



Department for
Communities and
Local Government

Section 106 affordable housing requirements

Review and appeal

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Contents

1. Introduction	2
2. Evidence	4
3. Form of Viability Evidence	5
4. Delivery	6
ANNEX A – Viability Reappraisal: potentially relevant key variables	7
ANNEX B – Procedural Note: applications and appeals	11

1. Introduction

1. The Government encourages a positive approach to planning to enable appropriate, sustainable development to come forward wherever possible. The National Planning Policy Framework establishes that the planning system ought to proactively drive and support sustainable economic development. It also requires that local planning authorities should positively seek to meet the development needs of their area.
2. Unrealistic Section 106 agreements negotiated in differing economic conditions can be an obstacle to house building. The Government is keen to encourage development to come forward, to provide more homes to meet a growing population and to promote construction and economic growth. Stalled schemes due to economically unviable affordable housing requirements result in no development, no regeneration and no community benefit. Reviewing such agreements will result in more housing and more affordable housing than would otherwise be the case.
3. The Growth and Infrastructure Act inserts a new Section 106BA, BB and BC into the 1990 Town and Country Planning Act. These sections introduce a new application and appeal procedure 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.
4. The new application and appeal procedures do not, in any way, replace existing powers to renegotiate Section 106 agreements on a voluntary basis. The application and appeal procedure will assess the viability of affordable housing requirements only. It will not reopen any other planning policy considerations or review the merits of the permitted scheme.
5. Affordable housing obligations on sites granted in accordance with a Rural Exceptions Site policy are exempt from this procedure. Where the affordable housing obligation is linked to a planning permission which was granted in accordance with a rural exception policy, an application under Section 106BA or appeal under Section 106BC cannot be made.

Section 106BA - Application to Local Planning Authority

6. An application may be made to the local planning authority for a revised affordable housing obligation. This application should contain a revised affordable housing proposal, based on prevailing viability, and should be supported by relevant viability evidence. The local planning authority may prepare its own viability evidence or provide commentary on the evidence submitted in support of the application. Further guidance on procedures for applications, including the Mayor of London's role, is given in Annex B.

Section 106BC - Appeal to the Secretary of State

7. Where the local planning authority does not agree with the developer's revised proposal for affordable housing, or does not determine the application, Section 106BC provides a right of appeal to the Secretary of State. The viability evidence supporting the application should be submitted with the appeal to support the developer's assessment of a viable affordable housing requirement. The local planning authority may also submit evidence. Further guidance on procedures for appeals is given in Annex B.
8. If allowed, the outcome of a successful appeal would be a revised affordable housing requirement in the Section 106 agreement for three years, starting on the date when the appellant is notified of the appeal decision.
9. The purpose of this guidance is to provide an overview of what evidence may be required to support applications and appeals under Sections 106BA and 106BC. The guidance does not prescribe a methodology for viability assessment but reflects the differing approaches used in the industry.

2. Evidence

Viability Test

10. The test for viability is that the evidence indicates that the current cost of building out the entire site (at today's prices) is at a level that would enable the developer to sell all the market units on the site (in today's market) at a rate of build out evidenced by the developer, and make a competitive return to a willing developer and a willing landowner.
11. The developer will need to demonstrate to the planning authority, and to the Planning Inspectorate on appeal, that the affordable housing obligation as currently agreed makes the scheme unviable in current market conditions.
12. A viable affordable housing provision should be proposed. This should deliver the maximum level of affordable housing consistent with viability and the optimum mix of provision. The proposal may consider whether adjustments should be made to the affordable housing tenure and mix and, where relevant, phasing may also be considered. Timing and level of off-site affordable housing contributions may also be considered, as may any other aspect of the affordable housing requirement.
13. The developer will need to submit clear, up-to-date and appropriate evidence. Wherever possible, this should take the form of an open book review of the original viability appraisal and should clearly demonstrate, by reference to evidence, that the proposals are not viable in current market conditions. The "original viability appraisal" is that which is the most recently agreed by the local planning authority and developer.
14. In those cases where an original viability appraisal was not prepared prior to planning permission being granted, the developer must clearly demonstrate through evidence why the existing scheme is not viable. A proposal to bring the scheme into viability should be submitted.
15. At appeal, if the developer is unwilling to proceed on an open book basis, general evidence of changes in costs and values since permission was granted can be submitted; however developers must consider whether this approach will provide sufficient evidence for the Planning Inspectorate to make a robust, impartial decision on viability.

3. Form of Viability Evidence

16. In most cases, developers should not be required to provide completely new viability appraisals to support applications and appeals under Sections 106BA and 106BC. The starting point for reassessing viability will be a review of the original viability appraisal (if any) at the time planning permission was granted (and any subsequent appraisals carried out in relation to any modifications of the relevant Section 106 agreement), in whatever form it was carried out.
17. A revised appraisal that underpins the case for reduced affordable housing provision should be prepared in the same form using a methodology as close as reasonably possible to that provided in relation to the application for planning permission, or (if relevant) the most recently agreed modification, whichever is later. Any changes in the methodology should be explained and justified.
18. The revised appraisal should be based on current market conditions. It should make the same policy assumptions and should assume that all other obligations remain the same as the permitted scheme. Sections 106BA and 106BC do not provide an opportunity to reopen policy considerations or requirements for planning obligations, other than for affordable housing. The revised appraisal may consider changes in revenues and costs which are associated with the delivery of planning obligations, for example changes in housing grant availability for the site.
19. The revised appraisal should identify those relevant variables where there is new evidence and where this impacts on viability. It should be clear where evidence has been revisited for the revised appraisal and why.
20. The local planning authority may undertake its own viability appraisal with supporting information and submit this as evidence at appeal. This may include any conditional elements on the proposed revised affordable housing obligations.
21. Annex A provides a summary of relevant key variables. This is not intended to be an exhaustive list to be followed in all cases but will vary significantly between schemes and locations. The Annex therefore indicates key areas which may be relevant.

4. Delivery

22. Revised affordable housing obligations, in line with current market conditions and based on the test of viability in this Guidance, should incentivise developers to start building.
23. Section 106BC ensures that if an Inspector modifies an affordable housing obligation on appeal, that modification is valid for 3 years. If the development is not completed in that time, the original affordable housing obligation will apply to those parts of the scheme which have not been commenced. Developers are therefore incentivised to build out as much of their scheme as possible within 3 years. It will not be sufficient to commence one part of the development to secure the revised affordable housing obligation for the whole scheme. If developers are concerned about the viability of their scheme at the end of the 3 years, they can seek to modify the agreement again. This could be done through voluntary renegotiation or by making a new application under Section 106BA.
24. This 3 year period, and the need to secure as much development as possible in that period, should incentivise developers to build out. Local planning authorities may wish to make similar time-limited modifications or conditions when considering an application under Section 106BA.
25. It should be noted that Sections 106BA and 106BC prevent the outcome of the first application in relation to a planning obligation being more onerous for the applicant than the existing obligation. Care should be taken to ensure revised affordable housing requirements do not exceed the overall level of obligation required under the original agreement. Care must also be taken to ensure that any modified requirement meets the statutory and policy tests for planning obligations.
26. In the event of an appeal, the Inspector will consider all the evidence before them. Should the Inspector issue a new affordable housing obligation for a 3 year period, it will include provisions to reapply the requirements of the original agreement for the part of the site that remains uncommenced.

ANNEX A – Viability Reappraisal: potentially relevant key variables

Table A (below) is intended to identify variables which could be relevant in reassessment of viability. These should only be considered if there is clear evidence that there have been changes in the original assumptions on which viability was assessed and this is now impacting on overall viability of the scheme. Where there has been no material change to a variable, it should not be necessary to revisit the original evidence.

Table A: Summary of potentially relevant key variables

Subject	Potentially relevant key variable
Land Value	<p>The agreed land value in the original appraisal should be used, unless the site has been acquired since and evidence is provided of the purchase price. If there was no original appraisal the market value at the date of the original permission should be used.</p> <p>Any purchase price used should be benchmarked against both market values and sale prices of comparable sites in the locality. Any significant overbid on the appeal site should be disregarded. Where market value is used, it should have regard to the development plan policies and all other material planning considerations, including planning and affordable housing obligations and disregarding that which is contrary to the development plan, whilst providing competitive returns to a willing landowner and a willing developer to enable the development to be deliverable.</p> <p>As both purchase price and market value address landowner profit, this should not otherwise be included in the appraisals.</p>
Related Land Costs and Fees	<p>Incurred relevant costs and fees, evidenced by reference to invoices, receipts, and other sources, are to be preferred, but clear justification will required if they exceed evidence on standardised figures These may include agents fees, legal fees, site promotion and other costs and fees, where appropriate.</p>
Site Investigation, Preparation and Infrastructure Costs	<p>Site specific evidence (reported cost estimates or invoices) should be provided by applicant/appellant and benchmarked against comparable market evidence, where relevant. These costs may include demolition; ecological, geotechnical, archaeological and other site investigations (including those undertaken before site purchase or for planning); basic on-site infrastructure and services. These may need to be verified by independent cost consultants. In some cases these will be reflected in land value and care will need to be taken to avoid double counting.</p>
Abnormal Construction	<p>Abnormal costs are dependent on site specific circumstances and may</p>

Subject	Potentially relevant key variable
Costs	<p>include decontamination, land stabilisation and land forming or raising.</p> <p>Any abnormal costs identified since the original appraisal may be included in the appraisal, and the applicant/appellant should provide site specific evidence (cost estimates or invoices), benchmarked against comparable evidence, where relevant and available. These may need to be verified by independent cost consultants. In some cases these will be reflected in market value and care will need to be taken to avoid double counting.</p>
Building Costs	<p>Cost estimates and known tender price evidence in the baseline appraisal should be updated. Site specific evidence based on reported cost estimates or invoices should be provided by the applicant/appellant and assessed against comparable market evidence. Where comparability is at issue, these can be benchmarked against the most detailed possible sections of Building Costs Information Service (BCIS) or other appropriate data sets or verified by independent cost consultants. BCIS data is expressed as cost per sq m of Gross Internal Area (GIA) requiring adjustment to Net Internal Area (NIA) used to estimate Gross Development Value. BCIS data excludes external areas (car parking, landscaping etc) which may need to be added.</p> <p>The cost impacts of any changes to legislation and Building Regulations since the baseline appraisal scheme can be taken into account.</p>
Taxes and Duties	<p>Stamp duty and VAT on site acquisition and sales should be included at the appropriate rate.</p> <p>Any changes in taxes and duties between the date of the baseline appraisal and the date of the application under Section 106BA should be taken into account.</p>
Planning and other Obligations	<p>The costs of delivering planning conditions or obligations in planning and highways agreements should be included and, if relevant, updated in accordance with the terms of the agreement. The revised costs of delivery of any obligations may be taken into account, if supported by appropriate cost evidence.</p>
Costs of Capital / Debt Finance	<p>The cost of borrowing money and related arrangement fees to fund the site acquisition, site preparation, land holding costs, construction and all major capital costs and fees may be included. Some developers fund these costs in whole or part from their own capital reserves.</p> <p>Supporting evidence from the applicant/appellant will be required to justify either the known borrowing costs and/or any assumed costs, when the developer intends to finance the scheme from their own funds. Debt finance costs can include incurred loan arrangement costs, if evidenced.</p> <p>Any differences from the original appraisal should be demonstrated and explained.</p>

Subject	Potentially relevant key variable
Grants	<p>Changes in housing grant availability can be an important factor in scheme viability.</p> <p>The revised appraisal should include current assumptions on housing and other grant availability and highlight changed circumstances and assumptions from those in the original appraisal.</p>
Gross Development Value (GDV)	<p>For market sales and private rented housing, viability appraisals should be supported by scheme specific evidence from comparable development schemes, taking into regard type of property, location and delivery. Appraisal comparables should be “achieved”, rather than “asking” prices and exclude marketing incentives (e.g. fit out, payment of stamp duty). Rents should be passing rents from recent letting and exclude service charges. Where comparability is at issue, these can be benchmarked against published sources e.g. Land Registry, Valuation Office Agency or agents’ market reports.</p> <p>For affordable housing (included intermediate tenures), the appraisal should, where relevant, include the lump sum payment to the developer by the landlord (typically a housing association) that is the capitalised net rent. Evidence should be provided to support this figure.</p> <p>Where the affordable housing is not going to be sold to a registered provider or no evidence of sale price can be provided, gross development value of the affordable housing should be appraised, to compare capitalised net rent with development cost.</p> <p>Sales prices for market housing, equity sharing and discount market sales in the revised appraisal should be those current at the time of the appraisal and assumed to remain static throughout all phases of the development programme.</p>
Sales Costs	<p>Costs are subject to local variation; specific evidence from comparable development schemes either in the locality or undertaken by the developer elsewhere is preferred.</p>
Developers’ Return	<p>Profit levels (developers’ return) varies significantly between projects to reflect the size and risk profile of the developer and the risks related to the development project.</p> <p>Any changed assumptions on developer profit (before interest and tax) since the original appraisal will need to be justified and evidenced from comparable schemes or data sources such as IPD Development Return Index. However, the local planning authority and Planning Inspectorate may also want to reference existing financial appraisal guidance where it provides ranges for typical profit levels.</p>
Landowners’ Return	<p>This is addressed in the land purchase price or market value and does not need to be otherwise included in the appraisal.</p>

Subject	Potentially relevant key variable
Contingency	Where a contingency allowance was included in the original appraisal, this may be carried forward into the new appraisal, but may be reduced where costs and other information is more certain. The introduction of new contingency provisions at application or appeal is to be discouraged.

ANNEX B – Procedural Note: applications and appeals

Procedures for applications to the Local Planning Authority under Section 106BA

1. The application to the local planning authority should be made in writing. There is no prescribed form for these purposes. The application should identify the address or location of the land to which the obligation relates and state the nature of the applicant's interest in the land. It should include a status report on the progress of the development. The application should include a copy of the original Section 106 agreement.
2. In all cases, applicants should submit evidence that the affordable housing element of the existing Section 106 agreement means that the scheme is unviable, and include a proposal for the maximum level of affordable housing consistent with viability and the optimum mix of provision. This should clearly identify the nature and form of the proposed change. Evidence, including that provided for the original Section 106 agreement, should be provided in accordance with this Guidance to support the application.
3. The applicant must provide evidence that all signatories to the Section 106 agreement have been notified of the application. Where it is not possible for all of the signatories to be notified, the applicant must publicise the application in the local area.
4. The local planning authority should notify the applicant of receipt of the application. It is for the local planning authority to decide how to publicise the application but, in accordance with the limited scope of these applications, publicity is expected to be limited and proportionate. The local planning authority has 28 days in which to make a determination under Section 106BA unless both parties agree, in writing, to extend this period.
5. The determination should set out, in writing, any variation to the affordable housing obligation and give reasons for this decision. In the event of a determination that a variation to the affordable housing requirement is not agreed, reasons should be clearly given.

London: Applications of Strategic Importance

6. Under Section 106BB, the Mayor of London must be notified of applications made under Section 106BA relating to developments of potential strategic importance on which he was consulted. The Mayor must notify the London Borough whether he wishes to make representations on the application within 7 days. He has a further 7 days to submit evidence, unless a longer period is agreed in writing with the

Borough. The Borough has an additional 7 days to issue a determination where Section 106BB applies.

Procedures for Appeals to the Planning Inspectorate under Section 106BC

Principles

7. The Government will be consulting shortly on a legislative procedure for the new Section 106BC appeals.
8. In the meantime, this annex sets out **interim** procedures to be followed by the Planning Inspectorate in the event of an appeal under Section 106BC.
9. Appeals under Section 106BC will be governed by the following principles:
 - they will only consider the issue of viability; there will be no opportunity for decision-makers (or third parties) to reopen questions around the overall acceptability of development proposals;
 - there will be an expectation that if parties provided evidence at the application stage, they will not seek to rely on new evidence on appeal;
 - there will be an expectation that appellants will set out their case fully at the outset of their appeal, and that no further information should need to be requested from them;
 - only signatories to the existing Section 106 agreement will be involved, except in exceptional circumstances;
 - all parties will communicate by electronic means wherever possible.

Appeal Procedures

Submitting an appeal: information required

10. Any appeal under Section 106BC must be made to the Planning Inspectorate in writing. This must be accompanied by a copy of the existing Section 106 agreement and a full copy of the application which was sent to the local planning authority under Section 106BA. Where relevant, a copy of the local authority decision on the application made under Section 106BA must also be included.
11. At the same time as submitting this information to the Planning Inspectorate, appellants must also send a copy of the same information to the local planning authority, the Mayor of London (where Section 106BB applies) and any other signatories to the existing Section 106 agreement, informing them that the appeal is being made. Where it is not possible to send this to all the other signatories, the appellant must publicise the appeal in the local area. The submission to the Planning Inspectorate must include a list of the addresses of all those who have been sent copies, and a copy of any publicity. Email communication is strongly preferred.

Procedure

12. The expectation is that the majority of Section 106BC appeals will be determined following the written representations procedure. The Planning Inspectorate will decide on the appropriate appeal route. It will inform the appellant, local planning authority and other signatories to the existing Section 106 agreement as soon as possible after receipt if they consider that the circumstances of the case warrant a procedure other than written representations. Where a hearing is determined to be necessary, this will take the form of a simple meeting between the inspector and the parties and would be expected to happen within a very short period.
13. The Planning Inspectorate will also determine which parties should be involved in the appeal, and so entitled to make representations. Due to the focus on the Section 106 agreement (rather than the planning permission), it is expected that in the vast majority of cases it will be appropriate to limit representations to those from the local planning authority, any other signatories to the Section 106 agreement and the Mayor of London (where Section 106BB applies). The Planning Inspectorate will retain the discretion to involve other parties where it is absolutely essential to do so in the interests of fairness.

Appeals determined by written representations procedure

14. The local planning authority and other Section 106 signatories will be invited to submit evidence within two weeks of being notified of the validity of the appeal by the Planning Inspectorate. The local authority's evidence should include an officer's report, any relevant committee resolutions, any relevant expert advice and the local authority's own proposals for viable affordable housing provision – if this differs from the existing obligation.
15. Upon receipt of all written representations, the Planning Inspectorate will have 28 days to issue a decision notice.
16. Table B (overleaf) sets out the anticipated timing for cases determined by written representations.

Table B: Indicative timetable for written representations appeals

Action	Timing
Appellant submits their appeal to the Planning Inspectorate and copies it to all signatories of the existing Section 106 agreement (and the Mayor of London, where Section 106BB applies)	
The Planning Inspectorate confirms that the appeal is valid and writes to the appellant, local planning authority, Mayor of London (where Section 106BB applies) and all signatories to the existing Section 106 agreement, seeking representations from all except the appellant	As soon as possible after receipt of appeal request
Local planning authority, Mayor of London (where Section 106BB applies) and all signatories to the existing Section 106 agreement, wishing to make written representations submit these to the Planning Inspectorate by email *	2 weeks after request from Planning Inspector
The Planning Inspectorate issues a decision notice, copied to all parties who submitted written representations or who requested to be informed of the outcome	4 weeks from receipt of all representations

* Where the Planning Inspectorate determine that clarification of evidence or additional evidence is required from any party to enable a determination to be made, this may be sought. If a hearing would allow a faster or more effective resolution, the Planning Inspectorate may arrange one as set out below. Any additional information required should be submitted within two weeks of request.

Appeals involving a meeting (hearing)

17. Where a hearing is to be held, a bespoke timescale would be agreed between the parties but the time period would only be extended for the length of time necessary to hold a simple face to face meeting to discuss matters specifically identified by the parties or the Inspector.
18. The Planning Inspectorate would undertake to hold such a meeting as soon as possible, and would expect the parties to make themselves available at short notice to attend. The Planning Inspectorate would issue the decision notice no more than 4 weeks after the event.

Inquiries

19. Inquiries will only be necessary in very rare cases where formal cross-examination is essential to establish the robustness of evidence.