

Delivery of Affordable Housing through Section 106 Agreements



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Introduction

Provision of affordable housing through S106 Agreements is a vital way of both developing mixed communities and helping to provide new homes for people on low to average incomes.

The use of S106 Agreements to secure affordable housing is not new. Nationally more than half of all new affordable housing provided by local authorities and Registered Social Landlords (RSLs) is developed on S106 sites and 75% of residential developments of more than 10 units are now subject to S106 Agreements¹.

Within the East of England the Regional Spatial Strategy indicates an expectation that 35% of all new homes should be affordable. This will require a step change from the current figure of 18%² affordable housing provision.

This guide, commissioned by the London Commuter Belt authorities and funded by Inspire East, seeks to provide a compendium of good practice in the application of S106 Agreements to affordable housing. Key messages which stand out include:

- The importance of developing robust and clear policies which have been subject to financial appraisal and are readily accessible on the local authority website
- A protocol which sets out how the local authority will handle S106 applications can considerably ease negotiation with developers
- Member involvement in developing affordable housing policies which are realistic and take account of local circumstances is vital.

We have been assisted in preparing this guide by local authorities from across the East of England and by the Housing Corporation Eastern Region. We thank them for their assistance and co-operation and offer particular thanks to our Steering Group from the London Commuter Belt authorities and Inspire East. Responsibility for mistakes and omissions is ours.

¹ Expanding Choice increasing the supply of affordable housing' HBF July 2007

² East of England Annual Monitoring Report 2004/05

Executive Summary

Local authorities throughout the East of England are now actively involved in negotiating S106 Agreements to provide affordable housing. S106 Agreements are one of the major sources of affordable housing provision and an increasing proportion of all new development is now subject to S106 Agreements which include an element of affordable housing.

This guide seeks to set out a series of steps which local authorities should take to deliver S106 Agreements which conform with policy and provide affordable housing to meet local need. It is divided into seven sections:

- National and regional policy context
- Financial viability and mix
- Access to and management of affordable housing
- Internal communications within the local authority
- Developing an effective negotiating process
- Partnership working
- Monitoring.

Key messages in each section are as follows:

Providing clear policy guidance

- A clear, thorough policy supported by evidence of need, a housing land availability study and a robust viability appraisal is a good starting point for negotiation.
- The type and mix of affordable homes sought by the local authority should also be supported by evidence of need.
- Affordable housing targets within policy should be set so as to be financially achievable.
- Local policies should reflect the requirements of PPS3 and the Government's Delivering Affordable Housing Policy Statement.

Viability, mix and use of public funding

- Local authorities should make a full assessment of viability, taking into account the full range of planning obligations.
- Local authorities should weigh up the relative merits of getting fewer larger units or more social rented units compared with simply seeking the largest possible number of affordable units. Financial viability appraisal will help them to do this and to demonstrate to members the trade-offs involved.
- Early dialogue with the Housing Corporation in order to establish the availability of grant and how it can add value to affordable housing schemes is essential
- Clear guidance on local authority priorities and on the availability of grant and how it can add value should be provided (and kept up to date) through SPD or the Housing Strategy.
- A tariff or formal set of charges is a valuable way of achieving clarity at policy level which should aid negotiation of individual S106 Agreements.
- The use of cascade mechanisms can help resolve uncertainty over provision of affordable housing on long-term larger sites when limited information on the availability of grant is available.

- Cascade mechanisms should include provision for review to take account of variations in grant funding and changes in house prices and development costs
- Where local authorities take financial contributions they should be able to demonstrate that these will contribute to the development of mixed communities in the area.
- Local authorities need to set out clearly the circumstances which they consider appropriate for off-site provision or the collection of a payment in lieu.
- Developer contributions should be broadly equivalent to the cost to the developer of provision of affordable housing on site.
- There should be a plan for spending developer contributions and this should be monitored and recorded.
- The proposed Community Infrastructure Levy could have implications for the delivery of affordable housing and authorities will need to keep abreast of emerging government guidance on its implementation.

Access to and management of affordable housing

- The use of an occupancy cascade within the S106 Agreement can help meet RSL and lender concerns and safeguard against the situation where an LCHO or social rented property is standing vacant.
- Another mechanism for meeting mortgage lenders concerns is to include a clause within the S106 Agreement specifying that normal occupancy or staircasing restrictions do not apply where a property is repossessed. A clause to this effect can be found at para 4.2.3 of the Law Society Model S106 Agreement.
- The rules governing the retention in perpetuity of affordable housing are complex
- Different rules apply to schemes in urban and rural areas and to schemes with and without public funding. These are summarised in Table 11.1.

Internal communications

- Regular liaison between departments is important for smooth running affordable housing negotiation.
- A clearly stated affordable housing policy and a steer in the LAA as to the importance of affordable housing will help ensure that all departments know the priority to be given to this issue.
- A formal protocol for negotiation with developers, which is clear about which departments will be involved and at what stage in the process is one way of clarifying the situation and providing continuity when staff move on.
- Members should be fully involved in setting affordable housing policies.
- Structures should be put in place which enable them to gain a good understanding of options and techniques for the delivery of affordable housing.
- Development of a cross-party consensus on affordable housing issues can be useful for delivering a long-term clear steer on local authority policy.

Developing an effective negotiating process

- A formal protocol for negotiation with developers, which is clear about which departments will be involved and at what stage in the process is very helpful.
- Use of pre-application discussion is widely considered to be good practice,
- The use of standard clauses or Agreements provides a useful starting point in discussions with the developer.
- Where local authorities have established a standard agreement or set of clauses through custom and practice, it is useful if these can be brought together in a single place and made available to the development industry.
- It is good practice to set out (in a protocol or supplementary guidance) the stage a S106 agreement should have reached before the application goes to committee.

Partnership working

- Local authorities cannot prescribe which affordable housing providers developers should work with in new housing schemes.
- However, it is still important that local authorities and affordable housing providers maintain close working relationships and local authorities can still identify their preferred partners.
- It is important that the interests of affordable housing providers are taken into account in policy development and scheme specific negotiations, whether there is a known affordable housing provider involved in a scheme or not.
- Protocols which guide the relationships between local authorities, affordable housing providers and developers can be a useful good practice tool.
- There are significant benefits in establishing good working relationships with the development industry.
- In building relationships with developers, authorities need to recognise the wide range of developers and landowners becoming involved with S106 Agreements;
- Planning Performance Agreements offer one way of structuring the negotiation process.

Monitoring

- **Key indicators which should be monitored include:**
 - The number of units granted planning permission by tenure of affordable housing and provider.
 - The number of affordable units completed and their source of funding.
 - Financial contributions held, received and spent.
 - The value of free/discounted land received.
 - Affordable housing provided in rural settlements of less than 3,000 people.
 - Affordability of the housing provided?
 - Standard and location (integration) of the accommodation provided?
 - Provision of affordable housing by size of site (particularly important in the case of lowered thresholds).
 - Split between 100% affordable and mixed tenure schemes.
 - Split between urban and rural provision (x tenure).
 - Provision on exceptions sites (x tenure).
- **The information provided should be regularly reported to members.**
- **There should be a dedicated officer with responsibility for monitoring affordable housing provision.**

Providing Clear Policy Guidance

1 National and Regional Policy Context

The basis for successful negotiation is clear planning policies at local level that reflect relevant Government guidance, and regional policies (particularly those set out within the Regional Housing and Spatial Strategies). Local policies need to be clear in spelling out the authority's affordable housing requirements, targets and thresholds.

1.1 National Policy and Guidance

Planning Policy Statement 3: Housing (PPS3) underpins the delivery of the Government's strategic housing policy objectives at national level. It is available online at:

www.communities.gov.uk/documents/planningandbuilding/pdf/planningpolicystatement3

PPS3 should be read together with the Government's Affordable Housing Policy Statement. Delivering Affordable Housing Policy Statement, Communities and Local Government, November 2006. This is available online at:

www.communities.gov.uk/documents/housing/pdf/152897

PPS3 makes several changes from its predecessor PPG3. In particular it sets out the circumstances in which local authorities can seek lower thresholds than the norm of 15 dwellings and introduces allocated rural exceptions sites. Annex B also clarifies the definition of affordable housing.

The introduction of lower thresholds is likely to involve many more landowners and developers (including individual householders seeking to develop small sites) in the provision of affordable housing. Clear guidance on local authority affordable housing policy will be very important if policy is to be implemented successfully.

Thresholds

The national indicative minimum site size threshold is 15 dwellings. However, Local Planning Authorities can set lower minimum thresholds, where viable and practicable, including in rural areas. This could include setting different proportions of affordable housing to be sought for a series of site-size thresholds over the plan area. Local Planning Authorities will need to undertake an informed assessment of the economic viability of any thresholds and proportions of affordable housing proposed, including their likely impact upon overall levels of housing delivery and creating mixed communities.

Allocated rural exceptions sites

Where viable and practical, Local Planning Authorities should consider allocating and releasing sites solely for affordable housing, including using a **Rural Exception Site Policy**. This enables small sites to be used, specifically for affordable housing in small rural communities that would not normally be used for housing because, for example, they are subject to policies of restraint.

PPS3 para 29 (CLG 2006)

Many local authorities have introduced thresholds lower than 15 units:

Malvern Hills District Council

In Malvern town, the Council requires up to 50% of units to be affordable on sites of 0.5 hectares and over or for sites of 15 dwellings or more. However, in the remainder of the District a lower minimum site threshold is set: 0.2 hectares or over, or 5 dwellings or more.

<http://www.malvern.whub.org.uk/home/mhc-planning-dpc-ldf-spg>

Harrogate Borough Council : Local Plan Policy : Good Practice identified by IDEa

The local plan adopts a range of thresholds across the district. The starting point in negotiations for an affordable housing contribution is 50 per cent. This proportion may then be reduced if such a figure is likely to make the scheme financially unviable.

On previously developed sites covering an area of 0.3 hectares or greater or comprising 10 or more dwellings, the proportion of affordable housing sought rises to 60 per cent. This is considered an 'exceptional substantial planning benefit'.

In the Harrogate example, land scarcity and high values are considered justification for setting such a low threshold in this largely rural district.

Definition of affordable housing

Affordable housing is:

'Affordable housing includes social rented and intermediate housing, provided to specified eligible households whose needs are not met by the market. Affordable housing should:

Meet the needs of eligible households including availability at a cost low enough for them to afford, determined with regard to local incomes and local house prices.

Include provision for the home to remain at an affordable price for future eligible households or, if these restrictions are lifted, for the subsidy to be recycled for alternative affordable housing provision'.

Social rented housing is:

'Rented housing owned and managed by local authorities and registered social landlords, for which guideline target rents are determined through the national rent regime. The proposals set out in the Three Year Review of Rent Restructuring (July 2004) were implemented as policy in April 2006. It may also include rented housing owned or managed by other persons and provided under equivalent rental arrangements to the above, as agreed with the local authority or with the Housing Corporation as a condition of grant.'

Intermediate affordable housing is:

'Housing at prices and rents above those of social rent, but below market price or rents, and which meet the criteria set out above. These can include shared equity products (e.g. HomeBuy), other low cost homes for sale and intermediate rent.'

These definitions replace guidance given in Planning Policy Guidance Note 3: Housing (PPG3) and DETR Circular 6/98 Planning and Affordable Housing.

The terms 'affordability' and 'affordable housing' have different meanings. 'Affordability' is a measure of whether housing may be afforded by certain groups of households. 'Affordable housing' refers to particular products outside the main housing market.

Annex B PPS3 (CLG 2006)

Community Infrastructure Levy:

The Government has proposed a Community Infrastructure Levy (CIL) which would allow local authorities to opt to replace wider S106 planning obligations with a standard charge. More detail is provided in a consultation paper:

www.communities.gov.uk/publications/planningandbuilding/infrastructurelevyguidance

The Government's has stated that its preference is for negotiated planning obligations to continue to enable affordable housing to be delivered on site, to achieve mixed communities. There must be no reduction in affordable housing contributions because of CIL. Initially affordable housing will not be included within the scope of what may be funded by the Levy, but it will be included in the definition of infrastructure so that it could be part of the CIL if evidence subsequently shows this to be necessary.

1.2 Regional Policy and Guidance

PPS3 requires that **Regional Spatial Strategies** (RSS) should set out the regional approach to addressing affordable housing needs, including the affordable housing target for the region and each housing market area. The East of England Plan or RSS sets out the regional strategy for planning and development in the East of England to the year 2021. It covers economic development, housing, the environment, transport, waste management, culture, sport and recreation, mineral extraction and more. The RSS is technically still in draft form but publication of the adopted East of England Plan is anticipated in early 2008. It has a chapter on Housing, available to view online at:

www.goe-consult.limehouse.co.uk/portal/rss/rss

Policy H3: Affordable Housing

Within the overall housing requirement in Policy H 1 'Regional Housing Provision 2001 to 2021', Local Development Documents should set appropriate targets for affordable housing taking into account:

- the objectives of the RSS
- local assessments of affordable housing need prepared in accordance with Government guidance
- the need where appropriate to set specific, separate targets for social rented and intermediate housing
- housing market considerations
- the Regional Housing Strategy.

At the regional level, delivery should be monitored against the expectation that some 35% of housing coming forward as a result of planning permissions granted after the adoption of the RSS are affordable.

East of England Plan

- **Local policies should reflect the requirements of PPS3 and the Government's Delivering Affordable Housing Policy Statement.**
- **They should also take into account the expectations set out in the RSS.**

2 Local Policy

Clear policy guidance is essential to provide a steer to developers and landowners about the priority which the local authority attaches to affordable housing provision and form of the affordable housing it wants to secure. Without clear and comprehensive policies it is much more difficult to negotiate a S106 agreement.

Government has set out the main issues which local planning authorities should cover in their Local Development Documents:

- **Set an overall (ie plan-wide) target** for the amount of affordable housing to be provided. It should also reflect an assessment of the likely economic viability of land for housing within the area.
- **Set separate targets for social-rented and intermediate affordable housing** where appropriate.
- **Specify the size and type of affordable housing** that is likely to be needed in particular locations and, where appropriate, on specific sites.
- **Set out the range of circumstances in which affordable housing will be required.** The national indicative minimum site size threshold is 15 dwellings. However, local planning authorities can set lower minimum thresholds, where viable and practicable, including in rural areas. This could include setting different proportions of affordable housing to be sought for a series of site-size thresholds over the plan area.
- **Set out the approach to seeking developer contributions** to facilitate the provision of affordable housing. In seeking developer contributions, the presumption is that affordable housing will be provided on the application site so that it contributes towards creating a mix of housing. However, where it can be robustly justified, off-site provision or a financial contribution in lieu of on-site provision (of broadly equivalent value) may be accepted as long as the agreed approach contributes to the creation of mixed communities in the local authority area.

PPS3 para 29 (CLG 2006)

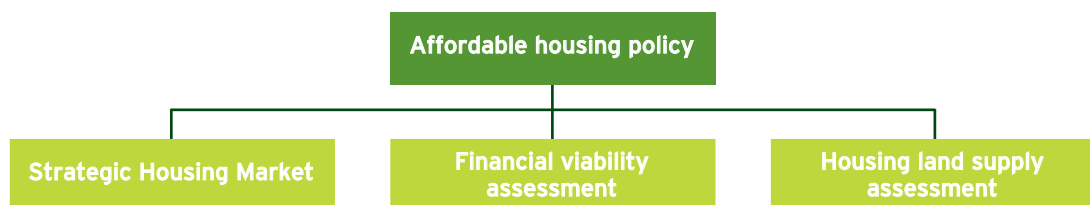
Government indicates that specific rural policies should also be considered:

Local authorities also need to consider whether they should include Rural Exception Site Policies which allocate and releasing sites solely for affordable housing. Rural exception sites should only be used for affordable housing in perpetuity. A Rural Exception Site policy should seek to address the needs of the local community by accommodating households who are either current residents or have an existing family or employment connection.

PPS3 para30 (CLG 2006)

In preparing their affordable housing policy local authorities should have regard to:

- Evidence of need³
- Financial viability (taking into account other planning obligations).
- Land supply⁴ (which will help determine thresholds).



Full consideration of these factors will enable local authorities to prepare policies which are realistic and deliverable and which cover the core issues about affordable housing. These include:

- Evidence of housing need
- A definition of affordable housing
- Information on site thresholds
- Affordable housing targets
- Affordability of the units
- Guidance on the use of public subsidy (Social Housing Grant)
- Type and tenure of affordable housing required
- Size of units required
- Pepper-potting
- Design quality and standards
- Phasing of the affordable units
- Long term affordability
- Dealing with issues about viability
- Form of developer contribution
- Commuted sums and off-site provision.

³ Strategic Housing Market Assessments will be central to demonstrating evidence of need. Government guidance outlines appropriate methodologies for assessing housing need in strategic housing market assessments, available online at: www.communities.gov.uk/publications/planningandbuilding/strategichousingmarket

⁴ Strategic Housing Land Availability Assessments will provide robust background information on land supply. See Strategic Housing Land Availability Assessments Practice Guidance (CLG 2007), available online at: www.communities.gov.uk/documents/planningandbuilding/pdf/399267

The London Commuter Belt authorities have developed a Directory which summarises the affordable housing policies of all the member authorities and identifies preferred development partners. These will form the starting point for negotiations with developers.

www.lcbhousing.org.uk

The preparation of Local Development Documents has proved to be a long process and many local authorities are still reliant upon affordable housing policies contained in historic local plans. Some authorities have turned to the draft Regional Spatial Strategy and the affordable housing target it sets out as their starting point for negotiation. Others are relying on Supplementary Planning Guidance or informal briefing notes to developers. The status of these documents will vary depending on the level of consultation involved in their preparation and whether adopted as council policy.

- **A clear policy on the provision of affordable housing is essential.**
- **It should be based on evidence of need, land supply and financial viability and should provide guidance on the percentage and mix of affordable housing sought and the appropriate thresholds, which may vary in different parts of the local authority area.**

Financial Viability and Mix

3 Development Economics and Implementation

Planning Policy Statement: Housing (PPS3) states that the economic viability of land for housing is one of the criteria that should be taken into account when assessing the suitability of sites for affordable housing (see below).

In Local Development Documents, Local Planning Authorities should:

Set an overall (i.e. plan-wide) target for the amount of affordable housing to be provided. The target should reflect the new definition of affordable housing in this PPS. It should also reflect an assessment of the likely economic viability of land for housing within the area, taking account of risks to delivery and drawing on informed assessments of the likely levels of finance available for affordable housing, including public subsidy and the level of developer contribution that can reasonably be secured.

PPS3 para29 (CLG 2006)

Economic viability of land for housing is affected by the availability of grant, the amount of affordable housing sought, the tenure of that housing, and the scale of other planning obligations such as contributions to education, highways, transport, community facilities, open space etc. Variations in any or all of these factors can have an impact on the economic viability of a scheme.

It is considered good practice to provide certainty on the financial terms on which the affordable housing is provided within the S106 agreement. This requires EITHER specification of the financial terms of the relationship between the developer and the Registered Social Landlord (RSL), OR guidance on the cost to the consumer of affordable housing. It is not advisable to specify both, because they are related and specifying one will automatically have implications for the other.

Where an authority wants to specify the financial terms for affordable housing, this should be discussed with affordable housing providers and with developers or their representatives (such as the House Builders Federation). It is important to ensure that these requirements make financial sense to the developer and the provider. They should normally be set out within a Supplementary Planning Document which is kept up to date in the light of changing house prices and affordability.

The remaining chapters in this section deal with different aspects of development economics. Sections 5, 6 and 7 consider some of the key factors which affect viability (scheme mix, grant and other planning obligations). Section 8 then considers how local authorities can deal with the situation where the availability of grant is uncertain and Section 9 covers financial contributions in lieu of on-site provision.

4 Mix and Types of Affordable Housing Sought

Whilst plan policy must include a target for total affordable housing provision government policy also allows local authorities to specify the type of affordable housing they want, in terms of both tenure and unit size and type. Given finite funding resources there can be difficult decision to be made about whether to seek a higher percentage of smaller units or a lower percentage of larger ones. Similarly there can be a choice between a larger number of intermediate units or a smaller number of social rented ones.

Local authorities are required to take account of financial viability, both with and without grant, in preparing their affordable housing policy.

In Local Development Documents, local planning authorities should:

Set separate targets for social-rented and intermediate affordable housing where appropriate.

Specify the size and type of affordable housing that, in their judgement, is likely to be needed in particular locations and, where appropriate, on specific sites. This will include considering the findings of the Strategic Housing Market Assessment and any specific requirements, such as the provision of amenity and play space for family housing, and, where relevant, the need to integrate the affordable housing into the existing immediate neighborhood and wider surrounding area.

PPS3 Para 29 (CLG 2006)

However the economics of individual sites and their suitability for different house types vary. Local authorities report that they can experience difficulties in agreeing a mix of units and tenure types. Most often this problem arises because there is a tension between getting the largest number of units (which would suggest a mix of 1 and 2 bed units for shared ownership) and getting homes which meet the most acute (and expensive) need, which would suggest a mix of 3 and 4 bed family houses for social rent.

“We try not to build one-beds, as these are not sustainable. We will accept less to get larger properties, so it is the numbers that give. There is no point having property that we cannot allocate.”

Local authorities need to weigh up different factors when deciding on the most appropriate tenure and size mix for new schemes. They need to take into account mixed community objectives along with the realities of development economics for schemes and the most up to date appraisal of local needs. There is no single best approach to this but it is important that decisions are carefully thought through and all realistic options are evaluated.

Where a policy decision has been taken (for instance that studio or 1 bed flats are not acceptable as affordable housing, or that a set proportion of 3 bed homes for social rent will be required on all new developments), this should be properly costed to demonstrate that it is financially achievable across a wide range of sites. The policy should be included in either policy or Supplementary Planning Documents so that developers know where they are starting from. If this means that a smaller proportion of affordable units would be acceptable guidance should be provided on what this proportion might be.

Mix, once agreed, should be specified in the S106 agreement, potentially subject to a cascade or other mechanism for dealing with uncertainty if the site is long-term and it is not clear whether or not Social Housing Grant will be necessary or available, (see next sections for fuller description).

- **Local authorities should weigh up the relative merits of getting fewer larger units or more social rented units compared with simply seeking the largest possible number of affordable units.**
- **Financial viability appraisal will help them to do this and to demonstrate to members the trade-offs involved.**
- **The type and mix of units sought by the local authority should also be supported by evidence of need.**

Table 5.1

Worked example: 0.25 hectare site target 50% affordable housing and a residual of £1.5m per hectare

0.25 hectare site	16 x 1 and 2 bed flats	8 x 2,3 and 4 bed houses	
Revenue	£2.1m	£1.45m	£1.5m
Cost	£1.5m	£1.1m	£1.1m
Scheme residual	£0.6m	£0.35m	£0.45m
Residual per hectare	£2.2m	£1.4m	£1.8m
Affordable Housing (units)	5 social rent 3 homebuy 50%	2 social rent 2 homebuy 50%	1.5 social rent 1.5 homebuy 37.5%

House prices 1 bed flat £150,000, 2 bed flat £200,000, 2 bed house £210,000, 3 bed house £235,000, 4 bed house £275,000.

5 Use of Grant

Grant availability often causes concern and problems for the viability of schemes. The Housing Corporation allocates grant to the regions and bids are then invited by the regional investment teams (working with the Regional Assemblies and local authorities) from Registered Social Landlords (RSLs) and other appropriate affordable housing providers (including certain developers who have met the Housing Corporation's criteria). [Because there is a shortfall of funding, the Corporation is increasingly concerned that public subsidy is not taken as automatically available]. While grant will be put into S106 schemes, this is only in order to provide clearly identified added value, as set out in the box overleaf:

Assessment of bids is carried out by Housing Corporation regional investment teams. Bids are assessed against four principal criteria, these are:

- Value in terms of public subsidy per home and per person housed.
- Quality judged using our Design and Quality standards.
- Deliverability with particular concern for planning status.
- Policy fit with national, regional and local strategies.

www.housingcorp.gov.uk/server/show/nav.00100f002

PPS3 requires local authorities to set out a clear policy for developer contributions to affordable housing through planning obligations. In some cases site viability will support delivery without grant: in others grant can work in combination with developer contributions to secure optimum outcomes. Grant is available where it will bring clear additional benefits, including:

- Additional affordable housing.
- A different mix of housing.
- Meeting higher design or environmental standards where the Housing Corporation believes them to be of benefit.

National Affordable Housing Programme Pre-Prospectus 2008-2011:

www.housingcorp.gov.uk/server/show/ConWebDoc.10781

Local authorities and their Registered Social Landlord (RSL) and developer partners need to make the case for grant and to be able to demonstrate that the scheme would not be viable without grant and/or that the injection of grant brings significant added value.

Early discussion with the Housing Corporation is essential when bringing forward schemes. As part of that process, it is good practice for local authorities to assess the economics of the scheme on the assumption that no grant will be available, and then compare the difference that grant could make if it became available.

“One of the main barriers to successful S106 affordable housing negotiation is the uncertainty of grant to guarantee the deliverability of schemes. To overcome this barrier the local authority is liaising with the Housing Corporation to identify and resolve funding issues.”

An economic appraisal toolkit is useful here and various models are available including the Housing Corporation’s own Economic Appraisal Toolkit⁵ and the Toolkit being developed for Commuter Belt authorities by Three Dragons. Such toolkits provide residual value calculations, with and without grant.

An alternative is to draw on expert advice to assess the impact of nil grant. The Housing Corporation provided clear guidance to local authorities in its National Affordable Housing Programme Pre-Prospectus 2008-2011.

⁵ www.housingcorp.gov.uk/eat

Supporting Bids for Grant with Economic Analysis

Bids will need to be accompanied by, in order of preference, either:

- An economic appraisal of the site and proposed level and mix of affordable housing using a recognised tool (such as the London Commuter Belt Toolkit, the GLAs Development Control Toolkit or the Housing Corporation EAT) and the values produced for grant required or
- A signed S106 agreement which offers different outcomes of affordable housing provision (levels and mixes) based on assumptions of different levels of grant (cascade Agreements) or
- Another form of validated assessment (e.g. confirmation from the local authority of the level of onsite affordable housing provision required by tenure and number based on a strategic housing market assessment).

National Affordable Housing Programme Pre-Prospectus 2008-2011:
www.housingcorp.gov.uk/server/show/ConWebDoc.10781

Local authorities can support this process by setting out the additional benefit they want to see from the use of grant and what their priorities are. For example, one local authority in the region states that:

It is assumed that schemes providing the minimum affordable housing requirements through S106 Agreements should be deliverable without grant. The Council will favourably support any bid for funding whereby the scheme is providing;

- Additional affordable housing units, where the affordable is more than the minimum 30% requirement.
- A larger proportion of rented units, where the % of rent to shared ownership is above the 75% basic requirement;
- A reasonable proportion of affordable houses as opposed to solely flats
- Higher design specifications, including e.g. level 4 and above of the Code for Sustainable Homes.
- Where the site may have significant additional local strategic relevance.

Value for money is assessed on the basis that the scheme is quantifiably providing additional benefits. For example, an enhanced design/quality specification, a greater proportion of affordable units, or a greater proportion of houses as opposed to flats or a greater proportion of social rent units as opposed to shared ownership.

Although few local authorities use their own resources to provide grant to HAs, it remains open to LAs to do so. The example of Broxbourne is given overleaf

Broxbourne BC has allocated £2.5 million a year for 2008-11 which it proposes to use in several ways:

- to fund schemes that are key to the council's affordable housing programme
- where additional social rented units can be secured
- to secure larger family homes
- to underwrite bids to the Housing Corporation that enable HAs to agree with developers to achieve the council's desired tenure mix.

The council's grant is normally only available to its preferred development partner HAs, which can influence the choice of HA for a S106 housing development.

- **Local authorities must enter into early dialogue with the Housing Corporation in order to establish the availability of grant and how they would like it to add value to affordable housing schemes in their area.**
- **Clear guidance on local authority priorities and on the availability of grant and how it can add value should be provided through SPD or the Housing Strategy.**
- **Where resources permit, LA grant can be a useful way of achieving the desired affordable housing mix.**

6 Cascade Mechanisms

Government recognises the use of funding 'cascade' arrangements to deal with uncertainty over the availability of grant⁶. Cascade arrangements can be especially useful with larger sites but can also be used for smaller developments where the availability of grant is required to bring forward a site for development.

Financial appraisal can be used to enable the S106 agreement to include provision for one level of affordable housing if grant is available and a different level or mix if grant is not available. This starts from the understanding that full grant is available for the affordable housing. It then provides for a variation in the number of affordable units and/or change in the mix of tenures between social rented and low cost home ownership if grant is not available or available on only a limited number of units.

Within the agreement there should be clear trigger points for reviewing the affordable housing requirement if grant is not forthcoming or less grant is available than expected.

London Policy on Cascades

Where the availability of grant is not known, S106 Agreements should include a cascade agreement, based on financial appraisal, which links the required affordable housing to the availability of grant. This should set the requirement for affordable housing should no grant be available and the output required should grant be available at a specified level or levels.

Cascade agreements should allow for affordable housing output to be increased if additional grant is made available.

The London Plan Supplementary Planning Guidance Mayor of London (2005)

⁶ See the guide 'Delivering Affordable Housing' which accompanies PPS3 (para 10)
<http://www.communities.gov.uk/publications/housing/deliveringaffordablehousing>

Table 6.1 below provides an example of a financial appraisal showing the effect of the availability of SHG. In the hypothetical example below if it was felt that £1.5m per hectare was an acceptable residual. 50% affordable housing without grant would not be financially viable and consideration would need to be given to a cascade permitting provision of 45% affordable units with 4 social rented units instead of 5. In this example, there is however no need for grant on all the affordable units and 50% affordable housing is achievable using grant only on the social rented units not on the HomeBuy ones.

[N.B. The residual value of £1.5m per hectare is purely hypothetical and should not be considered as a benchmark land value for a site or mix of use in the region.]

Table 6.1
0.25 hectare site of 16 x 1 and 2 bed flats, with and without SHG

5 social rent 3 homebuy 50% share	With full SHG	SHG rent only	No SHG	No SHG 4 social rent 3 homebuy
Revenue	£2.1m	£2.05m	£1.9m	£2.1m
Cost	£1.5m	£1.5m	£1.5m	£1,6m
SHG	£192,000	£144,000	Zero	Zero
Scheme residual	£0.6m	£0.55m	£0.35m	£0.45m
Residual per hectare	£2.2m	£2.0m	£1.4m	£1.8m

House prices 1 bed flat £150,000, 2 bed flat £200,000.

The use of cascades requires mechanisms to ensure they work for both the developer and the Registered Social Landlord (RSL). The trigger points for moving to the next stage of the cascade need to be explained and it must also be clear what the developer or RSL must do to justify a move from one stage to the next.

Where a cascade has been agreed within the S106 Agreement this does not affect the choice of RSL or other affordable housing provider. The cascade is merely a mechanism for deciding what will happen if grant is not available. The local authority and the developer may however have decided who is to be the preferred partner and this may be specified elsewhere in the S106 Agreement. Where the affordable housing provider is known they should be involved in drawing up the cascade and commenting on the method of viability appraisal used.

For large sites, with a number of development phases, the S106 Agreement can include review points when the amount and type of affordable housing can be reviewed in the light of the availability of grant at the time.

The Housing Corporation has provided guidance on the use of cascades in its joint publication with English Partnerships and ATLAS, *Cascades: Improving Certainty in the Delivery of Affordable Housing for Large Scale Development?*, available at:

www.englishpartnerships.co.uk/publications.htm#CascadesReport

Experience of Use of Cascades

Cascades are particularly useful for large scale developments where future grant availability is particularly uncertain. Breckland Council have used a cascade mechanism to set out alternatives for dwelling types and a mix of affordable housing tenures, between social rented and low cost home ownership (LCHO), depending upon the amount of grant received.

Housing needs vary over time and between locations. Needs in relation to house sizes, types and tenure are not static. The use of cascades allows flexibility at a later date and can mean that the units provided can reflect the greatest need. Cambridge City Council has used cascades in this way but has expressed some concerns about this issue. One of their concerns was that developers would attempt to exploit loopholes in cascade agreements and as a result the need to negotiate a 'watertight' cascade had the potential to lengthen S106 negotiations.

Cascades permit the resolution of conflicting positions leading to a commonly agreed solution. In the case of the Wixams the decision to use the cascade came soon after negotiations had stalled following changes in the grant regime. It was seen by the Council as a way out of a deadlock in that it offered something for both sides.

The use of cascades has helped achieve certainty of delivery, especially in large-scale regeneration sites, by allowing the S106 agreement to be finalised and the development to proceed uninterrupted. However, . . there is no consensus among local planning authorities as to whether cascades are the best option.

Cascades: Improving Certainty in the Delivery of Affordable Housing for Large Scale Development
(English Partnerships, ATLAS and Housing Corporation October 2007)
www.englishpartnerships.co.uk/publications.htm#CascadesReport

- **The use of cascade mechanisms can help resolve uncertainty over provision of affordable housing on long-term larger sites.**
- **Cascade mechanisms should include provision for review to take account of variations in grant funding and changes in house prices and development costs.**

7 Cascade Mechanisms

When assessing financial viability local authorities must take into account the full range of planning obligations which the site will have to bear. These include highways, education contributions, public open space, social infrastructure and a variety of other facilities without which the development could not take place. The cost of these planning obligations can be significant.

Local authorities may not be able to secure all the obligations they want and still deliver schemes which are financially viable and deliverable (this is particularly likely where there are alternative existing uses which do not require planning obligations or where there are very heavy site clearance or decontamination costs). It is important that authorities have a clear corporate view on their priorities and are realistic about what level of contribution can be achieved. Developers need to know this and the relative priority to be given to affordable housing if viability is under pressure and grant is limited. The importance attached to affordable housing delivery as set out in the Local Area Agreement is one way of spelling out where affordable housing sits in terms of the authority's priorities.

Some local authorities set out formally the schedule of planning obligations they will seek in the form of a menu of charges or overall tariff, often in a planning obligations supplementary planning document. Within this, there may be formal charges on a pro rata basis for some types of contribution such as highways or education, while other contributions may depend on the nature of the scheme. For example, contributions to public art or the public sphere may be restricted to mixed developments in city centres, while contributions to children's play areas will only be required on schemes with family homes.

Table 7.1

0.25 hectare site of 16 x 1 and 2 bed flats, with varying levels of other forms of planning obligations

5 social rent 3 homebuy 50% share	Planning gain £5,000 per dwelling	Planning gain £10,000 per dwelling	Planning gain £20,000 per dwelling
Revenue	£2.1m	£2.1m	£2.1m
Cost	£1.5m	£1.5m	£1.5m
SHG	£192,000	£192,000	£192,000
Scheme residual	£0.6m	£0.5m	£0.3m
Residual per hectare	£2.2m	£2m	£1.2m

House prices 1 bed flat £150,000, 2 bed flat £200,000.

The above table shows how increasing the level of planning obligations has a direct impact on residual values. In this notional example, as the level of planning obligations increases from £5,000 to £20,000 per dwelling, the residual value per hectare falls from £2.2m to £1.2m. This could have a detrimental impact on the viability of the site.

However, the residual value alone is not sufficient to assess whether the site is viable and can go ahead with the highest level of planning obligations. This is because all sites have an alternative use value (for brownfield sites, usually the value of the current use before redevelopment while for greenfield sites it is the agricultural land value) which must be weighed against the value of residential development. For instance, if the alternative use value for the land was £1.5m per hectare, the combination of a planning obligation requirement of £20,000 per dwelling and the affordable housing contribution would mean that the development was unlikely to come forward. The local authority, faced with this situation, would have to reconsider its priorities for the scheme.

The evidence from *The Use and Value of Planning Obligations in England* (Rowley et al, 2006) showed that affordable housing contributions amounted to more than half of the total value of planning obligations (£600m for affordable housing compared to £557m for all other obligations). This would seem to suggest either that the affordable housing is not necessarily sacrificed in favour of other obligations in order to make a scheme viable, or that the cost of affordable housing is higher than other obligations. The latter would mean that even if the total number of units delivered is less than the target, the value remains high as a proportion of the total developer contribution.

- **Local authorities must make a full assessment of financial viability, taking into account the full range of planning obligations.**
- **Affordable housing targets within policy should be set so as to be financially achievable.**
- **If this has been done then S106 Agreements should reflect policy.**
- **A tariff or formal set of charges is a valuable way of achieving clarity at policy level which should aid negotiation of individual S106 Agreements.**

8 Use of Developer Contributions

When assessing financial viability local authorities must take into account the full range of planning obligations which the site will have to bear. These include highways, education contributions, public open space, social infrastructure and a variety of other facilities without which the development could not take place. The cost of these planning obligations can be significant.

Local authorities may not be able to secure all the obligations they want and still deliver schemes which are financially viable and deliverable (this is particularly likely where there are alternative existing uses which do not require planning obligations or where there are very heavy site clearance or decontamination costs). It is important that authorities have a clear corporate view on their priorities and are realistic about what level of contribution can be achieved. Developers need to know this and the relative priority to be given to affordable housing if viability is under pressure and grant is limited. The importance attached to affordable housing delivery as set out in the Local Area Agreement is one way of spelling out where affordable housing sits in terms of the authority's priorities.

In seeking developer contributions, the presumption is that affordable housing will be provided on the application site so that it contributes towards creating a mix of housing. However, where it can be robustly justified, off-site provision or a financial contribution in lieu of on-site provision (**of broadly equivalent value**) may be accepted as long as the agreed approach contributes to the creation of mixed communities in the local authority area.

PPS3 para29 (CLG 2006)

As stated in PPS3, provision of affordable housing should normally be on site. However there may be circumstances where the local authority and developer may agree that off-site provision or a financial contribution is more appropriate than on-site provision. These circumstances could include:

- Where development is taking place in an area where there is already a high proportion of affordable housing.
- If the development is on a site which is particularly suited to flats and the local authority requirement is for family houses.
- If the development is in a very high value area and better value could be achieved through the procurement of affordable housing elsewhere in the borough.
- Where the affordable housing would be very expensive for occupiers - this situation often arises with apartment blocks with high service charges which apply equally to purchasers and occupiers of affordable housing.

For some authorities, the aim of mixing tenure on site in order to support the creation of mixed communities is a priority and it would be very difficult to justify commuted sums or off-site provision. But where housing needs are extreme, commuted sums or provision on another site may be able to deliver larger quantities of more suitable affordable housing than on-site provision. The key is land availability – and where the land market is very tight off-site provision may be preferable to a commuted sum because what is needed is land, not money. On the other hand, some authorities have used commuted sums to purchase market properties in order to meet housing need while still achieving more mixed communities.

The circumstances when an authority will consider taking a commuted sum or provision of the affordable housing on another site should be set out clearly in a local development document e.g. the authority's core strategy or relevant supplementary planning document. It is helpful for policy to explain that the authority will not accept a commuted sum or off-site provision simply because this is the developer's preference.

Where an authority has agreed to an off site contribution or payment in lieu, the next step is to identify the size of the (financial) contribution and that it is of broadly equivalent value to the cost of on-site provision (as PPS3 sets out). Financial viability appraisal can help to do this. Where an appraisal shows that the effect of affordable housing provision on site would be to reduce residual value by £X, then this sum can be sought from the developer by way of financial contribution.

Table 8.1

0.25 hectare site of 16 x 1 and 2 bed flats, showing potential developer contribution

5 social rent 3 homebuy 50% share	100% market housing	50% affordable 5 social rent 3 homebuy	37.5% affordable 3 social rent 3 homebuy
Revenue	£2.8m	£2.1m	£2.4m
Cost	£1.9m	£1.5m	£1.6m
SHG	Zero	£192,000	£132,000
Scheme residual	£0.9m (A)	£0.6m (B)	£0.7m (C)
Residual per hectare	£3.6m	£2.2m	£2.8m
Estimated developer contribution		£0.3m (A - B)	£0.2m (A - C)

House prices 1 bed flat £150,000, 2 bed flat £200,000.

Alternative mechanisms are in use around the region. Some local authorities ask for the house price of a comparable new build unit minus the grant. Others ask for a contribution equivalent to grant plus land value. Whichever mechanism is used the local authority will need to be able to demonstrate both that the approach is clearly set out in the appropriate documents within the LDF and that the value of the sum requested is broadly comparable with the cost to the developer of on-site provision. Below is an example from outside the region on requirements for developer contributions (this largely rural district has no threshold for affordable housing):

Affordable Housing Solutions in South Shropshire: Interim Planning Guidance

The Council require 50% of all new housing development, in the nine main settlements, to be for affordable housing. In order to allow single plots to be available for open market housing it requires 50% of the construction costs of an equivalent affordable house to be given to the Council as a contribution for affordable housing elsewhere in the District. On PPG 3 sites where there is off-site contribution required the Council will seek 120% of the agreed cost of constructions to offset development costs elsewhere in the District.

<http://www.southshropshire.gov.uk/static/page215>

Arrangements for payment of the developer contribution will need to be recorded within the S106 Agreement and should include a trigger mechanism (e.g. staged payment will be required on completion of X or Y units). Where development takes place over several years it will be necessary to include provision to revisit the financial appraisal in order to assess what the cost of providing affordable housing on site would have been at that time.

An example from within the region of an attempt to address the time lag issue is given below:

Off-site Provision

Exceptionally, where the Borough accepts that on-site provision is not possible consideration will only be given to off-site provision where:

- An alternative site or sites have been identified which would enable affordable housing appropriate to the identified needs to be met
- the alternative site(s) can deliver the off-site provision in the appropriate timescale and is located within the immediate locality of the development to ensure the affordable housing contributes to the needs of the locality
- the off-site affordable housing provision is deliverable prior to the on-site market development being completed.

Sometimes there is a requirement that the monies should be returned to the developer if they are not spent within a specified period. Again this will need to be recorded in the S106 Agreement. It is good practice for local authorities who take developer contributions to have a plan for how this funding will be spent and to be able to demonstrate how this fits within their wider housing strategy and contributes to the creation of mixed communities in the local authority area.

Whatever the nature of the developer contributions, they are usually required on completion of an agreed number or proportion of the market units. Until the market units are well under way, it is difficult to predict exactly when the required number or proportion of units will be completed and hence when the contributions will be made (units transferred to a HA) or paid. This is particularly the case at times of uncertainty in the housing market and LAs may be reluctant to make commitments to use financial contributions ahead of their actual receipt. Therefore there may be a significant time lag between the completion of the required amount of open market housing and the provision of off-site affordable housing or delivery of commuted sums. Local authorities need to take this into account when agreeing the timescale in which financial contributions must be spent.

- **Where local authorities take financial contributions they should be able to demonstrate that these will contribute to the development of mixed communities in the area.**
- **Local authorities need to set out clearly the circumstances which they consider appropriate for off-site provision or the collection of a payment in lieu.**
- **Developer contributions should be broadly equivalent to the cost to the developer of provision of affordable housing on site.**
- **Financial viability appraisal can help to demonstrate this.**
- **There should be a plan for spending developer contributions and this should be monitored and recorded.**
- **The timescale for receipt and spending of financial contributions should be realistic.**

Access to, and Management of, Affordable Housing

9 Access to Affordable Housing and Occupancy Cascades

In general, local authorities rely on affordable housing providers to ensure that those getting access to affordable housing are unable to compete in the open market for housing and are in need of affordable housing. Where the local authority no longer owns and manages its own stock, the authority will have arrangements with local Registered Social Landlords (RSLs) so that the authority can nominate people from its own register to the RSL. The Choice Based Lettings system which is rolling out across the country has introduced a greater amount of choice for applicants but not changed basic principles and the priority for available affordable housing which is to be given to those in most need.

Most S106 Agreements dealing with affordable housing do not directly address the matter of who gains access to the housing, leaving it to the established housing system to regulate this. But this tends not to be the case in rural areas and especially with rural exception sites, where both local and parish authorities are concerned that affordable housing is made available for people with different types of local connection. It is very often the case that new affordable housing in rural settlements is only supported on the basis that it will be for local people. PPS3 recognises this.

A Rural Exception Site policy should seek to address the needs of the local community by accommodating households who are either current residents or have an existing family or employment connection, whilst also ensuring that rural areas continue to develop as sustainable, mixed, inclusive communities.

PPS3 para 30 (CLG 2006)

The use of occupancy controls in rural areas can help to ensure that people with a local connection have priority. However, this should not be at the expense of meeting identified housing need. The purpose of an occupancy control is not to assist those with the strongest local connection (such as multiple forms of connection), but to help meet housing need locally wherever possible. In all cases, information about and evidence of local housing need is essential both to support the case for housing on rural exception sites and to inform the way such housing is allocated.

It can be difficult to strike a balance between occupancy restrictions that reflect the local circumstances at the time of drafting the agreement and 'future proofing' the agreement to allow for changes in circumstances. The example opposite of a rural exception site occupancy control from outside of the region, illustrates this flexibility as a last resort:

North Somerset

The cascade approach to the allocation of homes on a rural exception site is found in policy H5 of the replacement Local plan and states:

Where planning permission is granted for affordable housing on exception sites, the Council will need to be satisfied that adequate arrangements are in place, ideally with an RSL, to reserve the housing in question for local needs, both initially and in perpetuity. Both planning conditions and planning obligations may be used for this purpose. The inclusion of clauses in planning obligations which would enable lenders of private finance to dispose of property on the open market are unacceptable in respect of housing schemes on exception sites. It is however recognised that many lenders will not support RSL's in developing exception sites where the occupancy criteria are entirely restricted to the immediate and adjacent location. To this end an ultimate fallback for allocation to households in need in the rest of North Somerset has been introduced. This will also promote the mortgage-ability of low-cost or shared ownership sale units. Occupancy is therefore reserved in perpetuity for people in need of affordable housing in the following categories and order of priority:

- a Residents of the village or same parish in shared, overcrowded or otherwise unsuitable accommodation.
- b Residents of adjacent parishes in shared, overcrowded or otherwise unsuitable accommodation.
- c People dependent on or giving support to a household in the village or adjacent parishes.
- d Young, elderly, retired or disabled people who have lived or worked in the village or adjacent parishes.
- e Households that include people who are employed or about to be employed in the village or adjacent parishes and need to live locally.
- f Other residents of the village and adjacent parishes eligible in accordance with the published policies and procedures for allocating tenancies by the registered social landlord.
- g In order to avoid long-term voids or re-sale periods, after a rented property has remained void for three months or an owner-occupied property been marketed for 12 months, occupancy will firstly be allowed for other residents of North Somerset and if necessary and appropriate occupancy criteria will subsequently be extended to people outside the district, eligible in accordance with the published policies and procedures for allocating tenancies by the Council or by the registered social landlord.

Extract from North Somerset Replacement Local Plan adopted March 2007
<http://www.n-somerset.gov.uk/cairo/docs/doc15435.htm>

But there can be tensions between the objectives of the local authority and local community on the one hand and mortgage lenders on the other. Mortgage funders may have concerns about low cost home ownership schemes where the purchaser is not allowed to buy the property outright or there are restrictions either on the price that the property can be sold at (e.g. no more than 80% of market value) or on who can buy the property (a key worker or someone with a local connection). PPS3 recognises this and reminds authorities about the value of the use of local connection cascades.

Local authorities, the Housing Corporation and affordable housing providers should be aware of lenders' concerns and where possible introduce options to help alleviate them. One option is to introduce an occupancy 'cascade' that provides the opportunity for the housing to be made available to a broader group of people or a wider area, if nobody meeting the given criteria should come forward within some specified period. Normally, grant funded schemes must allow purchasers to staircase to full ownership when they can afford to do so, and the subsidy received is then recycled to provide further affordable housing. Even where there is a limit on the amount of equity that can be obtained by the purchaser, the cascade mechanism may be used to ensure that the provider and the purchaser can raise a mortgage. These issues are also referred to in paragraphs 8-10 of Annex A to the model planning obligation agreement.

PPS3 para 78 (CLG 2006)

RSLs can have similar concerns where they believe there is undue restriction being placed on them about the households to whom social rented housing can be let and this will mean social rented homes left empty.

"The affordable housing has to be limited to those in housing need and be available long term. We specify that the units can only be occupied by qualifying persons. Then it cascades to the village then the adjoining villages, then the district."

The use of an occupancy cascade, acceptable to all parties, within the S106 Agreement can help meet both RSL and lender concerns and safeguard against the situation where an LCHO or social rented property is standing vacant. Occupancy cascades differ depending on local circumstances but, as a general rule, set out the priority order for access to the affordable housing for different types of household e.g. current residents of the village or workers in the village, then residents of adjoining villages, then residents who have left the village to find accommodation in nearby towns and then to anyone who is in housing need within the local authority.

Time limits for each stage of the cascade process should be reasonable and take into account the interests of affordable housing providers who do not want properties standing vacant and those of low cost home owners who may need to move reasonably quickly if they are to secure another property within the sale housing market.

Another mechanism for meeting mortgage lenders concerns is to include a clause within the S106 Agreement specifying that normal occupancy or staircasing restrictions do not apply where a property is repossessed. A clause to this effect can be found at para 4.2.3 of the Law Society Model S106 Agreement.

With the introduction of Choice Based Lettings (CBL), there can be concern that local people will not get priority for affordable housing when it becomes available in smaller settlements and there could be a tension between the operation of CBL and S106 Agreements. However, by CBL systems including 'local connection' as a 'qualifying criteria' for affordable housing vacancies in certain settlements, preference can still be given to local people. It is important that those framing S106 occupancy cascades and those devising and operating CBL systems discuss how the two will work together in the situation where S106 Agreements are to be used to control who gets access to the affordable housing.

But there can be tensions between the objectives of the local authority and local community on the one hand and mortgage lenders on the other. Mortgage funders may have concerns about low cost home ownership schemes where the purchaser is not allowed to buy the property outright or there are restrictions either on the price that the property can be sold at (eg no more than 80% of market value) or on who can buy the property (a key worker or someone with a local connection). PPS3 recognises this and reminds authorities about the value of the use of local connection cascades.

- **The use of an occupancy cascade within the S106 Agreement can help meet RSL and lender concerns and safeguard against the situation where an LCHO or social rented property is standing vacant.**
- **Another mechanism for meeting mortgage lenders concerns is to include a clause within the S106 Agreement specifying that normal occupancy or staircasing restrictions do not apply where a property is reposessed. A clause to this effect can be found at para 4.2.3 of the Law Society Model S106 Agreement.**

10 Keeping Affordable Housing in Perpetuity

Local authorities are understandably concerned that affordable housing secured through S106 Agreements should remain affordable to second and subsequent occupiers. It is generally inappropriate that affordable homes should cease to be affordable either after a set time period or when the first occupant moves out.

The intention would normally be that affordable housing should remain affordable. However provision needs to be made within the S106 for circumstances where, for whatever reason, an affordable home is no longer required as affordable housing (perhaps because the initial occupant has moved on and no one else can be found to live in the property).

Local authorities also need to be aware that if an affordable home is sold on the open market this will generate a capital receipt which can be used to purchase a replacement property and should ensure that appropriate arrangements are in place within the S106 Agreement to cope with this eventuality.

Housing Corporation rules specify that where Social Housing Grant has been received, any proceeds from a sale must be re-invested to meet social housing need. However they do not specify that such re-investment must be in the same local authority area and there is no comparable guidance on re-investment of private sector subsidy secured through a S106 Agreement. But a local authority can seek to do this by ensuring that the re-investment of any sale proceeds in the local area is included in S106 Agreements.

New Build HomeBuy can be, and often is, provided without the use of grant. In such cases the standard Housing Corporation rules on staircasing do not apply; staircasing can be restricted in order to retain the housing as affordable. But where grant is used Housing Corporation rules must be followed and staircasing cannot be restricted.

CLG has provided considerable guidance on the retention of affordable housing in "Delivering affordable housing" the companion guide to PPS3:

www.communities.gov.uk/documents/housing/pdf/152897

Government guidance on retaining affordable housing in perpetuity

Restrictions on full ownership and leasehold enfranchisement

- 67 Generally, the Government wants those accessing shared equity and shared ownership schemes to be able to increase the size of their equity share and move on to full ownership, where this is sustainable. This releases value which can be recycled to help meet other households' affordable housing needs.
- 68 It is a condition of grant funding provided by the Housing Corporation that New Build HomeBuy schemes allow purchasers to increase their share and own up to 100 per cent of the home. There may also be arrangements for an affordable housing provider to have a first chance to buy these units back for use as affordable housing. However, in exceptional cases (eg rural exception sites) and for products other than New Build HomeBuy, one option for retention of shared ownership schemes as affordable housing is to restrict the share which a shared owner may purchase (eg 80 per cent), provided schemes are mortgageable.
- 69 Local authorities and providers should be aware that there are potential legal difficulties in restricting staircasing on houses offered for sale on shared ownership terms, as this can risk shared owners circumventing the terms of their lease to enfranchise (buy the freehold). In these circumstances the provider could receive a reduced receipt and would have no control over future occupiers. This is not a problem for flats, where purchasers cannot enfranchise until they have bought 100 per cent.
- 70 Leases granted by Registered Social Landlords (RSLs) are exempt from enfranchisement under the leasehold legislation (Schedule 4A of the Leasehold Reform Act 1967), provided the lease allows the shared owner to staircase to full ownership. They can in some circumstances restrict staircasing without risk of enfranchisement by relying on the low rent test under existing leasehold legislation. RSLs wishing to restrict staircasing are advised to take their own legal advice. RSLs should be aware that restricting staircasing for grant funded properties is only permitted where the property lies within a rural exception site. Shared ownership leases granted by other providers are not protected from enfranchisement in the same way within the leasehold legislation.
- 71 Although private landlords of affordable housing are not treated in the same way as RSLs in the leasehold legislation, they may choose to work in partnership with RSLs. Private providers may also include provision in shared ownership leases giving them a right of first refusal to buy back properties when the purchaser wishes to sell and move on. The Government is keeping this position under review.

Provisions for recycling subsidy

- 72 If a property comes within the definition of affordable housing and was grant funded by the Housing Corporation, but is subsequently lost to the affordable housing sector, because a social rented tenant exercises a Right to Acquire, a shared owner staircases to full ownership, or the home is no longer needed for affordable housing, then any subsidy obtained by the developer upon sale is required to be reinvested by him to meet future identified affordable housing needs. If the developer is a RSL this is required by statute or grant conditions. If the developer is unregistered, it will be imposed through grant conditions. If the developer does not wish to continue with the provision of affordable housing the subsidy can be returned to the Corporation for redistribution in line with national, regional or local housing priorities.

73 Receipts of RSLs from Right to Acquire sales and the majority of receipts from the new Social HomeBuy scheme are required to be used to provide replacement social rented housing. Subsidy from staircasing sales of New Build HomeBuy properties may be reinvested for wider affordable housing provision. Full details of the reinvestment of subsidy by grant funded RSLs can be obtained from the Housing Corporation's Capital Funding Guide on the Corporation's website. For other grant funded providers details are set out in the grant agreement.

Additional safeguards in rural areas

74 Specific safeguards exist within the Right to Acquire scheme and the HomeBuy scheme to ensure the long term supply of affordable housing in those rural areas which are subject to particular housing pressures (and, as in other areas, providers also have the right to buy back homes). These safeguards are:

- RSL social rented tenants in designated rural areas (under Section 17 of the Housing Act 1996 and SIs 1997/620-25 inclusive and 1999/1307) are not eligible for Right to Acquire or Social HomeBuy. These are small settlements of under 3,000 inhabitants with the same coverage as rural exception sites.
- Where a shared ownership property is on a rural exception site or in a small rural settlement of less than 3,000 inhabitants, the Housing Corporation will prioritise repurchase for grant funding if the various funding avenues available to the RSL have been discounted. Full details are set out in the New Build HomeBuy chapter of the Housing Corporation's Capital Funding Guide.

Concerns of lenders

75 The variety of options available for retaining properties within the affordable housing market can cause concern for mortgage lenders who may become reluctant to lend on affordable housing properties with restrictions. Consequently potential purchasers may encounter difficulties in obtaining the additional finance that they need.

76 Issues which may cause concern include restrictions intended to:

- ensure that future re-sales of properties are restricted to certain types of eligible households (e.g. key workers, those on the council waiting list, or those earning below a specified income)
- control the future sale price by restricting it to a percentage of the market value (for discounted sale products) or restricting the amount of equity which may be purchased by the owner (for shared ownership).

77 Some lenders may consider that these restrictions:

- do not give the existing shared owner an opportunity to move on because they are unable to dispose of their property at full market value within a reasonable time period;
- mean the lender is not be able to dispose of the property easily and at the market price within a reasonable time period, in the event of mortgage default where a lender would take possession.

78 Local authorities, the Housing Corporation and affordable housing providers should be aware of lenders' concerns and where possible introduce options to help alleviate them. One option is to introduce an occupancy 'cascade' that provides the opportunity for the housing to be made available to a broader group of people or a wider area, if nobody meeting the given criteria should come forward within some specified period. Normally, grant funded schemes must allow purchasers to staircase to full ownership when they can afford to do so, and the subsidy received is then recycled to provide further affordable housing. Even where there is a limit on the amount of equity that can be obtained by the purchaser, the cascade mechanism may be used to ensure that the provider and the purchaser can raise a mortgage. These issues are also referred to in paragraphs 8-10 of Annex A to the model planning obligation agreement.

It is important to distinguish between rented and low cost home ownership housing and between rural and urban areas. Key principles of the CLG guidance are set out in Table 10.1 below:

Table 10.1
Retaining Affordable Housing

	Urban	Rural
Social rented housing	<p>Tenants of Registered Social Landlord housing developed using Social Housing Grant have the Right to Acquire their dwellings.</p> <p>Social rented housing provided without public funding is not subject to the Right to Acquire.</p>	<p>In communities with a population of less than 3,000 there is no right to acquire publicly funded social rented housing. Social rented housing provided without public funding is not subject to the Right to Acquire.</p>
Low cost home ownership (LCHO)	<p>New Build HomeBuy purchasers must be able to buy outright.</p> <p>The affordable housing provider may have first refusal if the property comes on the market.</p> <p>For other publicly funded LCHO options the affordable housing provider may retain a 'golden share'.</p>	<p>On publicly funded schemes on rural exceptions sites the provider may restrict the share the low cost home owner can purchase so that the property remains affordable in perpetuity.</p>
	<p>For LCHO schemes without public funding the affordable housing provider may restrict the share the low cost home owner can purchase so that the property remains affordable in perpetuity.</p> <p>Shared owners of houses have the right to enfranchisement under the Leasehold Reform Act 1967. The Act does not apply to flats.</p> <p>The affordable housing provider may have first refusal if the property comes on the market.</p>	

- The rules governing the retention in perpetuity of affordable housing are complex.
- Different rules apply to schemes in urban and rural areas and to schemes with and without public funding. These are summarised in Table 10.1.

Developing an Effective Negotiating Process

11 Use of Pre-Application Discussions

Use of pre-application discussion is widely considered to be good practice, especially for larger schemes. It cuts down on delay once the application has been submitted. It enables the key issues to be identified early both from the authority's and the developer's point of view. Discussion can point the developer to the authority's policies, protocols, supplementary planning guidance and site briefs if not already known to the developer. It is also the place where difficult issues can be raised and a compromise thrashed out. Even if this is not possible such discussion should enable the planning officer to write a committee report which fully represents the complexities of the situation to members and enables them to reach an informed decision, including any trade-offs which may need to be made.

However, pre-application discussion can be time consuming and costly. Some local authorities are starting to charge for pre-application discussions.

Research by the Planning Advisory Service, A material world: charging for pre-application planning advice, (www.pas.gov.uk/pas/aio/40105) found that:

- only a few authorities presently charge for pre-application advice but more are actively considering it
- main reasons given for charging are to help improve service delivery and ensure better quality application submissions
- most authorities that charge claim that it helps filter out speculative and poorly thought out development proposals
- no authority interviewed charges for householder development and most also exempt development affecting small business premises
- those that charge say that the principle is now broadly accepted by developers and their agents, albeit often after some initial opposition.

Examples of the way pre application discussions are handled in the region are illustrated below:

“At the pre application stage, the Planning department will advise the developer/planning consultant to liaise with the housing department regarding the affordable housing requirements. Ideally a Registered Social Landlord (RSL) should be engaged at this point in the negotiations and this is encouraged by housing officers in discussions with private sector developers. Housing officers will also facilitate meetings between Developers, RSLs, planners and housing staff at the pre-application stage.”

“The developer comes to planning, then housing, then a joint meeting one to three times depending on the scheme.”

“The legal team drafts a S106 which is sent out. It may be tweaked and negotiated by email, or we may have to meet with their solicitors and sit round the table for more negotiation to finalise.”

12 Use of Standard S106 Agreements or Clauses

Some authorities use standard Agreements or standard clauses. This is seen as good practice because it informs developers, especially those lacking in experience of S106, about what it is that they will be asked to sign. As site size thresholds are reduced some developers are likely to be faced with planning obligations for the first time and it is useful for them to see what the legal document could look like. It is also helpful for new staff in local authorities who may not have experience in S106 or who need to come up to speed in their new authority. In principle the use of standard clauses should also reduce the time spent in negotiations.

The Law Society has prepared a model S106 agreement published by CLG which can be accessed at:

www.communities.gov.uk/planningandbuilding/planning/planningpolicyimplementation/planningobligations/modelplanningobligation

Discussion with local authorities suggests that individual solicitors can be unhappy with the Law Society/CLG model. It is however a very useful starting point and local authority solicitors and affordable housing teams should ensure that all the issues covered in the Law Society/CLG model are dealt with in any S106 agreement which they develop.

In practice many local authorities have evolved their own standard S106 agreement. These draw on experience from previous schemes as well as reflecting the preferences of individual local authority lawyers. Developing a sense of partnership between the local authority's lawyer and the developer's lawyer and a shared commitment to making things happen can be a fruitful part of the process.

The use of standard Agreements does not preclude site specific negotiation. The developer's legal advisors may want alterations to some of the wording, and the local authority's legal advisors will have to consider whether such alterations are in keeping with the intention or spirit of the standard agreement. Nevertheless those authorities that use standard clauses find them helpful as a starting point.

"We try (to use standard Agreements), but each developer/ land owner has their own foibles. Generally the S106 Agreements stay the same but with slight variations some of which prove to be a better practice than our original; this new phrasing is then adopted for subsequent S106s."

- **Use of pre-application discussion is widely considered to be good practice. The use of standard clauses or Agreements provides a useful starting point in discussions with the developer.**
- **Where local authorities have established a standard agreement or set of clauses through custom and practice, it is useful if these can be brought together in a single place and made available to the development industry.**
- **It is good practice to set out (in a protocol or supplementary guidance) the stage a S106 agreement should have reached before the application goes to committee.**

13 Setting up protocols and procedures for dealing with applications

13.1 Use of protocols

To help smooth the negotiation process between local authorities and developers, local authorities can establish a set of principles and practice in a negotiating protocol. This can simply be a formalisation of established practice or an agreed procedure that will be followed consistently from now on.

A number of local authorities have drawn up protocols for dealing with applications for development that trigger S106. These are usually available on the authority's web site. For example, see the Forest of Dean at:

www.fdean.gov.uk/content.asp?Parent_directory_ID=242&nav=327&ID=11427

Negotiating protocols set out the process for dealing with planning applications by the authority in some detail (e.g. they describe how negotiation with developers will be conducted and how the authority will co-ordinate inputs from various departments).

Protocols can also set out the information which the developer will be asked to provide (not just title to the land but also an undertaking to pay the council's costs for preparing, monitoring and overseeing a Section 106 planning obligation). The protocol can also explain the range of obligations which the authority will seek and how it will decide on its priorities if they cannot all be met.

In order to produce a protocol it is important to gain corporate backing and legal opinion about the legality of what is being included. It is essential to consult with developers, landowners and housing associations or other appropriate affordable housing providers when drawing up a protocol.

Major Projects Protocol (Southampton)

- Introduction of a Major Projects Coordinator.
- Deadline date introduced for the completion of the S106 agreement - the deadline date representing the 8 or 13 week Government performance standard.
- If S106 agreement is not completed by deadline date application may be refused.
- S106 process now runs in parallel with the planning application.
- S106 Heads of Terms identified at the pre-application stage.
- Council is promoting the use of pre-application meetings - to deal with any issues, and avoid unnecessary delays once the application is submitted and the clock is ticking.

[www.pas.gov.uk/pas/aio/37223#282,15,Improving Section 106 Delivery "The Southampton Experience"](http://www.pas.gov.uk/pas/aio/37223#282,15,Improving%20Section%20106%20Delivery%20-%20The%20Southampton%20Experience)

London Protocol

In London, the Association of London Government (ALG) and the Housing Corporation have jointly issued a draft protocol for S106 Agreements. This protocol includes a joint statement on social housing grant and S106 Agreements. It points to the need for financial appraisal to ensure grant is used effectively while ensuring that the scheme remains viable and emphasises the need for pre-application discussions. It is available at:

www.housingcorp.gov.uk/upload/pdf/s106andSHGprotocol.pdf

However, while the examples given here set out the councils' requirements in the form of a stand-alone protocol, the same information could be included in a Supplementary Planning Document (SPD). The difference is that a stand-alone protocol can be revised quickly in light of changing circumstances, whereas SPDs may be in place for several years before they are revised.

13.2 Planning Performance Agreements

For large or complex schemes, Planning Performance Agreements (PPAs) are increasingly being used to structure the negotiation process and define the responsibilities of both local authorities and developers in the process.

Planning Performance Agreements

A PPA is an agreement between a local planning authority and an applicant to provide a project management framework for handling a major planning application. This framework should improve and speed up the planning process by committing both parties to an agreed timetable containing 'milestones' that make clear what level of resources and community engagement are required, and ensure that all relevant aspects such as sustainability assessments and design standards are properly considered.

A PPA is a single process, starting at inception and negotiation and continuing to submission of the application, issue of the decision notice and beyond. It will encompass the signing of a section 106 or other agreement, where such an agreement forms part of the application, and compliance by the developer with any imposed condition which is not open-ended.

Planning Performance Agreements: a new way to manage large-scale major planning applications.
Consultation Document Para 11-12 (CLG 2007):
www.communities.gov.uk/publications/planningandbuilding/planningperformanceAgreements

The ATLAS publication, Implementing Planning Performance Agreements, provides practical guidance on the operation of PPAs. The document can be found at:

www.englishpartnerships.co.uk/docdownload.aspx?doc=PPA%20Guidance.pdf&pid=52DB9140EE54C7797FC91B4A65E56A6

More ideas to help develop better working relationships between local authorities and developers are set out in the Planning Advisory Service publication, Open for Business, available at:

www.pas.gov.uk/pas/aio/41620

Changing the Way that Local Authorities Work with Developers

The case study concludes with a few top tips for delivering the kind of culture change that promotes enabling behaviour within the local planning authority:

- Commit to effective engagement right through the service
- Understand that planning is about delivering on the authority's objectives
- Don't just reach judgements on proposals, when problem-solving is possible
- Involve all relevant parties early
- Give clear, unambiguous and authoritative advice
- Develop a corporate approach
- Support that approach with mechanisms and processes
- Right people in the right place at the right time
- Agree a project management plan
- Recognise that change can be threatening to staff, deal with staff concerns, and equip them to deal with new working requirements.

The benefits of this approach (summarised from report):

- Prevents conflicting advice.
- Resolves issues faster.
- Produces better planning decisions.
- Fosters a 'one-council' attitude.
- Promotes staff development.
- Developers like the approach
- Staff like the approach.

Open for Business (Planning Advisory Service): www.pas.gov.uk/pas/aio/41620

13.3 S106 Agreements and the Committee Stage

It is good practice to set out (in the protocol or supplementary guidance) the stage a S106 agreement should have reached before the application goes to committee. Usually this is specified as relating to the point where agreement is reached on Heads of Terms, although some authorities want the S106 to be signed before the application goes to committee.

Alternative approaches adopted across the region are illustrated below:

"The affordable housing mix is normally negotiated prior to the application being submitted. On occasions where the mix is yet to be finalised, the developer/ planning consultant will normally liaise separately with the housing officer. In most instances the S106 is agreed by the signatories before being taken to committee. In most cases the S106 agreement is negotiated at the same time/prior to planning consent."

"Planning permission is usually given at committee subject to a S106 but it is signed and formally negotiated afterwards. However, it will not get support for planning permission without sufficient affordable housing. The formal negotiation takes place afterwards but there are normally pre-application discussions which mean that the S106 can be signed quickly."

"Before being taken to committee the applicant must agree the heads of terms and say they will sign and complete. The final wording does not need to be ready for committee. It is becoming more common to use planning conditions for the affordable housing. The guidance says that affordable housing is a valid condition so permission can be granted before the S106 is issued. This gives certainty to the developer and meets government targets on the time to permission."

- **Protocols for dealing with S106 Agreements can be beneficial in setting out local authority procedures for dealing with the bulk of S106 applications.**
- **Planning Performance Agreements (PPAs) can be an effective way of dealing with large or complex sites.**
- **All protocols and PPAs should provide clear guidance on what stage S106 negotiations should have reached by the time the planning application goes to committee.**

14 Local Authority Organisation

The way local authorities organise their approach to negotiation with developers is extremely important. Good inter-departmental working between planning and housing cannot be emphasised enough and is at the heart of good practice.

Local authorities should ensure their housing and planning functions effectively deliver a shared vision by working to agreed objectives. This will require working closely with regional bodies to develop and reflect regional strategies, and with delivery partners (including Registered Social Landlords and private developers) to ensure quality, value for money and efficient delivery through Local Housing Partnerships.

Delivering Affordable Housing para 18 (CLG 2006)

Good practice on a corporate approach is provided in a series of reports and checklists published in August 2006 by the Audit Commission on 'Securing Community Benefits through the Planning Process'. The summary report highlighted that the involvement of councils' corporate centre is an important factor in improving performance on S106. Associated reports centred on:

Corporate Awareness Checklist; designed to raise awareness of the role and contribution of the Section 106 process among chief executives, leaders and other senior councillors and officers.

There is no single way in which inter-departmental working should be organised and successful authorities across the region have different approaches. But there are a number of principles and practice examples which point to good practice. These include:

- Shared priorities for the delivery of affordable housing; preferably formalised through the Local Area Agreement.
- A clearly defined process within an authority which ensures a consistent approach from when the developer first approaches an authority with a (preliminary) scheme.
- Allocating lead officers for negotiations and deciding how other officers are to be kept involved.
- Established working relationships between departments (with planning policy and development control, housing and legal as a minimum but also perhaps estates and services) that ensure who is responsible for different aspects of the negotiation and how the negotiations are to be conducted (eg by a dedicated S106 officer supported by those from the other departments).
- Agreement on how to handle relationships with external legal advisors (if used).

“Regular development team meetings organised to consider applications. Meetings bring in officers from within and outside the Council including housing, design, environmental health highways and traffic management (County Council), community safety (police).”

“The Development Manager attends fortnightly planning meetings to discuss major planning applications. The Development Manager involves the relevant planning officer in discussions with any sites which includes affordable housing.”

“Merging of functions has helped to create a stronger relationship when dealing with developments. This and close working relationship with legal team enables the authority to drive affordable housing in negotiations.”

Other ways of helping to build up effective inter-departmental working could include the involvement of external mentors or the use of joint workshops or site visits .

Connecting councillors with strategic planning applications: a good practice guide for London draws on existing good practice undertaken by boroughs and shows how councillors can be involved in all stages of the planning process. The interactive guide is hosted online at:

www.londoncouncils.gov.uk/councillorsandplanning

This guidance brings together those practices in London considered to be working well. It is aimed primarily at borough heads of planning, solicitors and relevant councillors and is designed to help boroughs increase the role of councillors prior to formal decision making. It highlights four key areas where councillors' involvement in the planning process can be maximised:

- councillor training
- councillor involvement prior to the submission of a planning application
- councillor involvement when a planning application has been submitted
- decision making.

The guidance gives many example of ways in which elected members are involved.

⁷ See the Planning Advisory Service publication *Real Collaboration - A Guide to Establishing Effective Collaborative Relationships in Planning Services*. The Guide focuses on establishing good working relationships between authorities but provides useful pointers for ways of strengthening inter-departmental working within authorities. It is available at: www.improvementservice.org.uk/component/option,com_docman/Itemid,43/task,cat_view/gid,112/

Several forms of councillor involvement were reported at the pre-application stage, in different boroughs. Examples include:

1 Ward Councillor Briefing

(a) - officers brief ward councillors about forthcoming applications. Developers (and other parties) are permitted to attend, and may answer factual questions if asked by ward councillors, but meeting is run by officers.

2 Ward Councillor Briefing

(b) - applicants make a presentation to ward councillors, with or without officers present.

3 Planning and Development Forum

chaired by the Head of Planning or the Planning Committee Chair. This extends the scope for community engagement at the pre-application stage. Applicants sign up for this and a selection of councillors are invited to attend. These councillors include relevant ward councillors and representatives of the different parties on the planning committee. Planning Committee Members are permitted to attend, but not permitted to speak - may ask questions via ward councillor colleagues, who are permitted to ask developers about their presentations.

www.londoncouncils.gov.uk/councillorsandplanning

- **Regular liaison between departments is important for smooth running of affordable housing negotiation.**
- **A clearly stated affordable housing policy and a steer in the LAA as to the importance of affordable housing will help ensure that all departments know the priority to be given to this issue.**

15 Involving Elected Members

The support of elected members for the delivery of affordable housing is crucial. Elected members need to understand the authority's policies and how negotiations with developers are conducted and the reasons why council policy may not always be achieved (e.g. when scheme economics make this unrealistic and/or other contributions sought by the council are to be given priority). A robust evidence base can help improve members understanding of affordable housing issues and this in turn should lead to the development of more realistic policies. Policies which are deliverable should translate into more effective development control and S106 Agreements which reflect council policy. Members should be involved in the development of policy and financial appraisal should be used at policy development stage to enable them to understand trade-offs and develop realistic policies.

Councillors who sit on the development control committee have to be impartial in their treatment of planning applications and so it can be difficult for them to engage in discussions over specific affordable housing proposals without compromising their impartiality. However it is important that councillors are fully briefed about the need for affordable housing, the council's policies and the mechanisms used for developing affordable housing through Section 106 Agreements. By keeping councillors up to date generally, they are better informed when they consider individual applications.

Ways of Engaging Elected Members

“The council has set up an Affordable Housing Working Group to oversee the implementation of the action plan for the Affordable Housing Strategy. The Working Group has elected member representation. It meets to monitor the delivery of the action plan and to gain support for the affordable housing element of potential future schemes.”

“The council has an affordable housing panel which involves the local council members, parish members, planning and housing officers who review applications at the pre-committee stage to clarify any issues that local parish people have. This is fed back to the planning committee.”

- Members should be fully involved in setting affordable housing policies.
- Structures should be put in place which enable them to gain a good understanding of options and techniques for the delivery of affordable housing.

16 Building Relationships with Housing Providers

16.1 Affordable Housing Providers

Good working relationships between authorities and locally active affordable housing providers helps to keep both parties up to date about the issues they face across both the development and management of affordable housing.

Registered Social Landlords (RSLs) and Councils – Keeping Up To Date

“Council holds regular forum with RSLs active in their area - 4 forums a year (2 with development staff and 2 with management and then also informally when there are new staff.”

“HomeBuy agents have regular quarterly meetings with the Council and are very willing to attend site specific meetings when asked, helping to maintain very good working relationship.”

Affordable housing providers may or may not be involved in negotiations over specific schemes but authorities can seek the views of affordable housing providers generally about the negotiation process they will follow and, it is good practice for affordable housing providers to be consulted where authorities establish procedural protocols for dealing with developer negotiations.

Local authorities cannot prescribe the affordable housing providers e.g. Registered Social Landlords (RSLs) whom they want to work with developers of specific sites but they still need to maintain close working relationships with affordable housing providers active in their area and can continue to identify their preferred partners.

- 48 The Government does not want local authorities to adopt restrictive practices which could preclude innovation and competition between potential affordable housing providers. The best use of resources is to engage with the most effective and best value provider, whether that is a Registered Social Landlord or unregistered body, as long as good management and ownership are ensured.
- 49 Local authorities should not prescribe affordable housing providers in planning conditions, obligations or local development documents. They should discuss with potential providers how affordable housing can be provided and long term management arrangements secured. They may include information on their standards (eg development, management, local presence, cost) in respect to providers. They should be able to robustly justify rejecting any particular provider on the basis of these standards.
- 50 Early dialogue (e.g a round table discussion) between developers, the local authority and potential providers can help to ensure the provider is acceptable to all parties. It may be useful to involve the provider in negotiating any planning obligation. Where a provider has not been identified, expert views may still be sought, eg through an advisory panel of providers with expertise in planning obligations negotiations. In rural areas, the local authority may involve the Rural Housing Enabler, where appropriate.

Delivering Affordable Housing (CLG 2006)

There are three possible approaches that can be used by authorities within this legal framework which can encourage developers to work with preferred affordable housing provider partners:

- 1 The local authority puts forward a list of preferred affordable housing providers and asks the developer to choose one from this list. If the developer does not find any on the list acceptable, it can go back to the authority to discuss alternatives. The final Registered Social Landlord (RSL) or other approved affordable housing provider will be selected as a result of negotiations between the authority and the developer.
- 2 The local authority identifies its preferred affordable housing provider and puts this organisation forward to the developer. If the developer does not accept this choice, it can go back to the authority to discuss alternatives. The final RSL or other approved affordable housing provider will be selected after negotiation.
- 3 The local authority develops a set of criteria which RSLs or other appropriate affordable housing providers must meet and the developer selects one that meets the criteria.

Where there is a known affordable housing provider involved in a scheme it is good practice to involve them in discussion about the S106 even though they are not normally a signatory to it. It is desirable to involve the affordable housing provider in negotiation as early as possible. Affordable housing providers have to minimise their own development risks and also subsequent management responsibilities for the affordable housing. The affordable housing provider should be involved in all matters that affect the affordable housing elements of a scheme and its longer term management. But, it is not essential for them to be a signatory to the S106 agreement.

In some cases, particularly large sites, the RSL or other appropriate affordable housing provider may not be identified during the S106 negotiation. In such cases the expert views of providers should still be sought, for example, in consultation with local, sub-regional or even regional panels of affordable housing providers.

There are a number of different ways of managing the relationship between the local authority and affordable housing providers.

The HARI S106 Code of Conduct

Three Rivers and Watford councils have developed the HARI partnership⁸ with 13 Registered Social Landlords (RSLs) in their area to strengthen RSL involvement in delivery of affordable housing.

The HARI - the Housing and Regeneration Initiative - is a partnership between Three Rivers District Council and Watford Council.

An 'Affordable Housing Group' was set up to examine how to get the best possible deal on sites which might offer some planning gain under 'section 106' deals. Meetings are attended by solicitors, planners and housing officers from both councils and local housing associations. An affordable housing strategy has been compiled for developers, which is regularly revised to take on board changing circumstances.

The Partnership has produced a S106 Code of Conduct which includes the RSL notifying the local authority as soon as they have been approached by a developer and share this information with other RSLs in the Partnership. The protocol can be found at:

[www.threerivers.gov.uk/GetResource.aspx?file=06%2011%2007%20HE%20i%20-%20\(08\)%20hari%20app%202.doc](http://www.threerivers.gov.uk/GetResource.aspx?file=06%2011%2007%20HE%20i%20-%20(08)%20hari%20app%202.doc)

Chelmsford

Chelmsford encourages developers to meet their affordable housing obligations by forming partnerships with RSLs that are signatories of the Council's Strategic Housing Partnership Agreement because the RSLs have existing local infrastructure arrangements, work within an agreed framework and share the Borough Council's vision about how they will meet the housing needs of local people.

The Cambridge Challenge

In Cambridgeshire, the 'Cambridge Challenge' has been established to forward development of affordable housing in the new growth areas. This is a pilot investment process to test the benefits of identifying a strategic partner for affordable housing provision at the earliest stage in the design and development of new communities.

⁸ The Housing and Regeneration Initiative.

One concern of authorities is that their lack of influence over working relationships between developers and Registered Social Landlords (RSLs) means that RSLs can end up in a 'bidding war' for development opportunities offered by developers. This, it is feared, will in turn, take up valuable RSL resources. By maintaining open communications between and with RSLs, the danger of bidding wars can be minimised.

It may be helpful for authorities and developers to consider whether it is the delivery or the management of the affordable housing that is of concern. In some areas local authorities enter into Agreements with developers which split the development and management roles between RSLs or other appropriate bodies. In such cases the authority can accept the developer's choice of partner for the delivery of the affordable units, while the management of the units is subsequently undertaken by a different organisation approved by the local authority.

Where RSL partners are involved in affordable housing schemes, they can provide advantages for the local area through their investment in community initiatives as well providing locally based management. So, although authorities cannot prescribe which RSLs work with developers, they may want to encourage developers to work with RSLs who have a long-term stake in the area.

- **Local authorities cannot prescribe which affordable housing providers developers should work with in new housing schemes.**
- **However, it is still important that local authorities and affordable housing providers maintain close working relationships and local authorities can still identify their preferred partners.**
- **It is important that the interests of affordable housing providers are taken into account in policy development and scheme specific negotiations, whether there is a known RSL involved in a scheme or not.**

Partnership Working Between Local Authorities

17 Why Sub-regional Working is Important

The issue of sub-regional working arises out of recognition that housing markets are wider than the average local authority administrative areas. It is therefore appropriate for local authorities within a sub-region to develop common solutions to shared problems. Nationally the process of commissioning sub-regional Strategic Housing Market Assessments has helped to develop ties between local authorities and all local authorities in the East of England are now part of a sub-regional housing market.

The housing delivery chain operates at local, sub-regional, regional and national levels. Delivering affordable housing targets requires effective joined-up strategic housing and planning approaches, focused and flexible use of resources, and co-ordinated delivery vehicles.

The strategic housing role includes working with Regional Assemblies and other local authorities to assess current and future need and demand for both market and affordable housing through a Strategic Housing Market Assessment (SHMA). This evidence will form the basis of local housing strategies and is an important aspect of developing affordable housing policies including targets and thresholds

Delivering Affordable Housing (CLG 2006)

Sub-regional structures have proved beneficial in enabling housing and planning officers from different authorities to share ideas and solutions to common problems. But they have not generally led to the development of common policies on affordable housing.

There are various reasons for this: policies which are appropriate for an urban authority may not be applicable to a neighbouring rural authority and vice versa, political and organisational priorities may be different or the SHMA may reveal radically different levels of need in adjoining authorities depending on the relationship between house prices and incomes and on the total level of new housing supply and the degree of self containment.

The LCB Directory of Affordable Housing Policies

The London Commuter Belt authorities have developed a Directory which summarises the affordable housing policies of all the member authorities and identifies preferred development partners. For example, Broxbourne specifies that the preferred partners are: Aldwyck, Broxbourne HA, Metropolitan and Paradigm.

For all of these reasons it does not seem appropriate or realistic to expect local authorities within an SHMA to develop common affordable housing policies – although it may be sensible for them to develop a checklist of common issues and approach to defining affordability which will be covered in their policies, albeit the detail of individual policies may differ between authorities. There are examples of good practice in sub-regional working:

Shropshire and Herefordshire Housing Officers Group (SHHOG)

To take forward the work of the West Housing Market Area Partnership a three tier structure has been established, namely, a member led West Housing Market Area Partnership, a sub regional, cross sectoral, co-ordination group and a housing officers group known as the Shropshire and Herefordshire Housing Officers Group (SHHOG). Rather than establish a new officer group, an existing group known as the Shropshire Housing Officers Group extended its remit to include Herefordshire in order to provide officer level support to the West Housing Market Area.

- **Partnership working between LAs within the same sub-regional housing market area can help to find common solutions to common problems.**
- **This could include common definitions of affordability.**
- **However it is not appropriate to expect LAs to have the common policies.**

18 Dealing with Sites which Cross Borough Boundaries

Where it is essential for local authorities to have common policies is where they are negotiating sites which straddle borough boundaries. This will require compromise where policies set different targets. Member involvement in developing policy parameters is critical and should involve Senior Members of both the controlling party and the opposition from both authorities as well as local ward members.

Agreement is more likely to be achieved where the proposed development offers something to both authorities – and affordable housing can be a significant factor in securing acceptance of major new development.

Worked Example

A scheme of 1000 homes is to be developed.

40% of the site is in Local Authority A, 60% is in Local Authority B.

Local Authority A has a policy of Local Authority A has a policy of 25% affordable housing

Local Authority B has a policy of 40% affordable housing

They could decide that the affordable housing target across the site will be 32.5% $(25+40)/2$

Alternatively they could apply a pro rata calculation $(25 \times 0.4) + (40 \times 0.6) = 10 + 24 = 34\%$

Nomination rights could be split either pro rata on area 40:60 or on a 50:50 basis.

Once members have set key parameters officers should have delegated powers to negotiate and bring forward schemes, provided they fit within the criteria set by members.

The Wixams Bedfordshire

Bedford and Mid. Bedfordshire met regularly to resolve development at the Wixams. A joint committee agreed matters relating to outline and full applications that straddle borough boundaries. Officers had discretion to sort reserved matters. The joint committee consisted of the lead planning officer for each local authority, with representation from the county.

Two thirds of the development is in Bedford but the affordable housing is split 50/50 between the two authorities.

Development West of the A1

For the West of A1 development straddling Stevenage and North Hertfordshire an external solicitor was brought in to work with the two local authorities and the County. This proved very useful and made sure that the local authorities presented a consistent front to the developer.

Richard Broomfield (an external consultant with surveying and Registered Social Landlord expertise) provided advice on affordable housing issues and assisted in negotiation with the developers.

- **Sub-regional structures have an important part to play in sharing expertise and skills. They do not necessarily lead to the development of common policies.**
- **Where major sites straddle local authority boundaries then a common approach to negotiation and policy development for the site in question is essential.**

Monitoring

19 What should be monitored?

Once an affordable housing target has been set it is important that delivery is monitored in order to identify whether or not the policy is working and to trigger appropriate action if this is not the case.

Reflecting the principles of 'Plan, Monitor, Manage', Local Development Documents should set out a housing implementation strategy that describes the approach to managing delivery of the housing and previously-developed land targets and trajectories. This should include:

- The approach to regular monitoring and review of actual housing delivery performance against the housing and previously-developed land trajectories.
- An indication of the circumstances in which specific management actions may be introduced should monitoring and review demonstrate that objectives are either not being met or risk not being met.
- An indication of management actions that may need to be taken in these circumstances.

PPS3 para 62 (CLG 2006)

Local authorities are required to provide standard information to the region and central government through their Annual Monitoring Report (AMR) and the Housing Strategy Statistical Appendix (HSSA) covering:

- The number of units granted planning permission by tenure of affordable housing and provider. (Although not identical to housing provided through S106 Agreements, since not all affordable housing will be provided on S106 sites, this data will include all S106 sites).
- The number of affordable units completed and their source of funding.
- Financial contributions held, received and spent.
- The value of free/discounted land received.
- Affordable housing provided in rural settlements of less than 3,000 people.

This information is useful for comparative purposes, particularly when placed in the context of the relevant policies. However individual local authorities will require more detailed information if they are to be able to assess whether or not their affordable housing policy is working.

Relevant indicators include:

- Affordability of the housing provided?
- Standard and location (integration) of the accommodation provided?
- Provision of affordable housing by size of site (particularly important in the case of lowered thresholds).
- Split between 100% affordable and mixed tenure schemes.
- Split between urban and rural provision (x tenure).
- Provision on exceptions sites (x tenure).

Table 19.1 below shows the format which local authorities in the South East are encouraged to use for submitting information on affordable housing provision to SEERA. The table seeks to quantify total; provision of affordable housing taking into account gains and losses (including demolitions and conversions) and then to specify the mix of affordable housing provided, use of financial contributions and the extent of affordable housing in villages.

Table 19.1
Specimen affordable housing return

GAINS AND LOSSES OF AFFORDABLE HOUSING						
New Build		Conversions		Change of use		Net Gain
A Gross Additions	B Losses through demolition	C Gains	D Losses	E From non-residential to affordable housing	F To non- residential from affordable housing	G Nett Gain (Loss) (A+C+E) - (B+D+F)
50	5	10	5	25	0	75

OTHER INFORMATION ABOUT AFFORDABLE HOUSING									
Additions x tenure			Additions x funding		Mixed tenure development	Provision in settlements of <3,000		Financial contributions in £000s	
G All	H Social Rent	I Intermediate affordable	J With Subsidy	K Without Subsidy	L Affordable housing new build completions in mixed tenure schemes	M All gross new affordable	N Provided in Rural Exception Schemes	O Collected	P Spent
75	50	25	60	15	50	25	10	£200,000	£250,000

Local authorities will also wish to consider the impact of their affordable housing policy in meeting housing need and to take into account the resources required in order to implement the policy.

IDeA has provided an analytical framework which local authorities can use for evaluating the effectiveness of their affordable housing policy.

Table 19.2
An analytical framework for evaluation of policy

Measure type	Definition and examples	Key indicators
<p>Inputs</p>	<p>Resources that are used to provide a service</p> <ul style="list-style-type: none"> • Staffing and skills • IT • Other 	<p>Staff involved in delivery of affordable housing policy</p> <ul style="list-style-type: none"> • Housing (FTE) • Planning (FTE) • Other (FTE)
<p>Throughputs</p>	<p>Those activities that convert inputs into outputs (ie the ratio of outputs to inputs)</p> <ul style="list-style-type: none"> • No of S106 Agreements • Length of time taken to negotiate S106 Agreements 	<p>S106 Agreements</p> <ul style="list-style-type: none"> • Completed pa Large sites Small sites • Under negotiation Large sites Small sites
<p>Outputs</p>	<p>The product or end-service</p> <ul style="list-style-type: none"> • No (and %) of affordable homes provided through S106 Agreements • No (and scale) of financial contributions and use made of them • Relationship to affordable housing target 	<p>Affordable housing provided (starts, completions, consents)</p> <ul style="list-style-type: none"> • Tenure and house type • Urban/rural • Financial contributions
<p>Outcomes</p>	<p>The impact the service or product has on the recipient (the service user or wider community)</p> <p>Eg measuring the success delivery of affordable housing through S106 Agreements has on:</p> <ul style="list-style-type: none"> • reducing homelessness, • improving housing choice, • improving life chances for poorer households 	<p>No of households housed in affordable housing provided through S106 Agreements</p> <ul style="list-style-type: none"> • Previous tenure • Urban/rural • Special needs • BME • Affordable housing released • No of households housed in more suitable accommodation • Increase in range of affordable housing provision in the borough

Based on: IDeA: Join the club, benchmarking for best value

20 Large Sites

Large sites bring particular monitoring problems. There is often a trigger arrangement in the S106 linking provision of affordable housing to delivery of market housing. Such a trigger may specify that the market units cannot be occupied until a certain percentage of affordable housing is finished. Alternatively provision of a financial contribution towards affordable housing may be triggered by completion or occupation of a specified number of sale units. These clauses cannot be enforced unless the local authority knows when the trigger point is reached. This will require monitoring.

An alternative mechanism is for a single affordable housing provider to be allocated all the affordable housing and to negotiate with landowner or developers to an agreed schedule.

Again this will require monitoring, although it is likely that more of the burden of collecting information will fall on the affordable housing provider.

The Wixams Bedford

Affordable housing is spread throughout the Wixams, pepper potted in clusters of up to 15 units. It is proportionate to ongoing development with 100% affordable housing to be provided when 85% of the market housing is completed.

Bedfordshire Pilgrims Housing Association will take on all the affordable housing. The market housing land is sold to individual developers who do not have to provide affordable housing.

Where developers or landowners are bringing forward big sites they will have their own monitoring process. In these circumstances it may be appropriate for the local authority to use information provided by the developer or a landowner as a basis for monitoring a major site. Several local authorities in the East of England are in this position and report that the major landowner provides regular detailed information in an easy to read spreadsheet. However monitoring remains the legal responsibility of the local authority and there are concerns about what will happen when multiple developers are on site.

“We recognise we will have to monitor what the developer tells us and will need to do a quick walk the site check to get early warning of trigger points.”

North Herts

“As big sites come forward, monitoring will become more burdensome. The developer submits a monitoring report every quarter. This is a very good spreadsheet. We hope this is honest and will check. We need to think what happens when there are multiple developers.”

Bedford

“At the Hamptons the landowner provides a monthly return to the local authority which records starts and completions by number of bedrooms. This provides useful information for identifying trigger points.

Once a year the local authority housing monitoring team walk the site and monitor slabs, eaves, completions and occupied dwellings. By comparing back to the original planning application, tenure split can be derived.”

Peterborough

21 Resourcing the Monitoring Process

For monitoring to be effective there must be a commitment of resources by the local authority and priority given to evaluation of the information contained in monitoring reports. This is in line with the requirement in para 62 of PPS3 that specific action should be taken where monitoring and review demonstrate that objectives are either not being met or risk not being met.

- There should be a dedicated officer with responsibility for monitoring. This is not necessarily a full time post. It will normally be based within the planning department, but will require close liaison with the housing enabling team who are responsible for the HSSA and potentially with legal services who monitor land charges and S106 Agreements.
- This officer should monitor all aspects of the S106 (not just affordable housing). If trigger points are missed then money, infrastructure and facilities negotiated for obligations can come in late (or not at all). This can have an adverse impact if key pieces of infrastructure are not available to incoming residents and existing communities.
- Regular feedback to members is essential: a quarterly report to planning committee is a good format. It should include recommendations for appropriate action if it becomes clear that targets are being missed or development failing to take place in line with the planned trajectory.
- The information provided should be made available to developers. The monitoring database provides key information about development in the area in one convenient source. It also avoids the risk of developers being required to make index-linked retrospective payments if the local authority realises belatedly that a trigger point has passed.

A bespoke S106 monitoring database for Colchester

Prior to the recruitment of a planning Agreements compliance officer in October 2003 on a part time basis, Colchester Borough Council was not adequately monitoring 106 Agreements. The current workload was too high and there were a number of 'orphaned Agreements' due to turnover in staff. Additionally, a number of old Section 52 Agreements were not being monitored even though they were still live. This meant that they were not being enforced.

It was decided that in order to create a universal index for the applications, they would be registered according to their land registration number. This decision was taken because all local authorities have a land charge system which is administered by legal services. The database is an access database in which all Section 106 Agreements have been logged.

Once the database had been set up, all interested stakeholders were involved in adapting and expanding the database so that it became more useful to more people. Because of the expanded use of the database to other parts of the council, it was redesigned along a 'point and click' system to make it more user-friendly. Data was linked to multimap (which is free) in order to provide information on site location.

In total, through the planning agreements compliance officer, the database is currently monitoring almost £60 million worth of obligations.

When money comes in for Section 106 Agreements it is automatically ring fenced. Finance Services are unable to release Section 106 money, until a release form is received signed by the head of the finance services, the head of the planning service and the legal services manager. This is a very auditable account of where the money is spent. Just as importantly the council can also show developers where the Section 106 money has been spent, according to the Section106 agreement.

The scheme was funded using Planning Delivery Grant which paid for additional funding of officer time, building the system and support mechanisms.

Colchester: The creation of a S106 database Planning Advisory Service:
www.pas.gov.uk/pas/core/page.do?pageId=37995

- **Monitoring of affordable housing delivery is essential to ensure that S106 agreements have been delivered.**
- **Key indicators which should be monitored include:**
 - The number of units granted planning permission by tenure of affordable housing and provider.
 - The number of affordable units completed and their source of funding.
 - Financial contributions held, received and spent.
 - The value of free/discounted land received.
 - Affordable housing provided in rural settlements of less than 3,000 people.
 - Affordability of the housing provided?
 - Standard and location (integration) of the accommodation provided?
 - Provision of affordable housing by size of site (particularly important in the case of lowered thresholds)
 - Split between 100% affordable and mixed tenure schemes
 - Split between urban and rural provision (x tenure)
 - Provision on exceptions sites (x tenure)
- **The information provided should be regularly reported to members.**
- **There should be a dedicated officer with responsibility for monitoring affordable housing provision.**
- **As an absolute minimum, authorities should monitor outputs of affordable housing. However more detail is required to assess whether the affordable housing policy is working.**
- **If local authorities measure throughputs, outputs and outcomes they will meet all the IDeA criteria.**



If you would like a hard copy of the executive summary of this guide then please contact us at:

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