no deduction of existing floorspace.

The Vacant Building Credit applies '*...where a vacant building is brought back into lawful use, or is demolished to be replaced by a new building,...*' (NPPG Paragraph 021 above).

It is therefore incompatible to claim that the building is 'in-use' to claim CIL relief on existing floorspace and claim the Vacant Building Credit.

The applicant will not be able to claim relief from CIL on the relevant building in addition to the Vacant Building Credit.

The Council will determine whether a building is eligible for either CIL relief or the Vacant Building Credit as follows:

- **CIL relief** will be granted if the relevant building has been in lawful use for a continuous period of at least six months in the period of three years preceding the granting of planning permission, and

- **Vacant Building Credit** will be applied to the development if the relevant building has **NOT** been in lawful use for a continuous period of at least six months in the period of three years preceding the submission of the planning application and is vacant at the time of making that application.

The Council will be rigorous in its application of the above criteria in order to assess fairly the competing interests of Affordable Housing need and the encouragement of brownfield development.

APPENDIX 2: STATUS OF THE CIL & S106 GUIDE (SPD)

Proposals for development should be made in accordance with the relevant policies of the adopted Development Plan, which currently comprises the Core Strategy (adopted Dec 2013) and Policies, Sites & Places DPD (adopted 2017).

The CIL & S106 SPD supplements Policy CS6 – Infrastructure and Developer Contributions – of the South Gloucestershire Core Strategy. The SPD will be used as a material consideration in the determination of planning applications where appropriate. The SPD should be read in conjunction with the South Gloucestershire Core Strategy, the CIL Charging Schedule, the Infrastructure Funding Statement and the Infrastructure Delivery Plan (IDP) and emerging new Local Plan.

In producing this SPD the Council has complied with the Town and Country Planning (Local Planning) (England) Regulations 2012, which set out the processes for its preparation, consultation and adoption. These regulations are separate from the CIL regulations which the Council must comply with in producing the CIL charging schedule.

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