



Llywodraeth Cynulliad Cymru  
Welsh Assembly Government

# **Delivering affordable housing using section 106 agreements:**

## **Practice Guidance**

**July 2008**

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# CONTENTS

## INTRODUCTION

The need for additional affordable housing	1
What this Guidance is for	2
How to use the Guidance	2
Limitations of the Guidance	2
Ten things to do to deliver affordable housing effectively	3

## A STEP BY STEP ROUTE TO DELIVERING MORE AFFORDABLE HOUSING

### STEP 1: TAKING ACCOUNT OF NATIONAL POLICY

1.1	Policy Framework	5
1.2	Ministerial Interim Planning Policy Statement 01/2006	6
1.3	TAN 1 and TAN 2	6
1.4	Good Practice	7

### STEP 2: PROVIDING THE LOCAL POLICY CONTEXT

2.1	Having a clear policy on affordable housing	9
2.2	Supplementary Planning Guidance	11
2.3	Dealing with a lack of clear policy	12
2.4	Key Points	14

### STEP 3: ELEMENTS WHICH MIGHT BE INCLUDED IN S106 AGREEMENTS

3.1	Defining Affordable Housing and Tenure	17
3.2	Neutral Tenure and specifying Affordable Housing Tenure	20
3.3	Amount of affordable housing	21
3.4	Practicalities of delivery: Location and timing of affordable housing	21
3.5	Mix and types of affordable housing sought	23
3.6	Specification and Standards	25
3.7	Access to, and long term management of, affordable housing	27
3.8	Specifying financial relationships between RSLs and developers	31
3.9	Use of developer contributions (including off-site and commuted sums)	34

3.10	Rural Exception Sites	37
3.11	Community Land Trusts	39
3.12	Key Points	41

#### **STEP 4: ISSUES WHICH LOCAL AUTHORITIES NEED TO CONSIDER**

4.1	Development Economics: the Basics	43
4.2	Making use of Development Appraisals	46
4.3	Use of Grant	48
4.4	Cascade mechanisms depending on Grant availability	48
4.5	Affordable housing and other planning obligations	50
4.6	Key Points	53

#### **STEP 5: DEVELOPING AN EFFECTIVE NEGOTIATING PROCESS**

5.1	Negotiations	55
5.2	Use of pre-application discussions	56
5.3	Use of standard S106 agreements or clauses	57
5.4	Protocols and procedures for dealing with applications	60
5.5	A consistent corporate approach	61
5.6	Working with Elected Members	63
5.7	Building relationships with housing providers	64
5.8	Key Points	65

#### **STEP 6: MONITORING AND RESOURCES**

6.1	Monitoring	67
6.2	Resources for Monitoring	68
6.3	Key Points	68

#### **FURTHER RESOURCES**

<b>Annex 1</b>	Glossary	71
<b>Annex 2</b>	Acceptable Cost Guidance	75
<b>Annex 3</b>	Vale of Glamorgan Protocol	77

# INTRODUCTION

## The need for additional affordable housing

i) A key policy goal of the Welsh Assembly Government is to increase the supply of affordable housing. This position has been expressed in *One Wales – a progressive agenda for the government of Wales* as a commitment to increase the supply of affordable housing by at least 6,500 over the period 2007-2011.

ii) This policy approach has been developed in response to high and rising house prices which have caused affordability to be a real issue, not just affecting the poorest but increasingly working households who previously expected to be able to buy. In this context, planning's ability to deliver housing, and especially affordable housing has become more important than ever.

iii) Available evidence suggests that there is potential to deliver significantly more affordable housing through the planning system. Research undertaken by the University of Sheffield (*The Use and Value of Planning Obligations in Wales, 2007*) found that Welsh Local Authorities only secured between £14m and £20m worth of affordable housing through Section 106 Agreements in 2005-6. This compared with the North of England in 2004, where land values were similar. Land values have risen significantly since then, enabling larger contributions from developers. The study concluded that, '*Wales could significantly increase the number and value of obligations by improving the negotiation process and the clarity of local policy*'.

iv) The Assembly Government has introduced a range of policies and tools to help local planning authorities (LPAs) to deliver the policy goal and to maximise the contribution to affordable housing from the planning system and mixed tenure developments. These are:

- A Ministerial Interim Planning Policy Statement 01/2006: *Housing* (June 2006);
- Guidance on Local Housing Market Assessments (March 2006); and
- Revisions to TAN 1 (Technical Advice Note 1: *Joint Housing Land Availability Studies*) and TAN 2 (Technical Advice Note 2: *Planning and Affordable Housing*) in line with the Ministerial Interim Planning Policy Statement (June 2006);
- The Affordable Housing Toolkit (June 2006).

v) *One Wales* builds on these by:

- increased funding to support social housing;
- proposals to significantly improve the use of publicly-owned land for affordable housing to meet local need; and
- requiring Local Authorities and National Park Authorities to prepare a delivery plan for affordable housing, to include target numbers.

## **What this Guidance is for**

vi) This Practice Guidance to Section 106 Agreements is a tool to support local planning authorities (LPAs) in delivering more affordable housing through the planning system. It aims to assist LPAs to improve the development, negotiation and implementation of Section 106 Agreements.

## **How to use the Guidance**

vii) The Guidance provides a step by step approach to improving the delivery of affordable housing through S106. It starts by outlining the steps, with a brief explanation of what is meant, and pointers to subsequent chapters which go into more technical detail, for example, on financial viability but also on policy, process, negotiations and monitoring. The aim is that someone with no previous understanding of how S106 might operate would be able to work their way through, referring to the more detailed chapters as necessary. At the same time those with more experience might wish to turn directly to the more detailed chapters, or to one in particular.

viii) The Guidance is not set in stone. Good practice is constantly evolving, as LPAs use 'what worked last time' and build on it. They also discard what did not work last time. Equally, economic circumstances are constantly changing, as the current dip in house price inflation demonstrates. This could make it more difficult to negotiate S106 affordable housing, but it could also enable housing associations to purchase more land themselves in a less competitive land market.

## **Limitations of the Guidance**

ix) There is a 'health warning' to the detailed examples that are found in the Guidance. The examples are purely illustrative and the status of some of them may not always comply fully with current policy. Thus for example an authority may have developed an excellent planning guidance document, but still does not have an up-to-date adopted Development Plan. This clearly affects the status of the guidance as it does not comply with national policy on the role of Supplementary Planning Guidance (SPG), but does not diminish its clarity and coverage and these qualities will give it weight within the development control process.

## **TEN THINGS TO DO TO DELIVER AFFORDABLE HOUSING EFFECTIVELY**

1. Provide clear guidance on affordable housing targets and thresholds in the Local Development Plan and any supporting Supplementary Planning Guidance.
2. Ensure targets are based on proper appraisals and tested out with partner Registered Social Landlords (RSLs) and developers.
3. Take account of wider Planning Obligations when setting affordable housing targets.
4. Use a cascade mechanism to ensure that developers and RSLs know what is expected both with and without grant.
5. Make use of a standard S106 Agreement, either that prepared by the Law Society or the Local Authority's own Agreement. Make sure the S106 clearly defines all the basic characteristics of the affordable housing to be provided - does it specify the number, tenure, type, quality standards, location and timing of the affordable housing? The Agreement should include an occupancy cascade and the option for the Local Authority or affordable housing provider to buy back the property.
6. Make use of pre-application discussions with developers and use this opportunity to ensure that they have identified and are working with a recognised affordable housing provider. Present a corporate approach when negotiating with developers.
7. In rural areas utilise a rural housing enabler – and recognise that it takes time to achieve results.
8. Establish monitoring arrangements and monitor delivery against targets. If targets are not met, ask why not.
9. Make sure that members understand and have an input into developing the Local Authority's affordable housing policy, but avoid involving them in site specific negotiation.
10. Keep up to date waiting lists for both social rented and Low Cost Home Ownership units and operate a common waiting list between the Local Authority and partner RSLs.





# A STEP BY STEP ROUTE TO DELIVERING MORE AFFORDABLE HOUSING

## STEP 1: TAKING ACCOUNT OF NATIONAL POLICY

This section covers the national policy framework for negotiating Section 106 Agreements for the delivery of affordable housing. The key documents are the Ministerial Interim Planning Policy Statement 01/2006, TAN1 and TAN2, and the Affordable Housing Toolkit which were all published in 2006. Mention is also made of the Planning Officers Society for Wales' own Guidance on Planning Obligations produced in 2008.

### 1.1 Policy Framework

1.1.1 In the first instance, all local planning authorities must take account of national planning policy. The national planning policy framework for housing is contained in:

- Ministerial Interim Planning Policy Statement 01/2006, *Housing* (MIPPS 01/2006);
- Technical Advice Note 1: *Joint Housing Land Availability Studies* (2006); and
- Technical Advice Note 2: *Planning and Affordable Housing* (2006).

1.1.2 The objectives of national policy are to provide:

- homes that are in good condition, in safe neighbourhoods and sustainable communities; and
- greater choice for people over the type of housing and the location they live in, recognising the needs of all, including the need of affordable or special needs housing in both urban and rural areas.

Provision of affordable housing is therefore at the heart of planning policy.

1.1.3 The Assembly Government is looking to use planning policy to achieve a mix of affordable and market housing, situated in well designed environments which are environmentally sound, energy efficient and help to promote community regeneration and improve quality of life. They should respect local landscape and wildlife and where possible be accommodated on previously developed land rather than on greenfield sites.

1.1.4 Planning policy requires Local Authorities to work collaboratively between housing and planning functions when preparing local housing strategies and development plans. It stresses that Local Authorities must understand the housing system so that they can develop evidence based market and affordable housing policies for inclusion in local housing strategies and development plans.

## **1.2 Ministerial Interim Planning Policy Statement (MIPPS) 01/2006 - Housing**

1.2.1 This Ministerial Interim Planning Policy Statement provides a revised Chapter 9 *Housing* of 'Planning Policy Wales' (2002). It states that:

*“A community’s need for affordable housing is a material planning consideration which must be taken into account in formulating development plan policies. Local Housing Market Assessments provide the evidence base supporting policies to deliver affordable housing through the land use planning system.” (9.2.14)*

1.2.2 The MIPPS sets out the Assembly Government’s land use planning policies on the role of housing in developing sustainable communities throughout Wales. It provides up-dated planning policies in relation to TAN 2: Planning and Affordable Housing and must be read alongside it. People, Places, Futures - The Wales Spatial Plan and the Statutory Code of Practice on Racial Equality in Housing – Wales must also be taken into account by local planning and housing authorities in developing their affordable housing policies in development plans.

1.2.3 The guidance requires local planning authorities to:

- include an affordable housing target in the development plan which is based on the housing need identified in the local housing market assessment;
- indicate how the target will be achieved using identified policy approaches; and
- monitor the provision of affordable housing against the target (via the Local Development Plan Annual Monitoring Report) and where necessary take action to ensure that the target is met.

Website for the MIPPS:

<http://wales.gov.uk/topics/planning/policy/mipps/housingmipps?lang=en>

## **1.3 TAN 1 and TAN 2**

1.3.1 The Welsh Assembly Government has produced technical advice on housing land availability and planning and affordable housing. Links to these are given below.

*Technical Advice Note (TAN) 1: Joint Housing Land Availability Studies (2006)*  
<http://wales.gov.uk/topics/planning/policy/tans/tan1?lang=en>

1.3.2 TAN 1 provides guidance on the preparation of Joint Housing Land Availability Studies and shows how they are integrated into the Development Plan process. All LPAs have a responsibility to identify a 5 year supply of housing land and to do so in partnership with the development industry, statutory undertakers, infrastructure providers and other key bodies as appropriate.

1.3.3 TAN 1 also prescribes that information on past housing completions, both affordable and market, should be recorded in the Annual Monitoring Report.

*Technical Advice Note (TAN) 2: Planning and Affordable Housing (2006)*  
<http://wales.gov.uk/topics/planning/policy/tans/tan2?lang=en>

1.3.4 TAN 2 provides advice on:

- affordability;
- affordable housing and land use planning;
- working together - the roles of Local Authorities, Registered Social Landlords and private developers;
- assessing local housing markets;
- Local Housing Market Assessment and the Development Plan;
- setting the affordable housing target;
- affordable housing policy approaches;
- design;
- securing affordable housing;
- involvement of a Registered Social Landlord; and
- monitoring and review of affordable housing policies.

1.3.5 TAN2 highlights the steps to support the delivery of housing through the planning system. More detail on how these policies should be developed can be found in section 7 below.

## **1.4 Good Practice**

*The Affordable Housing Toolkit (2006)*

<http://new.wales.gov.uk/topics/housingandcommunity/housing/publications/affordablehousingtoolkit?lang=en>

1.4.1 The Toolkit is a one-stop shop providing practical advice to enable Local Authorities and their partners to maximise the supply of affordable housing.

1.4.2 It is essentially a signposting document to raise awareness of the inter-relationship between different policies, tools, and functions and provide examples of good practice from around Wales. Issues discussed include:

- planning policy;
- Wales spatial plan;
- Social Housing Grant Programme;
- Rural Housing Enablers; and
- the role of public sector land.

***Section 106: Guidance on the use of Planning Obligations for Welsh Local Authorities, Planning Officers Society for Wales (2008)***

1.4.3 The aim of the guidance is to provide Local Planning Authorities, and anyone carrying out development, with practical tools and methods to help improve the development, negotiation and implementation of Planning Obligations. This guidance is not intended to provide a prescriptive protocol for the S.106 process, although there are extracts of SPGs on specific topics, and a process map for consultation and member/community engagement. The guidance also provides examples of good practice in the context of auditing financial contributions through legal agreements. Appendix 1d deals with affordable housing, drawing on Newport and Cardiff City Council's SPG.

## STEP 2: PROVIDING THE LOCAL POLICY CONTEXT

TAN 2 provides guidance on the crucial building blocks of development plan policy. The building blocks are summarised in this section of the Guidance, along with consideration of their relevance to S106 agreements.

### 2.1 Having a clear policy on affordable housing

2.1.1 Having a clear planning policy for the delivery of affordable housing is an essential starting point for the negotiation process between local planning authorities and developers.

#### ***Defining Affordability and Affordable Housing***

2.1.2 Affordability is defined in terms of, “the ability of households or potential households to purchase or rent property that satisfies the needs of the household without subsidy..”. Affordable housing, for the purposes of the planning system, includes Social Rented and Intermediate housing.

#### ***Setting affordable housing targets***

2.1.3 Development plans must include an authority-wide target (expressed as numbers of homes) for affordable housing to be provided through the planning system, based on the housing need identified in the LHMA. (TAN 2, section 9.0)

#### ***Setting site-capacity thresholds***

2.1.4 Development plans need to set out site-capacity thresholds above which a proportion of affordable housing will be sought. There may be one threshold for the whole authority or, for example, different site-capacity thresholds for different parts of the plan area or a range of site capacity thresholds in conjunction with differential affordable housing contributions. (TAN 2, paragraphs 10.3-10.8)

#### ***Setting site specific targets***

2.1.5 An indicative affordable housing target for each residential site or mixed-use site which incorporates a residential component (TAN 2, paragraphs 10.3-10.9). The target is just that, a starting point for negotiation. There may be a single target across an authority or indicative targets may be identified on a sub area basis.

2.1.6 In setting both site capacity thresholds and targets, Local Authorities need to take into account the impact which affordable housing has on site viability. Too high a target and delivery of housing could be held back. It is also possible for sites to be allocated solely for affordable housing where there is clear evidence of local need.

#### ***Securing affordable housing***

2.1.7 Development plans and/or Supplementary Planning Guidance (SPG) should set out the circumstances where local planning authorities will use planning

conditions or Planning Obligations to ensure that the affordable housing provided is occupied in perpetuity by people falling within particular categories of need. (TAN 2, section 12.0)

### ***Provision which is not on the application site***

2.1.8 There is a strong presumption that affordable housing should be provided as part of mixed tenure developments – helping to create mixed and strong communities. But there may be exceptional circumstances in which the local planning authority considers it more appropriate to provide the affordable housing on another site or as financial contribution in lieu (and which must be used to provide affordable housing). Development plans (or SPG) should set out these exceptional circumstances. (TAN 2, paragraph 12.5)

### ***Rural Exception Sites***

2.1.9 Affordable housing provision in rural areas must be supported by a rural exception site policy. Rural exception sites should be small (as locally defined in the development plan), solely for affordable housing and on land within or adjoining existing rural settlements which would not be released for market housing. The affordable housing provided on such sites should meet the needs of local people (see TAN 2, paragraphs 10.16-10.17) in perpetuity and count towards the overall level of housing provision. (MIPPS 01/2006, paragraph 9.2.22, TAN 2, paragraphs 10.13-10.15)

2.1.10 In addition to the building blocks of policy making, there are other aspects of negotiating successful S106 agreements which need to be taken into account and which are identified under Steps 3 and 4 of this Guide.

### ***The relationship between policy and SPG***

2.1.11 The recent Planning Officers Society for Wales publication on S106 Agreements sets out what policies should be included in the Local Development Plan and which need to be included in Supplementary Planning Guidance. As a general rule LDPs should set out the general principles as to what will be covered in a S106 Agreement and more detailed matters should be covered in SPG.

*“In order to allow developers to predict as accurately as possible the likely contributions they will be asked to make through Planning Obligations and therefore anticipate the financial implications for development projects, Local Authorities should seek to include as much information as possible in their published documents in the Local Development Plans. Local planning authorities should include in their new-style LDPs general policies about the principles and use of Planning Obligations – i.e. matters to be covered by Planning Obligations and factors to be taken into account when considering the scale and form of contributions or level of affordable housing provision.*

*More detailed policies applying the principles set out in the LDPs ought then to be included in Supplementary Planning Guidance. These more detailed policies might include matrices for predicting the size and types of obligations likely to be sought for specific sites; sub-plan areas; or windfall sites.”*

## **2.2 Supplementary Planning Guidance**

2.2.1 Supplementary planning guidance can help in explaining the background to an authority's policies and setting out in more detail how an authority will implement those policies. The SPG can provide detailed information e.g. on how it calculates payment in lieu.

### **Example of purpose and content of SPG from Pembrokeshire Coast National Park Authority**

Pembrokeshire Coast National Park Authority, Affordable Housing in Pembrokeshire, Adopted May 2006

*“This SPG is published to provide more detailed guidance on the way in which Development Plan policies will be applied.”*

1. STATUS OF THIS SUPPLEMENTARY PLANNING GUIDANCE (SPG)
2. AFFORDABLE HOUSING PLANNING POLICY
3. DELIVERY OF AFFORDABLE HOUSING IN PEMBROKESHIRE
  - Affordable Housing for Rent
  - Low Cost Home Ownership
  - Provision of Land
  - Off Site Provision
  - Self Build with Community Land Trusts
4. WHO WILL AFFORDABLE HOUSING BE PROVIDED FOR AND HOW WILL IT BE KEPT AFFORDABLE?
  - Affordable Housing and Affordable Housing Need
  - Evidence of Need
  - Planning Obligations and Conditions
  - Local Person
5. DESIGN
6. ISSUES OF VIABILITY

2.2.2 An example of the type of detailed guidance which an SPG can provide comes from Carmarthenshire which sets out the different levels of affordable housing required in different parts of the county.

#### **Example of detailed guidance in an SPG**

##### **Carmarthenshire SPG: How much affordable housing should be provided?**

In all areas of the County, the possible contribution of affordable homes through the planning system is far less than local need. Therefore the limit on how much should be provided is based on site viability. We have used the Three Dragons Development Appraisal Toolkit, which has been developed in partnership with other Welsh Local Authorities, to set target figures for the provision of affordable homes, as follows:

**Llanelli** (postcode areas SA4, SA14 8, SA14 9, SA15 1, SA15 2, SA15 3): 25% of the number of homes on the site

**Rural north and west** (postcode areas SA33, SA34, SA38, SA39, SA40 and SA44): 35% of the number of homes on the site

**Carmarthen** (postcode areas SA31 1, SA31 2, SA31 3): 35% of the number of homes on the site

**Rural central and east** (postcode areas SA19, SA20, SA32): 25% of the number of homes on the site

**South and east** (postcode areas SA14 6, SA14 7, SA15 4, SA15 5, SA16, SA17, SA18): 25% of the number of homes on the site

2.2.3 Some SPGs provide specific information about the typical content of S106 agreements, providing a detailed step by step guide to the negotiation process and model clauses to be used in S106 agreements (see Steps 3 and 5 below).

2.2.4 Supplementary planning guidance should be subject to public consultation and be adopted by council resolution.

2.2.5 Whilst SPG can explain and expand on the policies of a Local Authority, SPG should not be used to introduce new policy.

## **2.3 Dealing with a lack of clear policy**

2.3.1 The Planning and Compulsory Purchase Act 2004 introduced a new development plan system. Once Local Development Plans (LDPs) are in place it will be much easier and quicker to update elements of local planning policy. Local planning authorities are at different stages in the preparation of their LDPs (the first LDPs are currently scheduled to be adopted in 2010).

2.3.2 Across Wales the strength of the current local planning policy framework is variable. Less than half of authorities have adopted Unitary Development Plans (UDPs) containing affordable housing policies. Others have out of date development plans or council approved plans. As a result, a number of authorities will not have



clear planning policy for affordable housing until they have adopted their new LDPs. Even where affordable housing policies do exist in adopted plans, some are now outdated based on the latest evidence of housing need.

2.3.3 To assist authorities in filling the short term gap until their LDPs are in place, the Assembly Government will be introducing Affordable Housing Delivery Plans (AHDPs). Under the AHDP Guidance each Local Authority and National Park Authority will be required to prepare a delivery plan for affordable housing, consistent with their housing strategy, to include target numbers.

2.3.4 Given the evidence of need from the first round of Local Housing Market Assessments the intention is to allow AHDPs to set policy as an interim measure. Although policies in AHDPs will not have the same status as adopted development plan policies, or (in some instances) conventional SPG, they will be based on a comprehensive analysis of relevant evidence and will therefore be material considerations of significant weight.

2.3.5 The overall aim of the AHDP is to provide a clear statement of how a Local Authority intends to improve delivery of affordable housing as part of their strategic housing and planning functions. It will also provide direction and support to stakeholders and partners involved in the delivery of affordable housing. (Draft AHDP Guidance, paragraph 1.1)

2.3.6 AHDPs are an interim single purpose measure until authorities have adopted Local Development Plans (LDPs) in place. The Assembly Government regards AHDPs as an essential transitional link between the current development plans, housing strategies and future LDPs. (Draft AHDP Guidance, paragraph 1.11)

2.3.7 Working with the new AHDPs, there are a number of options which authorities can use to strengthen their policy position for affordable housing, prior to the adoption of their LDPs.

**LPAs with recently adopted UDPs may either:**

- incorporate existing UDP affordable housing policies into the AHDP if those policies continue to be up to date (the AHDP will then constitute formal Supplementary Planning Guidance within the meaning of *Local Development Plans Wales*); or
- where the Local Housing Market Assessment (LHMA) identifies a significant increase in the need for affordable housing, use the AHDP process to update policies.

**LPAs continuing to work on UDPs should:**

- incorporate emerging UDP affordable housing policies into the AHDP using the LHMA and other relevant evidence (here the AHDP should have the status of formal SPG on UDP adoption); and

- where the UDP is close to adoption, use the AHDP process not only to supplement UDP policy, but also to signal future policy review and direction where appropriate.

#### **LPAs without adopted UDPs should:**

- *include interim affordable housing policies in the AHDP using evidence drawn from the LHMA, Housing Strategy and early stage LDP work where available.*

2.3.8 The first document that LPAs prepare for consultation as part of LDP preparation is their 'Preferred Strategy'. This is then developed into the full Deposit Plan. The 'Preferred Strategy' should include an affordable housing target, based on the LHMA, and could also provide an indication of how this will be delivered (i.e. through draft policies on thresholds and targets). In effect the AHDP policies will operate in the role of emerging LDP policies and will acquire progressively greater weight as they progress through the LDP process. Interim planning policies contained in AHDPs do not form part of the actual development plan and, unless existing development plan policies are comprehensive and up to date, AHDPs will not be capable of fulfilling the role of conventional Supplementary Planning Guidance (SPG).

2.3.9 However, an AHDP prepared in accordance with the AHDP Guidance, based on evidence contained within the LHMA and in accordance with advice on the preparation process contained in the Guidance, will be a material consideration that should be awarded significant weight when determining planning applications for housing and in dealing with such proposals at appeal.

2.3.10 Last autumn the Minister announced a presumption in favour of housing developments where an authority does not have the required 5 year supply of land for housing. Inspectors have been implementing this at appeals, but are not able to address an LPA's lack of policy to secure affordable housing.

## **2.4 Key Points**

- ❖ *A clear policy for the provision of affordable housing is a critical starting point for negotiations between planning authorities and developers;*
- ❖ *There are a number of important building blocks which need to be set out in policy and which include the definition of affordable housing, the capacity of sites above which affordable housing will be sought (the 'threshold'), the amount of affordable housing (the target) to be sought, the circumstances in which an authority will accept affordable housing contributions which are not on-site and policies for rural exception sites in rural settlements;*
- ❖ *Supplementary planning guidance can usefully explain the background to adopted policy and provide more details about the way an authority will implement policy but SPG cannot introduce new policy;*

- ❖ *It is recognised that some authorities do not have a clear policy or their policies are becoming out of date. As an interim measure until their LDPs are adopted, the Assembly Government has identified a number of ways in which policy can be augmented, including the provision of Affordable Housing Delivery Plans.*



## STEP 3: ELEMENTS WHICH MIGHT BE INCLUDED IN S106 AGREEMENTS

This section outlines the core elements which might be included in S106 Agreements. While they may not all be essential in every case, it is worth considering them as part of a general appraisal of the approach that the Local Authority proposes to take. Key elements include defining what is affordable, determining the tenure of affordable housing, the mix and timing of delivery, specification and standards, access and management, the rules on affordable housing in perpetuity, use of developer contributions (off-site or commuted sums) and rural exception sites. Some authorities also take a neutral tenure approach, some specify the financial relationship between developers and RSLs, and increasingly Community Land Trusts are considered as an alternative approach to perpetuity and other issues.

### 3.1 Defining Affordable Housing and Tenure

#### *What counts as Affordable Housing*

3.1.1 TAN 2 provides a definition of affordable housing which all local planning authorities need to use.

#### **Defining Affordable Housing**

The definition of 'affordable housing' for the purpose of the land use planning system as described in this Technical Advice Note is housing where there are secure mechanisms in place to ensure that it is accessible to those who cannot afford market housing, both on first occupation and for subsequent occupiers. However, it is recognised that some schemes may provide for staircasing to full ownership and where this is the case there must be secure arrangements in place to ensure the recycling of capital receipts to provide replacement affordable housing. ....Affordable housing includes:

- Social rented housing;
- Intermediate housing.

Social rented housing is that provided by Local Authorities and registered social landlords. Intermediate housing is that where prices or rents are above those of social rent but below market housing prices or rents. (*TAN2 Section 5*)

3.1.2 TAN 2 makes clear that **all** other housing is market housing and should not be treated as affordable housing.

3.1.3 Intermediate housing can include equity sharing schemes (e.g. Homebuy) and other schemes where prices or rents are above those of social rent but below market housing prices or rents. It can include shared ownership<sup>1</sup> but it should be noted that this type of intermediate housing is no longer supported for funding through the Social Housing Grant programme.

3.1.4 Intermediate housing can include schemes where secure arrangements are in place to ensure future affordability or the provision of replacement affordable housing where staircasing to full ownership is possible e.g. by recycling capital receipts.

3.1.5 S106 agreements cannot be used to take away from occupiers their rights under housing legislation – including the Right to Buy and Right to Acquire.

### ***How to define affordability at the local level***

3.1.6 Affordability is defined as the ability of households or potential households to purchase or rent property that satisfies the needs of the household without subsidy (further guidance is provided in the *Local Housing Market Assessment Guide*). Affordability can be based on an assessment of the ratio of household income or earnings to the price of property to buy or rent available in the open market in the local housing market.

3.1.7 Within a Local Authority area there may be significant variations in house prices and/or incomes which define different sub markets. These sub markets should be identified through Local Housing Market Assessments and can be used to identify different levels of affordability within a Local Authority area.

3.1.8 For further information - see the *Local Housing Market Assessment Guide*, Welsh Assembly Government, 2006, and TAN 2 Section 4.0 (Policy Map Step 1).

3.1.9 By defining affordability in terms of the relationship of property prices to incomes, authorities can then work out what percentage of open market value can be afforded by households in each of their sub markets. This information should be kept under review to ensure that the changing relationship between local house prices and incomes is taken into account.

*“We do not want to use % of open market value. House price multiples are very high and in these places 30% off open market value will still not be affordable if income multiples are above 7.”* (Local Authority officer)

3.1.10 S106 agreements can explicitly define affordable housing by reference to tenure (e.g. social rent and Homebuy) and by reference to the relationship between incomes and property prices.

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<sup>1</sup> With shared ownership the purchaser purchases a share of equity in their home and pays a ‘rental’ on the unbought share.

## **Different approaches to defining affordability and set out in an SPG**

### **Carmarthenshire SPG**

#### **i) Affordable sale prices**

Developers will be expected to sell affordable homes at a price based on the median household income in the community network area of the development. This figure is updated and published each November on the Council's website.

The price paid to the developer for different house types is calculated as follows:

Price = p

Median gross annual household income in the community network area of the development = I

1 bedroom home:  $p = (40/19) \times I$

2 bedroom home:  $p = (50/19) \times I$

3 bedroom home:  $p = (60/19) \times I$

4 bedroom home:  $p = (70/19) \times I$

#### **ii) Affordable rents**

Weekly rents, including any service charges other than for internal heating and lighting, must not exceed the following figures:

Weekly rent = r

Definition of i as above.

1 bedroom flat: Rent =  $0.2 \times i / 52$

2 bedroom flat: Rent =  $0.25 \times i / 52$

2 bedroom house: Rent =  $0.27 \times i / 52$

3 bedroom house: Rent =  $0.3 \times i / 52$

(Above formulae are based on three times household income plus a 5% deposit)

### **Powys County Council – Affordable Housing for Local Needs – Interim Development Control Guidance – February 2007 (limited extract)**

The median annual gross pay for a full time employee in Powys in 2006 was £20,094.

- Using a mortgage multiplier of x 3.5 + 5% deposit (for a single earner), a dwelling of £74,031 could be afforded.
- If a multiplier of x 5.5 + 5% deposit (for a dual earning household) is used, a dwelling of £116,334 could be afforded.....
- In the case of the x 5.5 multiplier, a 3 person 2 bedroom house could be afforded in all community council areas.

### **Affordability defined in a S106 Agreement**

#### **Gwynedd County Council– S106 template**

“Affordable” means that the proportion of the Qualifying Persons net disposable income together with their spouse or partners net disposable income (that is gross wage/salary less income tax and national insurance payments) including Benefits entitlement used to meet the mortgage, rent or rent/mortgage should not exceed 30%.

## **3.2 Neutral Tenure and specifying Affordable Housing Tenure**

3.2.1 The principle of neutral tenure is that applicants should be allocated accommodation according to their needs and relative priority but those with sufficient income to purchase equity with assistance from Homebuy would be given the opportunity of doing so. In practice this means that Local Authorities may not always want to specify the tenure of the affordable housing in a new scheme.

### **Operating a Neutral Tenure Approach**

Traditionally, a Local Authority would specify in the S106 agreement the percentage social rent and percentage Homebuy in a scheme. With a neutral tenure approach, the tenure of the affordable housing is not specified and instead all the affordable housing is neutral tenure and the RSL will decide whether a new home is going to be Homebuy or social rented, depending on who is in need at the time the home becomes available. The unit would not be tied to that tenure in future; a social tenant could part purchase at the start and then when they moved on, the unit could revert back to social rent, or a Homebuy unit could become social rent at some time in the future.

In this type of scheme, the Local Authority specifies one fixed price for affordable housing that the RSL will pay the developer and which depends on the assumptions used about the broad balance between social rent and Homebuy for the scheme when it is completed.

(Case study of Local Authority using neutral tenure)

3.2.2 The Assembly Government intends to issue further guidance on the operation of a tenure neutral approach and will be consulting upon the possibility of it becoming mandatory for all grant funded affordable housing. Pending the outcome of this consultation, Local Authorities may still choose to specify the balance between social rent and intermediate housing in new developments; with the choice being based on what is required to meet local need. Where there is no Social Housing Grant, defining the tenure of affordable housing in a S106 agreements will remain an option.



### **3.3 Amount of affordable housing**

3.3.1 Local Authorities should specify the amount of affordable housing they are seeking to achieve. This is usually set out in terms of a percentage of the total housing on a scheme that should be affordable, but issues of location within the development (section 3.4) and mix and type (section 3.5) must also be addressed. This percentage should be informed by the Local Housing Market Assessment which includes an estimate of the need for additional affordable housing. However, the percentage target should be realistic, and ideally the Local Development Plan policy which sets out the target should be based on a financial appraisal of all allocated sites in the Plan (see Step 4: Development Economics: The Basics and Making Use of Development Appraisals). Otherwise, schemes may not be viable and if so, will not go ahead.

### **3.4 Practicalities of delivery: Location and timing of affordable housing**

#### ***Location and integration***

3.4.1 Achieving mixed communities means that affordable housing needs to be well integrated into new mixed-tenure housing schemes. This is often referred to as 'pepper potting'. Local Authorities can usefully expand on the principles they will use in determining the location of affordable housing in mixed tenure schemes through supplementary guidance.

3.4.2 The way in which affordable housing is 'pepper potted' in a specific development will depend on a number of factors, such as the size of the site, the tenure of the affordable housing, any surrounding housing. It is good practice for Local Authorities to seek the views of the housing association(s) which will own and manage the affordable housing in deciding how affordable housing should be 'pepper potted' in a particular scheme.

3.4.3 Usually the location of affordable housing within a scheme can be dealt with, without specific provision in a S106 agreement (as part of approval of the detailed scheme layout and/or through a planning condition). Local Authorities should refuse planning permission where schemes do not provide effective integration of affordable housing in new developments.

3.4.4 Integrating affordable housing usually also means making sure that the affordable housing is not compromised by comparison with the market housing on the site in terms of design, specification and location – this is sometimes referred to as 'tenure blind' housing. Section 3.6 below looks at other aspects of design and standards for affordable housing in more detail.

#### ***Timing of provision of affordable housing***

3.4.5 In some cases affordable housing has been provided very late on in a mixed tenure scheme because of inadequate safeguards set out in S106 agreements. It is important that S106 agreements set out the timing of provision for affordable housing and most agreements now do this. But there are still concerns amongst some

Local Authorities and housing associations that occasionally the delivery of affordable housing is much later than intended because the Local Authority's intentions have not been carried through into the delivery mechanisms specified in the S106 agreements.

3.4.6 It is good practice for Local Authorities to set out in their policy documents (probably most appropriately in a SPG) how they will handle issues around timing of delivery and then to ensure that the S106 agreements carry this through.

#### **Timing of Delivery – Policy Context**

Whether the affordable housing is to be provided on or off-site, the completion of the affordable housing will normally be linked to the completion of a specified percentage of the general market housing to ensure the scheme is developed as a whole. Where a large development is proposed in phases, the number of affordable houses should also be phased, to further integrate general market and affordable housing. Such phasing should provide the necessary infrastructure for the affordable housing to be occupied prior to commencing a new phase.

*(Para 4.14, Cardiff City Council, Supplementary Planning Guidance, Affordable Housing, March 2007)*

#### **Timing of Delivery – Local Authority Approach**

The S106 specifies that no more than 30% of the open market units can be occupied until the contract is signed with the RSL. If that hasn't happened after two months, we offer the affordable housing to an alternative RSL. Once the contract is signed, no more than 70% of the open market units can be occupied until the affordable units have actually been transferred to the RSL.

*(Local Authority officer description)*

#### **Timing of Delivery – Examples of Clauses in S106 Agreements**

##### *Example 1*

The Owner hereby covenants with the Council that the Owner shall construct and complete one Affordable Dwelling prior to the disposal or occupation of the 3<sup>rd</sup> Dwelling constructed on the Red Land thereafter the Owner shall construct and complete a further Affordable Dwelling prior to the disposal or occupation of the sixth Dwelling Unit to be constructed .....

##### *Example 2*

The Developer shall not Occupy more than 40 dwellings of Market Housing within the Development until the Developer has entered into an agreement with an RSL: identifying for Transfer to the RSL 34 dwellings within the Development, such transfer to be at a rate of at least:

- 12 dwellings prior to the Occupation of more than 80 Market Dwellings;
- 24 dwellings prior to the Occupation of more than 150 Market Dwellings; and
- 34 dwellings prior to the Occupation of more than 170 Market Dwellings."

3.4.7 Timing of delivery of affordable housing can be a particular issue with large developments which are planned and delivered over a number of phases. It is important that the S106 agreement reflects the way the Local Authority want the affordable housing planned over the life of the development – usually to make sure that the affordable housing is spread throughout the phases and does not come through in just one of the phases.

3.4.8 With large-scale development it is also good practice to have a number of ‘review points’ set out in the S106 agreement so that all parties (the Local Authority, developer and housing association) can reconsider the way affordable housing is to be delivered in later stages of the scheme. ‘Review points’ could include mechanisms to reconsider, for example, the balance of affordable tenures/introduction of neutral tenure, type of affordable housing specified, timing of delivery of affordable housing. However, any review mechanism should focus on the detail of delivery; it should not allow a renegotiation of fundamental aspects of provision, as this would undermine the consideration and determination of the application for the development.

### **3.5 Mix and types of affordable housing sought**

3.5.1 Within any policy that sets out the percentage of affordable housing that will be sought, good practice suggests that the mix of sizes and types of affordable housing should also be specified. This provides greater clarity for the developer and allows the impact on scheme viability to be assessed. Almost all Welsh authorities specify the mix and types of affordable housing in their policies or supplementary planning guidance or site briefs. Below we give an example of a clear message given to developers at the pre-application stage.

### Affordable Housing Requirements

- We will require 30% affordable housing on the above site in line with our recent Housing Market Assessment.
- All units will be neutral tenure and will have to be constructed to Welsh Assembly Government Design Quality Requirements which include all of the Lifetime Homes and Secured by Design Standards.
- The Design Quality Requirements will be those current at the time of the detailed planning application.
- Price: the housing will be transferred to the RSL at 50% of WAG Acceptable Cost Guidance.
- You will be required to work with a RSL zoned by the Welsh Assembly Government for development in Xxxxx.
- The XXXX Consortium is the only consortium zoned for development in Xxxx.
- Their Xxxx representative and therefore your RSL point of contact is:  
Name/Address/Email/Telephone

Assuming that the site will take 120 units at 30 to the hectare our suggested mix would be as follows:

2p1b flats	14
4p2b houses	14
5p3b houses	6
6p4b house	2
Total	36

To help you with your calculations the 2007 ACG<sup>2</sup> rates are given below:

#### House Type ACG 2007

2p1b flat	101,200
4p2b houses	167,300
5p3b houses	184,000
6p4b house	213,100

3.5.2 Rather than specifying the mix of social rented and intermediate housing that will comprise the affordable housing, a neutral tenure approach requires the developer to provide affordable dwellings without specifying the tenure. In effect, the developer provides housing that meets DQR standards and no assumption is made about the availability of grant. With tenure neutral, whether the affordable units will eventually be social rented or intermediate tenure is a matter for the RSL, depending on grant availability, recycled grant, or additional private finance.

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<sup>2</sup> See Annex 2 for details of Acceptable Cost Guidelines.

3.5.3 It is argued that not specifying whether the housing will be social rented or shared equity helps the developer in marketing the scheme. Local Authorities and RSLs find neutral tenure schemes attractive because it gives them flexibility, for example, if a bid for Social Housing Grant is unsuccessful, or if the housing needs assessment shows a higher than expected demand for intermediate rather than social rented units.

3.5.4 However, there may be an issue when assessing the viability of the scheme. With neutral tenure, the underlying assumption is that the units should be treated as social rented, and the Local Authority should specify the price that the RSL will pay the developer so that this can be factored in to the economic appraisal. If this is not done, it will be difficult to assess scheme viability. Where Local Authorities leave it up to the RSL and the developer to agree the price to be paid for the affordable units, the additional uncertainty would have to be factored in to the appraisal.

3.5.5 The potential danger from this approach is that if some of the units end up as intermediate, the developer may have passed on costs to the landowner that were not in fact incurred. This would increase developer profits at the expense of affordable housing. This is because the underlying assumption is that the units will be social rented, whereas the point about tenure neutral and the flexibility that it provides means that some of the units will not be social rented in practice.

3.5.6 Neutral tenure is thus highly dependent for its effectiveness on specifying in advance what the RSL will pay for the units. Good practice involves setting out the payments for different sizes and types of dwelling. For greater clarity the LA should set out the price for one social rented unit and one Homebuy unit so that different combinations of social rent and Homebuy can be modelled using a development appraisal toolkit, as these produce different payments to the developer, which of course impacts on scheme viability.

3.5.7 A reverse funding cascade may be useful here. This would set out what can be delivered without grant, and then specify the added value that could be achieved with the aid of grant. See Section 4.4 for an example.

## **3.6 Specification and Standards**

3.6.1 New affordable housing (whether social rent or intermediate) which uses Social Housing Grant must be designed and built in accordance with the latest edition of the Welsh Assembly Government's *Development Quality Requirements: Design Standards and Guidance (DQR)*. The requirements expand on the Assembly Government's Regulatory Code that protects investment in housing associations in Wales and safeguards the interests of tenants and prospective tenants. DQR covers:

- *Space standards;*
- *Accessibility;*
- *Energy efficiency; and*
- *Security.*

3.6.2 The use of DQR provides homes that are flexible and responsive to the changing needs of the occupants and are capable of meeting the changing needs of a variety of households likely to occupy a house during its design life. DQR encompasses Lifetime Homes Standards that require homes to be flexible, adaptable to meet long-term needs, and convenient for tenants.

3.6.3 DQR will also apply to new affordable housing which is, or could be, social rented or neutral tenure provided by registered social landlords but without Social Housing Grant. DQR does not apply to low cost home ownership products which do not receive Social Housing Grant.

3.6.4 All new affordable housing funded by Social Housing Grant is required to meet Level 3 of the Code for Sustainable Homes. It is also the intention to move towards Code Level 4 and 5 as soon as possible.

3.6.5 Over time, standards for affordable housing may change and it is important that S106 agreements can deal with this and ensure that the standards to which the affordable housing is built are up to date. One way in which this can be done is set out in the example below.

#### **Example of S106 Clause on Standards**

“The Social Housing.....will be in accordance with any standards laid down by the Welsh Ministers and applying to the Nominated RSL;.....”

3.6.6 Ministerial Interim Planning Policy Statement 01/2008, *Planning for good design*, supplemented by *Technical Advice Note 12: Design* (2002), promotes and encourages good design in the built environment. Best practice in construction procurement, including design, is promoted through the Assembly Government’s support for ‘Rethinking Construction’ in Wales.

#### **Carmarthenshire SPG**

It is expected that affordable homes should meet the following standards:

- Secured by Design<sup>3</sup> (Dyfed Powys Police);
- Lifetime Homes (Joseph Rowntree Foundation);
- Housing Sight (RNIB Cymru);
- EcoHomes ‘very good’ or equivalent; and
- Carmarthenshire Homes Standard

Affordable homes for rent by housing associations must also meet the Welsh Assembly Government’s Design Quality Requirements.

<sup>3</sup> Secured by Design is a flagship police initiative to set standards for designing out crime.

### **3.7 Access to, and long term management of, affordable housing**

3.7.1 Normally the Local Authority will set out through plan policy who is eligible for affordable housing in the area. The S106 agreement should focus on what is required to deliver this in the context of the relevant scheme. However, specifying nominations to a scheme can become very complex. It is not unusual for the Local Authority and the developing RSL to have separate waiting lists within the same council area and this can cause problems in allocating housing. It is good practice for the Local Authority and local RSLs to operate two shared waiting lists, one for social rented housing and the other for low cost home ownership. However, the S106 agreement should concentrate on outcomes and defining thresholds rather than the fine detail of the process.

#### ***Operation of local connection cascades***

3.7.2 For many Local Authorities, particularly rural authorities bringing forward development on exception sites, it is important to ensure that affordable housing is allocated to local people, thus ensuring that the housing effectively meets its purpose in providing for identified local need. Local connection cascades (which identify the priority order of households to whom new properties and subsequent vacancies should be offered) are one way to do this.

#### **Example of a Local Connection Cascade**

**Powys:** References in this policy to community are defined for initial occupiers as the community council area in which the site lies, together with immediately adjoining town or parish council areas. If successive occupiers cannot be found within the community, occupiers resident at the time in the appropriate shire area in Powys should be next sought, followed by occupiers resident in the rest of Powys and adjoining Local Authority areas. The Council will require proof that substantial efforts have been made to find a local occupier before the eligible area is widened to the next level.

3.7.3 Local connection policies can encourage rural communities to support development of exceptions sites. But they can cause problems for funders and housing managers if their application results in long periods when properties stand empty or make it difficult for the property to be sold in the event of default. TAN 2 (para 12.7) suggests a cascade period of 4-6 weeks for rental schemes and up to 3 months for LCHO.

3.7.4 Where local connection is applied to low cost sale properties (e.g. Homebuy) it is important to ensure that local estate agents are aware of how the system operates. The Local Authority and managing RSL will also need to keep an up to date list of demand for LCHO so that local purchasers can readily be found for any properties which become available on the second-hand market.

## **Keeping affordable housing in perpetuity**

### **3.7.5 TAN2 defines affordable housing as:**

*“.....housing where there are secure mechanisms in place to ensure that it is accessible to those who cannot afford market housing, both on first occupation and for subsequent occupiers.” (TAN 2, paragraph 5.1)*

### **3.7.6 TAN 2 also states that the expectation is that affordable housing provided through the planning process will be affordable in perpetuity and will not become available on the sale housing market. Therefore clauses in Planning Obligations that enable lenders to dispose of affordable housing on the open market as a last resort other than where an RSL is involved are discouraged.**

*“Where a local planning authority seeks to place strict occupancy controls, lenders of private finance often require registered social landlords to negotiate for the inclusion of clauses in Planning Obligations which would enable the lender to dispose of the property on the open market as a last resort, if the registered social landlord were to get into financial difficulties. The need for such clauses can be avoided, in most cases, if the local planning authority leaves the issue of controlling occupancy to the registered social landlord. However, should lenders seek the inclusion of such clauses in Planning Obligations relating to the provision of affordable housing, local planning authorities will wish to weigh the balance of interests carefully and make their own judgments before agreeing to such clauses. The Assembly Government would take steps to persuade lenders against open market disposal, but could not prevent lenders from doing so if the terms on which they had lent allowed such disposal.” (TAN 2 para 13.3)*

### **3.7.7 There is a potential conflict here with the Right to Acquire (RTA) which gives social rented tenants the right to buy their home. The Right to Acquire does not apply in settlements of below 3,000 inhabitants, which should cover most rural sites and all exceptions sites. Elsewhere RTA receipts should be used to fund the provision of replacement affordable housing in the area. Where there is no public funding the Right to Acquire does not apply.**

### **3.7.8 The Council of Mortgage Lenders has issued an advice note on low cost home ownership (see <http://www.cml.org.uk/cml/policy/issues/166> ) which includes guidance on perpetuity and the use of cascade mechanisms.**

*“Occupancy controls and nomination rights restricting the current and future use of affordable housing to particular groups of people (eg, local people and key workers) but without any time limitations are unacceptable to lenders. If a lender has to take the property into possession, it is obliged to get the best price for the property and sell at the earliest opportunity. If only a very limited number of people are able to buy the property and no suitable buyer is available, the lender will not be able to sell and the borrower's debt will continue to accrue. Lenders therefore favour a cascade mechanism - which involves offering the property to a very local market and gradually widening the net until eventually the property can be sold on the open market. If there is a strong and continuing market for affordable homes in*



*the area then there should be no problems selling the property locally. Alternatively the Local Authority or housing association could buy the property back in the case of difficulties.”*

3.7.9 Paragraph 12.7 of TAN 2 also provides guidance on occupancy cascades.

3.7.10 A list of lenders who are prepared to fund low cost home ownership schemes can be found in “Moneyfacts”. A list of lenders who funded “capped” shared ownership schemes in 2007 where the opportunity to staircase was limited to 80% can be found in the CML briefing note.

3.7.11 A S106 Agreement will usually require affordable housing to be affordable in perpetuity. A period for perpetuity can be defined where appropriate.

3.7.12 Where a registered social landlord wishes to dispose of any of its stock on the open market, (e.g. where it proves impossible to let a social rented property, by reason of its location), it can only do so with the express permission of both the Local Authority in which the property is located and the Welsh Assembly Government<sup>4</sup>.

### ***Low Cost Home Ownership and Perpetuity***

3.7.13 The Leasehold Reform Act 1967<sup>5</sup> gives leaseholders (e.g. Homebuy purchasers) the right to purchase the freehold of their property<sup>6</sup>. Under Schedule 4A, leases granted by RSLs are exempt from this requirement provided the lease allows the home owner to staircase to full ownership. RSLs 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 should seek specialist legal advice.

3.7.14 Restricting staircasing for grant funded properties is only permitted where the property lies within a rural exception site.

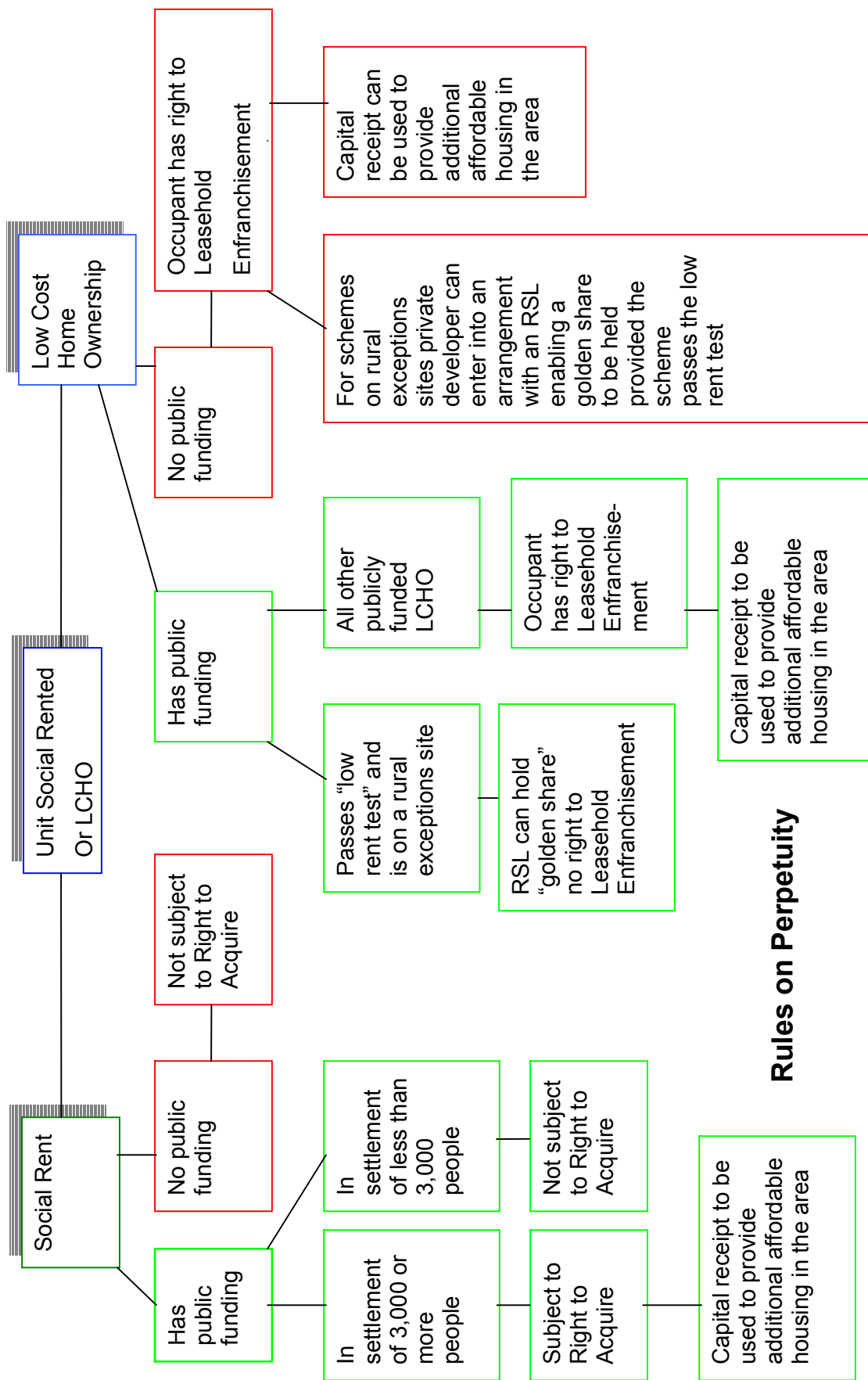
3.7.15 Shared ownership leases granted by other providers are not protected from enfranchisement in the same way within the leasehold legislation. Although private landlords of affordable housing may choose to work in partnership with RSLs to achieve the same protections. Again specialist legal advice will be required.

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<sup>4</sup> The 'Essex Review of the Regulatory Framework for Housing Associations in Wales' is currently consulting on changes to section 9 of the Housing Act 1996 which could result in a broadening of the General Consent Order. This would eliminate some of the need for individual consents for disposals of RSL land and property.

<sup>5</sup> Proposed amendments to the Housing and Regeneration Bill will create the power to exempt certain areas from leasehold enfranchisement under the Leasehold Reform Act. There will be a consultation on the protected areas, which can be wider than just rural areas, and LPAs may wish to consider whether they wish to apply for protected area status.

<sup>6</sup> Under the Leasehold Reform Act (as amended by the Commonhold and Leasehold Reform Act 2002) the tenant of a long lease of a house has the right to purchase from the landlord either a lease extension or (if the tenant wishes) the freehold, if qualifying tests are met. A premium is payable to the landlord. Tenants of long leases of flats benefit from the rights conferred by the Leasehold Reform, Housing and Urban Development Act 1993. The rights are very complex, but in essence individuals may purchase a new lease and a two-thirds majority of the tenants in a development can collectively purchase the freehold (this must be done by using a tenants-owned management company).



### **3.8 Specifying financial relationships between RSLs and developers**

3.8.1 It is not essential for Local Authority policies or S106 agreements to spell out the financial relationship between the developer and the RSL which will own and manage the affordable housing in a scheme. However, where this is done, it provides clarity for all parties and helps developers and landowners to assess the likely financial impact of the amount and tenure of affordable housing being sought. In turn, this should help ensure that land prices adjust to take account of affordable housing and other Planning Obligations which will be sought by local planning authorities.

3.8.2 The financial relationship between the developer and RSL can be set out in a number of ways:

- transfer of the land for affordable housing free or at a heavily discounted price;
- at a price per unit which is capped at X% of ACG;
- for Homebuy or other low cost home ownership products - at a price per unit which is capped at X% of open market value (with a clear definition of how open market value will be identified e.g. by reference to Land Registry prices for relevant house types in the relevant area); and
- for Homebuy or other low cost home ownership products - at a price per unit which is based on local incomes and reflects local affordability.

3.8.3 The use of ACG (Acceptable Cost Guidance)<sup>7</sup> is becoming increasingly popular, whether Social Housing Grant is available or not. ACG is used to benchmark value-for-money appraisals of social housing schemes that are proposed by Welsh Registered Social Landlords (RSLs) and in respect of which they will be applying for public subsidy. A fuller description of ACG is provided at Annex 1.

3.8.4 The following example illustrates a typical Local Authority approach to the use of ACG to establish the financial relationship between the developer and the RSL.

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<sup>7</sup> ACG (Acceptable Cost Guidance) is used to benchmark value-for-money appraisals of social housing schemes that are proposed by Welsh Registered Social Landlords (RSLs) and in respect of which they will be applying for by public subsidy. Annex 2 provides further details.

### **Example of Using ACG to specify financial relationship between RSL and Developer**

#### **Example for a Homebuy property (ACG Band 5)**

For a three bed house the ACG = £134,500

30% of £134,500 = £40,350

£134,500 - £40,350 = £94,150

The discount on the sale price to the Registered Social Landlord would be £40,350 per unit, and therefore the RSL capital contribution would be £94,150 per unit (i.e. the RSL would pay the developer £94,150 for the property).

#### **Example for a social rented property (ACG Band 5)**

For a three bed house the ACG = £134,500

58% of £134,500 = £78,010

£134,500 - £78,010 = £56,490

The discount on the sale price to the Registered Social Landlord would be £78,010 per unit, and therefore the RSL capital contribution would be £56,490 per unit (i.e. the RSL would pay the developer £56,490 for the property).

This methodology can be applied to any scheme simply by applying the formula according to the number and types of properties in the development.

*(Newport City Council, Affordable Housing draft Supplementary Planning Guidance, December 2004)*

3.8.5 Local Authorities can specify a percentage of ACG for neutral tenure schemes.

3.8.6 Whilst the use of ACGs provides clarity, there can be disadvantages of which Local Authorities need to be aware. With social rented properties and where there is no grant, there can be a gap between the payment based on ACG and the amount which the RSL can afford to pay, based on what it can borrow against the rental income it will receive<sup>8</sup>.

3.8.7 With Homebuy units, it is very common for the payment by the RSL to be based on 70% of the relevant ACG. The RSL can end up in 'credit' or 'deficit' depending on the relationship between ACG and market value in the locality. For this reason ACG should not be used to determine what price a homeowner will actually

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<sup>8</sup> RSLs borrow money against future income (i.e. gross rents less management and other costs). Where this is less than the price they are being asked to pay for a dwelling, they will need to find another funding source to make up the difference.

pay. That approach can lead to a windfall profit for the first purchaser on resale or an inability to sell the house without suffering disadvantage. An alternative approach for Homebuy is for Local Authorities to specify a percentage of open market value as the appropriate payment from RSLs and to govern resales.

3.8.8 Many Local Authorities are increasingly concerned about the situation whereby a developer will invite a number of RSLs to bid against one another for the S106 affordable housing. The highest bidder gets the housing, but at a higher price, reducing the value of the developer's contribution. In order to prevent this, some authorities specify the price that will be paid for the affordable housing. This may take the form of a 'matrix' of prices for each size and type of unit that might be delivered, as in Bristol; or the S106 agreement may specify a formula to be used to calculate the price that will be paid for the affordable units.

3.8.9 The Bristol City Council's Matrix is affordability driven, generated from research into the incomes of those in housing need and their ability to pay. It provides a matrix of payments for five different property types in inner and outer Bristol – recognising that land values vary between areas. The RSL's payment to the developer is determined by identifying the net loan that a target rent can support for particular properties taking account of the capitalised acquisition costs as well as ongoing revenue costs. (Note: target rents are agreed with the Housing Corporation to ensure that each RSL will converge with Local Authority rents by 2010.) Bristol's Local Plan policy is to seek to secure up to 30% additional affordable housing on all eligible sites **without public subsidy**, with the developer paying the grant element. Affordable housing is sought on all sites over 15 units.

3.8.10 The Matrix is set out in a document available on the council's web site.

<http://www.bristol.gov.uk/ccm/content/Housing/affordable-housing/affordable-housing-information-for-developers-and-housebuilders.en>

3.8.11 Supplementary Planning Guidance approved in January 2001 provides detailed advice. The Affordable Housing Practice Note, published in April 2007, provides the developer with additional information to support the negotiation process. The policy is supported by the West of England Sub-region Housing Need and Affordability Assessment (May 2005).

3.8.12 The council believe that this approach provides clarity, consistency and certainty for both developer and RSL. The Matrix is updated each year by RPI plus 0.5%. The aim is to ensure that the Matrix is sustainable in the long term as well as remaining responsive to different land values.

### Example of Bristol Matrix for Social Rented Housing

House type in inner area	Minimum size m <sup>2</sup>	Target rent	2007/08 payment by RSL
1 bed 2 person flat	46	£74.02	£48,280
2 bed 3 person flat	62	£85.83	£58,656
2 bed 4 person house	76	£85.20	£60,925
3 bed 5 person house	86	£95.86	£64,374
4 bed 6 person house	101	£106.74	£72,420

### Example of Bristol Matrix for Shared Ownership Housing

House type in outer area	Full Value Estimate (April '07)	Salaries required for 50% share	2007/08 payment by RSL
1 bed 2 person flat	£82,924	£13,883	£41,462
2 bed 3 person flat	£97,218	£16,241	£48,609
2 bed 4 person house	£128,327	£21,407	£64,164
3 bed 5 person house	£158,701	£26,482	£79,351
4 bed 6 person house	£178,460	£29,749	£89,230

3.8.13 These examples were taken from the BCC web site on 13 April 2008. A new Matrix will shortly be available, covering 2008/09.

3.8.14 The RSL payments, taken from the Matrix, are set out in the planning agreement. For more information, see the Bristol City web site link below:

<http://www.bristol.gov.uk/ccm/content/Environment-Planning/Planning/planning-policy-documents/affordable-housing-practice-note.en>

## 3.9 Use of developer contributions, including taking units off site or as a commuted sum

3.9.1 The Welsh Assembly Government has given consistent advice that on-site provision is preferred:

*“Development plans (or SPG) should set out the exceptional circumstances where provision may not need to be on an application site.....”* (TAN 2, paragraph 12.5)

3.9.2 On-site provision of affordable housing is preferred as this helps to achieve the policy goal of mixed and sustainable communities. However, there are circumstances when on-site provision is not the ideal option. This could be, for instance, where the market housing comprises high value flats and the service charges would make the affordable housing unaffordable. Examples where off site units or a commuted sum might be acceptable are set out below:

- ensures better management of affordable units;
- very high ‘other housing costs’ such as service charges;

- need to purchase street properties for families where scheme is flats;
- site is located far from services, schools etc. so affordable housing is not sustainable; and
- site is located in primarily social rented area while affordable units are required elsewhere.

3.9.3 Examples of where an alternative to a mixed (pepper potted) on site contribution has been accepted include:

*“In the rare occasions that we couldn’t get the preferred or the alternate RSL, then we will accept a financial contribution.”*

*“We either negotiate service charges as a percentage as well, or we choose not to pepper pot and have a separate block under the RSL’s control – this helps with their management costs as well. Or, in another scheme, the developer offered another site across the road – they provided the land plus a capital sum and paid for the planning application.”*

(Both are quotes from Local Authority officers)

3.9.4 Off-site provision may be preferred to a commuted sum where land supply is scarce and there is a general lack of suitable sites for affordable housing. In such cases a commuted sum would not stretch as far as the provision of an alternative site.

3.9.5 Where a commuted sum is accepted, there should be no advantage to the developer and no disadvantage to the RSL. Payment of commuted sums should normally be on commencement of development, as this will assist in achieving the affordable housing to be provided in a timescale equivalent to on-site provision. It is also essential to preserve the value of a commuted sum throughout the life of a permission. This can be done by appropriate interest or index-linking provision in the agreement. Two examples of commuted sum calculations are given below:

## Examples of Formula for Calculation of Commuted Sum

### Example 1

$$C = S - G$$

This is the difference between the fixed price the RSL would have paid (G) and what the developer can sell on the open market (S). This removes the incentive for the developer not to have affordable housing on site.

### Example 2

In exceptional cases a financial contribution in lieu of on-site affordable housing provision may be acceptable where it has been agreed with the Council that the affordable housing should not be provided on-site and where the developer does not own or control an alternative site. The developer would have to provide to the Council a financial sum in line with the formula ..... Financial contributions will be used to provide new affordable housing on other sites within Cardiff.

### Formula for Calculating Financial Contribution (*Note – abbreviated extract*)

1. Where a financial contribution in lieu of on-site provision is appropriate, the contribution will be calculated according to the formula set out below. This is based on the assumption that the developer's contribution should be equivalent to the Social Housing Grant required to develop an RSL new-build scheme of the same proportion and type of affordable units that would otherwise have been expected on-site. The logic behind this is the fact that RSLs are able to build affordable housing by securing private finance to supplement the grant. In most cases, contributions based on the above formula will allow commuted payments to contribute to the overall affordable housing provision without recourse to public subsidy.
2. Before a calculation can be made it will be necessary to have agreed the appropriate proportion of affordable housing and a surrogate stock mix, based on housing need. The formula is:

**Grant Eligibility ((ACG £ per unit) x (% SHG)) x N = £ financial contribution**

**Grant Eligibility** = Presently this is determined by multiplying the Acceptable Cost Guidance per dwelling by the Social Housing Grant rate (see definitions below).

**ACG** = Acceptable Cost Guidance per dwelling by Social Housing, related to dwelling type and occupancy

.....

**% SHG** = Social Housing Grant rate. ....

**N** = Number of off-site surrogate affordable housing units .....

*(Cardiff City Council, Supplementary Planning Guidance, Affordable Housing, March 2007)*



### 3.10 Rural Exception Sites

3.10.1 Local planning authorities that cover rural areas can make use of the same mechanisms to deliver affordable housing through mixed tenure schemes as are available for urban areas. In addition, in rural areas, local planning authorities can make use of rural exception sites to boost delivery of affordable housing in small settlements. TAN2 defines a rural exception site as:

*“Small scale housing site, within or adjoining existing rural settlements for the provision of affordable housing to meet local needs, which would not otherwise be allocated in the development plan.” (TAN2, Glossary, Annex B)*

3.10.2 In order to justify provision of a rural exception site, a genuine local need must be demonstrated, typically through the use of a local needs survey. This is a task which may be supported by a rural housing enabler. Rural housing enablers help to raise the profile of affordable housing generally and work with rural communities to ascertain housing need and identify appropriate sites.

3.10.3 To ensure that the affordable housing in a rural exception site meets local need, the S106 agreement will typically contain an ‘occupancy cascade’ which sets out the geographical areas and/or types of household eligible for the housing. Whilst the cascade must ensure that the affordable housing is meeting local needs, it is important that it is not so tightly drawn and with long gaps between different ‘steps in the cascade’ that properties remain vacant for long periods whilst occupiers are sought.

3.10.4 S106 agreements for rural exception sites may also include clauses which prohibit occupiers of low cost home ownership schemes from purchasing their properties outright and ensure that the housing is retained as affordable housing in perpetuity.

## **South Shropshire – Affordable Housing on Rural Exception Sites**

The Owner shall not sell or (without the prior written consent of the Council) let (whether by way of a tenancy or lease or otherwise) or offer so to do the Dwelling other than:-

- (a) to a Qualifying Person at no more than the Formula Price or at an Affordable rent; and
- (b) in accordance with a sales marketing plan (defining the marketing price selling agent and nature and minimum extent of advertising in newspapers circulating in the District and otherwise) approved by the Council in writing (such approval not to be unreasonably withheld).

2.2 If after a period of three months of the Dwelling having been made available for sale or letting no Initial Qualifying Person has agreed terms in accordance with clause 2.1(a) of this Schedule with the Owner to purchase (or take a tenancy or lease of) the Dwelling the Owner may sell (whether by way of lease or otherwise) the Dwelling at no more than the Formula Price to a Secondary Qualifying Person.

2.3 If after a further period of two months the Dwelling has not been sold (or let) or subject to an offer so to do in accordance with clause 2.1(a) of this Schedule to a Qualifying Person the Owner may offer to sell the Dwelling to the Council or to a body nominated by the Council at the Formula Price.

### **Formula**

#### *Initial Sale*

Open Market Value = £190,000

Affordable Price calculated at  $3.5 \times £30k$  (average income) = **£105,000**  
(£105,000 = 55.3% of OMV)

Therefore, subsequent affordable sale price can be at no more than 55.3% of OMV at the time of disposal.

#### *Future Resale*

Open Market Value = £240,000

Affordable sale price at resale = **£132,750** (£250,000 x 55.3%)

*(South Shropshire District Council Report of Head of Planning & Building Control No. 17/2008 Development Control Committee 30 April 2008)*

### **Golden Triangle (Harrogate, York, Leeds)**

#### **Standard Affordable Housing Heads of Terms for Section 106 Agreements**

- Prices for discounted sale homes to be inserted. These to be index linked to the Halifax Property Price Index on sites where development delays are expected due to Remedial/infrastructure work.
- Prices for discount sale homes to include marketing costs to be incurred by RSL (3% of the discounted price or £1500).
- Requirement for marketing period of discounted sale homes to extend for a minimum of six months.
- Requirement for those purchasing under discounted home ownership scheme to enter into lease with RSL restricting condition of resale i.e. limiting the percentage of open market value at which the home can be sold.

[http://www.leeds.gov.uk/Advice\\_and\\_benefits/Housing\\_advice/Low\\_cost\\_home\\_ownership/Golden\\_Triangle\\_Partnership\\_affordable\\_housing\\_good\\_practice\\_manual.aspx](http://www.leeds.gov.uk/Advice_and_benefits/Housing_advice/Low_cost_home_ownership/Golden_Triangle_Partnership_affordable_housing_good_practice_manual.aspx)

## **3.11 Community Land Trusts**

3.11.1 A Community Land Trust (CLT) is a mechanism for the democratic ownership of land by the local community. Land is taken out of the market and separated from its productive use so that the impact of land appreciation is removed, therefore enabling long-term affordable and sustainable local development. The value of public investment, philanthropic gifts, charitable endowments, legacies or development gain is thus captured in perpetuity, underpinning the sustainable development of a defined locality or community. Through CLTs, local residents and businesses participate in and take responsibility for planning and delivering redevelopment schemes.

3.11.2 Further information can be found at:

[http://www.communitylandtrust.org.uk/index.php?option=com\\_content&task=blogcategory&id=47&Itemid=70](http://www.communitylandtrust.org.uk/index.php?option=com_content&task=blogcategory&id=47&Itemid=70)

3.11.3 There are three pilot CLTs in Wales, all in Powys. It is intended that they should own land for the benefit of the community in order to build co-operative housing and affordable social housing, develop community ownership of land, develop socially inclusive villages and attract sustainable inward investment.

## Examples of Community Land Trusts

### *Example 1*

**Powys CLT** - The Assembly Government and Powys County Council are helping to fund three pilot CLT affordable housing projects. The first at Castle Caereinion near Welshpool in Powys will build 10 units of housing on land transferred at nil cost from a private developer into the ownership of the Castle Caereinion Community Land Trust (the Trust).

The original S106 granted in 1996, required that six serviced plots be transferred over to the Council as a condition of planning permission being granted. With assistance from Land for People a business case for the transfer of the land was put to the Powys CC property panel which agreed to the land being given to the Trust, without coming into the ownership of the council. The Trust has now got detailed planning permission for four one bed units and six two bed homes.

The S106 has been amended to include a mortgagee in possession clause to satisfy the lenders, Charity Bank and Venturesome and is now being discussed with several providers of retail mortgages,

The scheme would not have been possible without the pioneering approach being taken by Powys and their willingness to amend/improve their planning and legal policies to help the CLT pilots move forward.

### *Example 2*

**Stonesfield Community Trust, Oxfordshire** - In the early 1980s, steep rises in land value in West Oxfordshire had a destructive effect on many village communities. In response, Stonesfield Community Trust (SCT) was founded in 1983. Local activist Tony Croft donated a quarter acre site in the village of Stonesfield for affordable housing for local people in perpetuity. A seed corn grant of £3000 from a local company was used to register the trust and negotiate planning permission, which alone increased the value of the donated land from £3500 to £150,000, enabling SCT to raise a mortgage and build the first four properties. SCT has since borrowed additional funds from the Local Authority and ethical investors.

They have developed a further eight affordable homes on another quarter acre site, and converted a redundant glove factory into workspace units for the village. More recently, a second development has been completed to house the village post office at a low fixed rent. All properties have high-energy efficiency standards to ensure low running costs. In 2005, the first loans were fully repaid and net income from CLT property now funds a local youth service. In a few years time the net income generated by CLT rents for community purposes in the village will be £40,000 a year.

### 3.12 Key Points

- ❖ *Local Authorities are advised to use the definition of affordable housing set out in TAN 2;*
- ❖ *The affordability of housing needs to be defined at local level;*
- ❖ *In the absence of neutral tenure, the balance between social rented and Homebuy should be specified in accordance with identified local needs;*
- ❖ *Where a neutral tenure approach is taken, the RSL decides the tenure depending on who is in housing need when the dwelling becomes available.*
- ❖ *The target percentage of affordable housing should be informed by the Local Housing Market Assessment and set out in the affordable housing policy in the LDP;*
- ❖ *This target should be realistic and ideally the LDP policy should be based on a financial appraisal of all allocated sites;*
- ❖ *The location and integration of the affordable units should be set out after seeking the views of the relevant RSL;*
- ❖ *Local Authorities should set out their approach to the timing of the affordable housing delivery in policy documents and this should be carried over into S106 agreements;*
- ❖ *The mix of sizes and types of affordable housing should be set out in the S106 agreement;*
- ❖ *It is good practice to specify that the affordable housing must meet the most recent versions of the Assembly Government's Development Quality Requirements and the Code for Sustainable Homes;*
- ❖ *Local connection cascades can help to ensure that the affordable housing meets its purpose in providing for identified housing need;*
- ❖ *A S106 agreement will usually require the affordable housing to remain affordable in perpetuity. Where the Right to Acquire applies, sales receipts should be used to fund replacement affordable housing in the area;*
- ❖ *Where a commuted sum or off-site provision is accepted, there should be no advantage to the developer and no disadvantage to the RSL.*



## STEP 4: ISSUES WHICH LOCAL AUTHORITIES NEED TO CONSIDER

Local Authority planning and housing officers are often concerned that their knowledge and understanding of development economics may put them at a disadvantage in negotiating S106 contributions for affordable housing. This section aims to provide a short but clear introduction to the basic principles underlying the economics of development and hence whether and under what circumstances a scheme may be viable or not.

### 4.1 Development Economics: The Basics

#### *Underlying principles*

4.1.1 In considering a housing scheme, from the developer point of view, a number of basic decisions must be made in relation to whether or not a particular site is viable for housing development. First, what sort of units are likely to sell in the current local market, and what price might they achieve. Second, how many units of that size and type can be provided on the site (density). For illustrative purposes the analysis is kept very simple. Assume that the site can provide 100 units which are likely to sell at £300,000 each (e.g. 4 bed family homes). This means that the total amount of sales revenue that can be achieved from the site is £30m (100 x £300,000). The developer will then work backwards by deducting from that gross development revenue or value the total build costs.

4.1.2 These costs will vary considerably between sites and there may be exceptional issues, for example moving statutory undertakers' apparatus or dealing with site contamination. In such cases the authority will need to satisfy itself that the estimated costs are realistic, but also recognise the planning benefits which may arise from some such works in bringing a 'difficult' or derelict site back into beneficial use.

4.1.3 In this example each house costs £100,000 to build (including architects fees etc. etc.). So the total build costs are £10m. The developer has to make a profit on the scheme, so a gross profit margin of 25% is assumed and this too is deducted from the gross development value. What remains is termed the gross residual value of the site. This may or may not bear any resemblance to what is actually paid for the land, not least because the developer may have bought the land a long time ago at a much lower value. But it is an important concept for estimating the economic viability of the scheme.

4.1.4 The table below illustrates this, for a scheme with no Planning Obligations of any kind.

**Table 1 Scheme with 100 Market Units, No Affordable Housing**

A - Sale price per unit	£300,000
B - Number of units	100
C - Total gross development value (A x B)	£30,000,000
D – Build cost per unit	£100,000
E – Total build costs (E x B)	£10,000,000
F – Developer profit margin (25% of C)	£7,500,000
G – Gross residual value (C – (E + F))	£12,500,000

4.1.5 This scheme is clearly unrealistic, but it makes the numbers easier (a 4 bed family home would cost more than £100,000 to build, and developer profit margins may well be higher than 25% in order to keep shareholders happy). It is also unrealistic because there will be Planning Obligations, of which S106 for affordable housing is just one element. However, that is the element that is of interest in this example.

4.1.6 Table 2 below shows the impact of a S106 contribution of 30% affordable housing. This means that only 70 market units will be provided on the site, while 30 affordable units will be built by the developer and transferred to an RSL at a price that (in this example) reflects the build costs but provides the land free. In reality a lot will depend on the price paid by the RSL, as the next two examples will demonstrate.

**Table 2 Scheme with 30% Affordable Housing**

A - Sale price per unit	£300,000
B – Number of market units	70
C - Total gross development value (A x B)	£21,000,000
D – Number of affordable units	30
E – Price paid by RSL (D x F)	£3,000,000
F – Build cost per unit	£100,000
G – Total market housing build costs (F x B)	£7,000,000
H – Developer profit margin (25% of C)	£5,250,000
I – Gross residual value (C + E – (G + H))	£11,750,000
J – Other Planning Obligations	?
K – Price paid for site	?



4.1.7 In this table, row I gives the new gross residual value of the site, which has fallen by £750,000. Out of this residual must also come any other Planning Obligations, and the price paid for the land. In terms of scheme viability, provided that the net residual value – the amount left once other Planning Obligations and the land itself have been paid for – is positive, then the scheme is viable and will go ahead. If it is zero this is less likely, although possible. If it is negative then it is very unlikely that the scheme will go ahead in this form.

4.1.8 What happens when a larger S106 contribution is requested? Table 3 below shows the impact on the residual value of raising the contribution to 40%. Surprisingly perhaps, the difference is not great, although this partly results from the numbers used to make this example simple to understand – as noted above, the build costs are unrealistically low.

**Table 3 Scheme with 40% Affordable Housing**

A - Sale price per unit	£300,000
B - Number of market units	60
C - Total gross development value (A x B)	£18,000,000
D – Number of affordable units	40
E – Price paid by RSL (D x F)	£4,000,000
F – Build cost per unit	£100,000
G – Total market housing build costs (F x B)	£6,000,000
H – Developer profit margin (25% of C)	£4,500,000
I – Gross residual value (C+ E – (G +H))	£11,500,000
J – Other Planning Obligations	?
K – Price paid for site	?

4.1.9 Table 3 shows that an extra 10% affordable units makes a difference of only £250,000 over the 30% version. Again, notwithstanding the caveats about the actual numbers used here, this difference is not great. However, it could still be sufficient to push a scheme into a zero or negative residual value depending on the other Planning Obligations and the price that the developer has or must pay for the site.

4.1.10 Scheme viability may be very sensitive to the ‘Other’ Planning Obligations that are being asked for. The development appraisal must include an accurate measure of the value of other Planning Obligations. The balance between affordable housing and all the other Planning Obligations should be determined within the Local Authority, so that it does not become part of the S106 negotiations with the developer. In the past some developers have been able to take advantage of a lack of agreement or consistency between different departments and play one off against another. As one developer put it, ‘if you have a hole in your approach we will drive straight through it’!

4.1.11 Supplementary Planning Guidance can be used to set out the authority's priorities. It is the Welsh Assembly Government's view that, provided the infrastructure necessary to allow development to proceed has been secured, affordable housing should be the priority, and this can be stated clearly in the SPG.

### ***What is an acceptable land value?***

4.1.12 There are two approaches to valuing land: the first is the residual method as used in the examples above; while the second is the comparison method. This assigns a value to a site by comparing it with the prices obtained in the market for the sale and purchase of sites with similar characteristics. The most important characteristics are location, planning status, and size of site. If relatively few transactions have taken place in an area, such that those sites sold have rather different characteristics, then much depends on the skill and experience of the valuer in giving weight to the evidence available.

4.1.13 The comparison method is mainly used in valuing land in order to establish an open market value, for example, for land purchase agreements or options, where the parties agree a price based on the market value of the land (MV). It is also used as a check to ensure that the values and costs used in the residual valuation are realistic. It would clearly be useful to Local Authorities to establish a database of the market values achieved in land sales in their district<sup>9</sup>.

4.1.14 The short answer, of course, is that an acceptable land value is the price that someone is prepared to accept for the sale of the site. If the land value offered is too low, the site will not be released for development. In the case of public sector land, however, there may be a case for accepting a below market price (on the basis of the comparison method) in order to achieve certain other goals such as carbon neutral development, community facilities or even affordable housing. In such cases, care should be taken in carrying out the economic appraisal to ensure that best value is being achieved in terms of the use of public funds.

## **4.2 Making use of Development Appraisals**

4.2.1 Development appraisals can be used in advance of any planning applications, to assess the potential viability of a site with different combinations of market and affordable housing. Ideally, this would happen at the very beginning of the process of producing a Local Development Plan. When deciding which sites to allocate for housing, LAs could use a development appraisal toolkit to assess viability. This would not only provide assistance in developing a realistic affordable housing policy, but would also give LAs greater confidence when negotiating with developers. However, in some cases it may be best to employ professional consultants to assist with site appraisal. The Valuation Office Agency can be of assistance here. If a professional is employed, then it will be helpful for LA officers to

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<sup>9</sup> The Valuation Office Agency receives and records details of all land transactions and analyses and monitors market trends in all types of land and property. They can provide information on sales data for use in assessing Gross Development Values as well as land prices. (Contact details: District Valuer for Wales, Ty Rhodfa, Ty Glas Road, Cardiff CF14 5GR; tel. 029 2080 6857; [www.voa.gov.uk](http://www.voa.gov.uk))

ensure that they fully understand what assumptions have been made about prices, costs and acceptable profit margins and how these have been used to perform the appraisal.

4.2.2 Negotiating the amount and type of affordable housing to be provided often comes down to a debate about scheme viability. There are various approaches taken by local planning authorities to resolving differences; sometimes the approach is explicitly set out in policy guidance or may follow established procedures.

### **Approaches to Negotiating Scheme Viability**

#### *Example 1 – Set out in an SPG*

However in exceptional cases excessive development costs may undermine the viability of a proposal. In such cases the Council will be prepared to take account of some unforeseen abnormal costs where robust evidence is provided of their existence. The evidence provided should contain costings and valuations that will need to be verified by the Council's nominated independent quantity surveyor (cost of employing an independent surveyor for this role to be borne by the developer). Where evidence is provided and agreed, consideration could be given to varying the level of on site provision and/or identifying other forms of appropriate provision.

*(Cardiff Supplementary Planning Guidance; Affordable Housing. 2007)*

#### *Example 2 - An established Local Authority process*

Where developers claim they cannot meet the affordable housing target the council takes an “open book” approach asking:

- how much was paid for the site;
- what are the decontamination costs;
- what about habitat surveys, transport assessments and other similar expenses;
- what is the profit margin on the site; and
- what are the proposed house prices.

This information is assessed by the Local Authority estates department who advise whether the developer figures are reasonable or should be questioned.

4.2.3 Where an ‘open book’ approach is followed, the developer’s information could be given to an independent professional with the agreement from both parties that their conclusions will be accepted.

4.2.4 Another option is to allow two professionals, one from the developer, one from the council, to reach agreement on the viability or otherwise of what the council is requesting.

4.2.5 Some Local Authorities make use of development appraisal models to help them in assessing scheme economics and to identify when the viability of a proposal is in doubt. Development appraisal models provide the option of testing a range of assumptions about the scheme, for instance, the amount of affordable housing, development density, dwelling size and type and the scale of other Planning Obligations.

### **4.3 Use of Grant**

4.3.1 It is Welsh Assembly Government policy to ensure that grant is used to provide added value. The starting point for S106 negotiations should be that no grant will be available. In some cases this means that the LA may not be able to achieve its S106 targets in terms of numbers of affordable units. In other cases the target may only be achieved if there is a high proportion of intermediate housing which does not require grant to be viable. In yet other cases, the LA may have to compromise on both tenure mix and total numbers of affordable units. Which of these cases applies will depend on the underlying economics of development in the locality. Where land values are high, much more can be achieved without grant, whereas grant may be needed in low value areas simply in order to achieve any affordable housing at all.

4.3.2 Grant may also add value by enabling the provision of specialist housing, e.g. for families with disabilities or for the elderly. The uncertainty associated with bids for grant may mean that such facilities are best provided on RSL-owned sites rather than through developer contributions on S106 sites.

### **4.4 Cascade mechanisms which set out the amount/type of affordable housing depending on Grant availability**

4.4.1 It is good practice to set out the amount and types/sizes of affordable housing with and without grant. While the underlying assumption is that all the affordable units will be social rented, if sufficient grant is not available then either the LA must accept fewer units in total, or some of the units may need to be intermediate tenure, or a combination of both. A cascade can set out the preferred option for the site, followed by the second best, third best and so on.

4.4.2 An example is taken from a Supplementary Planning Document (SPD) produced by an authority in the East of England. It has not yet been formally adopted, although its provisions have already been implemented in relation to two developments.

## Cascade Mechanism

### Policy Outline – English Local Authority

If the Borough Council is satisfied that it is necessary to review the range and nature of the affordable housing obligation within the overall planning contributions framework, the Borough Council will consider the inclusion of a cascade mechanism in the S106 agreement for the development that achieves the policy requirement should public subsidy support be available at a specified level and may allow units that would have been affordable to become market housing if the required public subsidy is not forthcoming.

In determining the level of public subsidy required to support specified levels and mixes of affordable housing the Borough Council will have regard to the scheme specific appraisal information and the latest funding advice from the Housing Corporation. In these instances the level of the developer contribution must be considered to represent an appropriate response to the site economics and the requirement for public subsidy support will be considered in terms of the value of the developer contribution, as reflected in terms of the proportion of the reduced unforeseen and unexpected development costs. Public subsidy will not be a substitute for the land owner contribution.

The cascade agreement will allow for the affordable housing outputs to be increased or changed if additional public subsidy becomes available and/or the scheme profitability on large phased sites increases at the time of commencement above the level in the scheme appraisal.

*(Draft policy – English Local Authority)*

4.4.3 Elsewhere in the SPD, detailed specification is provided on what the RSL will pay the developer, **without grant**, for different sizes and types of affordable housing, including both social rented and intermediate (shared ownership) new build products. The cascade is presented at the end of the SPD and is not expected to become the norm.

## **Cascade Mechanism**

### **Flintshire SPG**

Whilst all types of affordable housing provision are needed in the county, the Council will require the applicant to consider the type of homes to be provided in a cascading order of preference, as follows:

1. Social Rented - through an RSL, such as a housing association.
2. Shared Ownership - through an RSL or other bona fide management organisation.
3. Subsidised Market Homes – provided as low cost discounted housing for sale.
4. Private Rented - provided as low cost rented accommodation.

Working through the order of preferences the applicant should consider the feasibility of including each type of housing within their proposed development scheme and provide justification for their final approach. Whilst the Council appreciates the need for schemes to be viable, it will stress the need for affordable homes to meet local community needs, and will negotiate accordingly with applicants. Applications which provide a form of affordable housing which is not considered to best meet the needs of the local community will be regarded less favourably.

[http://www.flintshire.gov.uk/wps/portal/english/services?WCM\\_GLOBAL\\_CONTEXT=/Web%20Content/flintshire/english/services/100006/200074/local+planning+guidance+notes](http://www.flintshire.gov.uk/wps/portal/english/services?WCM_GLOBAL_CONTEXT=/Web%20Content/flintshire/english/services/100006/200074/local+planning+guidance+notes)

## **4.5 Affordable housing and other planning obligations**

4.5.1 As noted above, Local Authorities need to take account of other Planning Obligations when assessing scheme viability. There are cases where the affordable housing contribution has had to be reduced at the last minute because of a suddenly realised 'need' for highways or education contributions. Good practice would ensure that this does not happen, particularly in front of the developer. While scheme viability may require that the total S106 contribution has to be less than the LA would wish for, the balance between 'other' contributions and affordable housing should be agreed in advance, including setting out the proportionate reduction in requirement that would have to be made in order to ensure the scheme goes ahead. As already noted, the Welsh Assembly Government's view is that affordable housing should be the priority once sufficient infrastructure to enable the scheme to proceed has been made available.

4.5.2 It is important that developers and others are able to understand how other Planning Obligations have been derived, and how they are justified. Information on wider Planning Obligations should be set out in the relevant SPG which should explain how they have been derived. In considering the implications of many types of wider Planning Obligation it will normally be necessary to carry out an impact

assessment which estimates the likely impact on the local environment and infrastructure of providing an additional dwelling or dwellings. For example, an impact assessment may estimate that an additional dwelling is likely to give rise to X number of additional car-journeys, accommodation for Y number of additional primary or secondary school places or the need for Z number of square metres of additional open space. The cost of mitigating that impact can then be assessed and levied on those dwellings which contribute to the impact (e.g. sheltered housing and one bed flats do not impact on primary or secondary school places but other dwellings do).

4.5.3 For further information on impact assessment see “Planning Obligations: Good Practice Guidance” CLG 2006  
<http://www.communities.gov.uk/publications/planningandbuilding/planningobligationspractice>

4.5.4 Where the total requirement for affordable housing plus other Planning Obligations would be so high as to make the scheme not financially viable it will be necessary for the Local Authority to identify and specify priorities. For example, the LA may have a target of 30% affordable housing, plus contributions to other Planning Obligations of a further £100,000 in value. If this put the scheme into jeopardy, a pre-agreed formula for reducing the burden on the developer might be that all obligations take a 5% cut. If the need for affordable housing was recognised as having the highest priority, it might be pre-agreed that only the ‘other’ obligations would be reduced, again proportionately to the level which made the scheme viable. If however infrastructure was recognised as essential in order to achieve affordable housing, then it could be pre-agreed that all obligations except infrastructure should take a percentage cut sufficient to make the scheme viable.

4.5.5 Examples of how Local Authorities deal with conflicting priorities include:

- through good working relationships between senior staff in the relevant departments;
- by reference to a specific senior officer or group of officers who have a defined ‘arbitration role’;
- through debate at planning committee; and
- using Supplementary Planning Guidance to set out priorities.

4.5.6 However an authority deals with conflicts about specific schemes, what is important is that each LA sets out its priorities in advance and is very clear about how these will be applied in different circumstances.

### Setting out an Authority's Priorities

3.10 In certain cases, a site may be assessed as appropriate for the provision of affordable housing, but there may be other planning requirements which the Council is pursuing which make provision on the site inappropriate. In such circumstances, other forms of provision would be appropriate (see paras. 4.4 to 4.6).

3.11 Whilst the provision of affordable housing will be balanced against other planning requirements, the need to provide affordable housing remains a primary objective of policy. This approach is supported by both Policy 24 of the Local Plan and by PPW. Where other Planning Obligations are offered or are sought by the Council, affordable housing requirements will normally still apply in full, though the Council may be prepared to negotiate to ensure total sought Planning Obligations are reasonable in scale.

*(Cardiff City Council SPG)*

### Dealing with Conflict Between Policy Objectives

An authority in **Sussex** took the initiative in setting up a high level steering group for an urban extension allocated in the local plan, involving landowners, key agencies and community representatives, well in advance of development coming forward. Through discussion and collaborative working the group has been able to forecast and tackle potential blockages to the process such as lobbying for a new access road and preparing a series of background documents on eg transport, employment and design strategy. This work will provide a robust evidence base for producing an SPD, thus smoothing the path for future developers and minimising potential delay.

Such a pro-active group brings confidence to the process and ensures things happen in the right order. The process has had its challenges – in a small Local Authority with a heavy workload resources can be very limited and real corporate commitment is needed to ensure this work is prioritised. The project has also been challenged by a lack of support from the County Council on highway matters.

Source: ATLAS “ Planning for Large Scale Development”

[http://atlas2.eniserv1.net/page/case/index.cfm?coArticleCaseStudies\\_articleId=5&coSiteNavigation\\_articleId=5](http://atlas2.eniserv1.net/page/case/index.cfm?coArticleCaseStudies_articleId=5&coSiteNavigation_articleId=5)



## 4.6 Key points

- ❖ *When negotiating S106 contributions for affordable housing, Local Authority planning and housing officers may find it useful to develop a basic understanding of development economics;*
- ❖ *The simple approach is to estimate the total value of the completed scheme, deduct all costs and then the 'residual' is what can be paid to the landowner for the site. If this residual is negative or very small, the scheme will not be financially viable;*
- ❖ *Costs, especially build costs, may vary considerably between sites and there may be exceptional costs which affect viability. Local Authorities will need to be satisfied that these costs are realistic, but also recognise the planning benefits which may arise from bringing a 'difficult' site back into use;*
- ❖ *Scheme viability may be sensitive to the 'other' Planning Obligations that are requested. A consistent approach to Planning Obligations is essential so that developers do not play one department off against another;*
- ❖ *Supplementary Planning Guidance can be used to set out the authority's priorities. The Assembly Government's view is that, provided the necessary infrastructure has been secured, affordable housing should be the priority, and this can be stated clearly in SPG;*
- ❖ *Development appraisals can be used in advance of planning applications to assess the potential viability of allocated sites. This not only helps develop a realistic affordable housing policy but can give greater confidence in negotiations. The Valuation Office Agency can provide assistance here;*
- ❖ *Grant should be used to provide added value, and the starting point of negotiations should be that no grant is available. It is good practice to set out the amount and sizes/types of affordable housing sought with and without grant. A cascade can set out the preferred option for the site, followed by the second best and so on;*
- ❖ *Where scheme viability is threatened by the S106 contributions, it is good practice to develop an approach for dealing with conflicting priorities and set this out in advance rather than in negotiations with developers.*



## STEP 5: DEVELOPING AN EFFECTIVE NEGOTIATING PROCESS

An efficient and speedy negotiating process for S106 agreements is central to the successful delivery of affordable housing. But there are still difficulties around the process which can cause delays and frustration on all sides. This section of the Guide looks at the principles for a better system and highlights practical ways of improving the negotiating process.

### 5.1 Negotiations

#### *The issues*

5.1.1 There are a number of issues which can cause delays and frustrations in the negotiation process.

5.1.2 Developers complain that Local Authorities do not provide sufficient information early enough, do not work corporately and do not always have the skills and resources to deal with complex schemes and viability issues.

5.1.3 Local Authorities may see developers as looking to secure deals which are not in keeping with local needs and policies whilst housing associations can get caught in the middle – or find themselves excluded from negotiations and then have to pick up an agreement which just doesn't work from their perspective.

#### *Principles for a better system*

5.1.4 Having an up to date policy is an important starting point for successful negotiations. The Guide explores this issue in more detail in Section 2.3 and sets out options open to authorities to develop a clear policy framework in advance of adopting a new development plan (whether the authority has an adopted UDP or not).

5.1.5 Other principles for an effective negotiation process are set out below and then looked at in more detail in subsequent sections of the Guide:

- use of pre- application discussions (Section 5.2);
- use of standard S106 agreements or clauses (Section 5.3);
- protocols and procedures for dealing with applications (Section 5.4);
- a consistent corporate approach from authorities (Section 5.5);
- working with Elected Members (Section 5.6); and
- building relationships with housing providers (Section 5.7).

## 5.2 Use of pre-application discussions

5.2.1 Early dialogue between the planning authority and developer can reduce the amount of time spent negotiating the S106 and alert the developer to the affordable housing requirements at an early stage.

*“If early dialogue occurs then generally little problem as good communication and consultation between all parties occurs. However if (there is) late dialogue then problems occur as landowner has unrealistic expectation of site value.”* (Local Authority planning officer)

*“Developers are aware of requirements and can build in costings. ....Builds up a relationship with potential applicant”.* (Local Authority planning officer)

5.2.2 Where a significant site is being placed on the market, the local planning authority should consider engaging proactively, perhaps by issuing a site brief or engaging in discussion with the owner. This will help to ensure that bidders are effectively informed of the planning context of the site and that the successful purchaser will already have made a realistic estimate of the Planning Obligation costs which are likely to arise from their development.

5.2.3 Some authorities positively promote pre-application discussions and have a defined process for undertaking them, for example with published guidelines and a questionnaire. The Local Authority can clarify what they want and the developer knows what to expect.

### A Process for Pre-Application Discussions

#### *Example 1*

**Monmouthshire** - The Strategy and Policy Officer who deals with affordable housing issues provides developers of potential schemes with a checklist of information which explains what the Council will require and the supporting evidence available. This will include the type and mix of affordable housing and the amount which the developer should expect the RSL to pay for the units.

#### *Example 2*

**Gwynedd** – Provides information to potential applicants explaining how the council approaches potential affordable housing schemes and emphasising the importance of an early meeting with the Local Authority. (*Information in Relation to How to Approach a Planning Application for the Provision of Affordable Housing*: see

<http://www.gwynedd.gov.uk/upload/public/attachments/822/Submittinaplaningapplication.pdf>)

5.2.4 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 reached. Even if this is not possible such discussion should enable the planning officer to write a committee report which spells out areas of agreement and outstanding differences between the authority and the applicant. Elected Members are then in a better position to reach an informed decision, including any trade-offs which may need to be made.

5.2.5 However, pre-application discussion can be time consuming and costly. Some Local Authorities are starting to charge for pre-application discussions<sup>10</sup>. Research by the Planning Advisory Service, *A material world: charging for pre-application planning advice*, <http://www.pas.gov.uk/pas/core/page.do?pagelId=40108> 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; and
- those that charge say that the principle is now broadly accepted by developers and their agents, albeit often after some initial opposition.

### 5.3 Use of standard S106 agreements or clauses

5.3.1 Practice in the use of model agreements (or clauses) varies considerably between authorities and there are a variety of ways in which authorities draw up legal agreements with developers.

5.3.2 Many Local Authorities already use standard or model S106 agreements or clauses. In theory they can provide consistency and transparency to the public, members and developers and can make work easier for the legal team:

*"This helps to speed up the delivery of the development and avoids lengthy debates between legal professionals. Our S106 agreements have set values for the LCHO units and clearly stated terms for the social rented properties. Other departments' requirements are explicit within the agreements so there are no challenges made by the developers. Developers prefer the standard agreement as it speeds up the development and the terms are clear on what needs to be delivered."* (Local Authority officer)

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<sup>10</sup> Section 93 of the Local Government Act 2003 provides authority for charging for discretionary services provided that specified limitations and requirements are met.

5.3.3 Some Local Authorities are in the process of drawing up their own model Planning Obligation whilst other authorities have an established approach.

### **Use of Standard Agreements/Clauses**

#### *Example 1*

**Cardiff** - Housing Strategy and Legal Services at Cardiff Council have worked together to design standard affordable housing clauses for S106 agreements which are easily amended to suit specific site requirements.

#### *Example 2*

**Pembrokeshire** – The SPG on Planning Obligations (S106 Agreements) is aimed at developers and applicants and provides ‘an explanation and guidance on planning agreements’. The SPG includes a layout of a S106 agreement.  
[www.pembrokeshire.gov.uk/objview.asp?object\\_id=2077](http://www.pembrokeshire.gov.uk/objview.asp?object_id=2077)

#### *Example 3*

**Flintshire** provides a similar guide (Local Planning Guidance Notes No 22 Planning Obligations).  
[http://www.flintshire.gov.uk/wps/portal/english/services?WCM\\_GLOBAL\\_CONTEXT=/Web%20Content/flintshire/english/services/100006/200074/local+planning+guidance+notes](http://www.flintshire.gov.uk/wps/portal/english/services?WCM_GLOBAL_CONTEXT=/Web%20Content/flintshire/english/services/100006/200074/local+planning+guidance+notes)

*Example 4* – Examples of councils in England which provide model S106 agreements:

**South Hams** - provides model heads of terms for S106 agreements and deals with:

- i) General Matters to be Covered In Agreements/Conditions e.g.
  - Securing Affordable Housing in the Longer Term
  - Design Related Considerations
  - Occupancy Criteria
  - Mortgagee in Possession Clause
  - Exclusion from Right to Buy
- ii) Model Legal Agreements shown for a variety of situations e.g.
  - Developer Builds and Transfers Affordable Housing Units to Registered Social Landlord[http://www.southhams.gov.uk/administration/committee\\_agendas/executive/29Jan04/item9appendixg.pdf](http://www.southhams.gov.uk/administration/committee_agendas/executive/29Jan04/item9appendixg.pdf)

**Basingstoke and Deane** Best Practice Note, Affordable Housing and Community Infrastructure, 2006 and which covers a range of policy and implementation issues for delivery of affordable housing and provides specimen S106 agreements associated with application for outline and detailed planning permission. Basingstoke and Deane was a Beacon Council for Affordable Housing in 2005-2006  
<http://www.basingstoke.gov.uk/council/legal/notes/default.htm>

**Tunbridge Wells** Model S106 agreement, including a standard schedule for Affordable Housing  
[http://consult.tunbridgewells.gov.uk/portal/spp/dah/dahspd?pointId=chapter\\_65](http://consult.tunbridgewells.gov.uk/portal/spp/dah/dahspd?pointId=chapter_65)

**City of Stoke on Trent** Model S106 agreement for affordable housing  
<http://www.stoke.gov.uk/ccm/navigation/environment/local-development-plans/supplementary-planning-documents/>

5.3.4 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](http://www.communities.gov.uk/planningandbuilding/planning/planningpolicyimplementation/planningobligations/modelplanningobligation)

5.3.5 The Law Society/CLG model can be a very useful starting point although individual authorities and their lawyers may not agree with the wording of specific clauses. Nevertheless the model provides a useful checklist of issues to be dealt with in a S106 agreement.

5.3.6 It is important that S106 agreements set out clearly the definitions being used to describe different aspects of the affordable housing to be provided. The examples of standard S106 agreements/clauses identified above do this. The definitions used are not identical from authority to authority and reflect local circumstances and policies. TAN2 provides a helpful glossary which is replicated in Annex 1 of this Guide and could form the basis for Local Authority standard definitions. It is especially important for Local Authorities to make clear what they will accept as intermediate affordable housing.

5.3.7 Whether through the use of model agreements or clauses or otherwise, it is important that authorities are consistent and transparent about the stage the S106 agreement has reached when an application is taken to committee for a planning decision. There are various options which authorities are following:

- S106 agreement ready to be signed;
- Heads of Terms of the S106 agreement are agreed; and
- S106 agreement is only started after approval in principle at committee.

5.3.8 Where negotiations for the S106 agreement are only begun after the committee stage, there can be difficulties if the negotiations lead to significant changes in the nature of the scheme (and which was the basis on which councillors believed they made their decision). Similar problems can arise as details are negotiated where heads of terms presented at committee stage are too general to be meaningful.

5.3.9 It is good practice to ensure that elected decision makers are aware of the principle agreements on affordable housing and other Planning Obligations which will be part of the legal (S106) agreement. The more complete the picture on the S106 agreement at the stage when the decision on grant/refusal of planning permission is made, the better able are councillors to take this decision.

### **Providing Guidance on Approach to S106 Negotiations**

Basingstoke and Deane Borough Council provides clear guidance on the approach which the Council takes:

“Where a determination by the Development Control Committee is required, a Planning Application which needs an associated Section 106 Agreement will only be placed before the Development Control Committee for permission where the agreement can be engrossed before the expiry of the application – either 8 or 13 weeks after the submission of the application.”

*(Best Practice Note - Section 6: The Planning Application and Section 106 Agreement Process)*

5.3.10 It is required of Local Authorities that both draft and final versions of S106 agreements are placed on the planning register.

## **5.4 Protocols and procedures for dealing with applications**

5.4.1 Establishing a protocol for S106 agreements is good practice. To help smooth the negotiation process between Local Authorities and developers and to explain the role of RSLs in this, 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.

5.4.2 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 different departments within the council).

### **Procedures for dealing with planning applications and S106 agreements**

#### *Example 1*

**Gwynedd Council** – The council’s Affordable Housing SPG includes a flow chart showing the applications process where a scheme involves affordable housing. (Gwynedd Council, Affordable Housing Project, Supplementary Planning Guidance, Affordable Housing, May 2005 – Appendix 6.)  
[http://www.gwynedd.gov.uk/upload/public/attachments/810/Final\\_spg\\_eng.pdf](http://www.gwynedd.gov.uk/upload/public/attachments/810/Final_spg_eng.pdf)

#### *Example 2*

**Vale of Glamorgan** – Has a protocol for dealing with applications which involve a Planning Obligation (including affordable housing) and which involves the council’s dedicated S106 officer as well as planning and other officers. See Annex 3 for protocol.



5.4.3 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. Where costs of monitoring an agreement are to be sought, the authority will need to determine a reasonable and efficient basis for calculation. Calculation by reference to application fees is one option.

5.4.4 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.

5.4.5 A major concern for both Local Authorities and developers can be the length of time it takes to negotiate and agree a S106 agreement. Local Authorities often feel that this is due to constraints on available resources, in particular demands on the time of legal officers whilst developer and landowner solicitors may not be familiar with the affordable housing elements of a legal agreement.

5.4.6 An option open to Local Authorities is to ensure that their legal costs are met by developers. These need to be set at a realistic level so that the authority has adequate legal resources (either in-house or externally) to offer an efficient service to applicants.

## **5.5 A consistent corporate approach**

5.5.1 The way Local Authorities organise their approach to negotiation with developers is extremely important. Good inter-departmental working between planning and housing is vital and forms the core of good practice.

### **National Policy Guidance**

Housing and planning authorities must work together to create the policy framework for the provision of affordable housing and should adopt a collaborative approach to preparing, co-ordinating and implementing local housing strategies, development plans and Supplementary Planning Guidance. (TAN 2)

5.5.2 There is no single way in which inter-departmental working should be organised and successful authorities have different approaches. There are a number of principles which are good practice:

- a clearly defined process for dealing with S106 affordable housing negotiations to ensure consistency and which is set out, for example through a published protocol;
- an identified co-ordinating officer with an affordable housing specialism and who can work across departments; and

- a clear structure for a cohesive working relationship between all departments with an input into the S106 agreement (and which may include officer working groups with the responsibility of keeping track of scheme negotiations and maintaining consistency in the application of policy).

5.5.3 Inexperience of Local Authority officers for some of whom using S106 for affordable housing is a relatively new practice and the bedding in of new procedures is an issue. There is a trade off between spreading the workload and building up expertise:

*“There may be an issue with consistency and officer training, as splitting the negotiating role amongst many Development Control Officers does not allow so much experience to be built up. However, centralisation in one person is not reasonable due to the volume of planning applications for which S106 would be relevant.”* (Local Authority officer)

5.5.4 There are a number of different aspects of good practice which are already established in Wales; with authorities using one or more of the different options depending on local circumstances.

#### **Mechanisms to ensure a consistent corporate approach**

##### *Example 1*

Having a specialist affordable housing officer who is involved in all negotiations which involve affordable housing.

##### *Example 2*

Lead on negotiations is taken by the planning case officer who liaises closely with the relevant housing officer. Negotiations with applicant on affordable housing matters are always carried out jointly.

##### *Example 3*

Inter-departmental working groups are set up to oversee proposals involving affordable housing (and which involve, as a minimum, housing and planning officers but also can include council lawyers, property experts, those with responsibilities for economic development). These groups also act as the officer forum where any conflicts between requirements for affordable housing and other Planning Obligations are discussed and resolved.

##### *Example 4*

Use of round table meetings of developers, their advisers, housing, planning, highways authority, relevant RSL and others to seek agreement on affordable housing issues.

##### *Example 5*

Appointment of specialist officer whose role is to deal with all Planning Obligations (including affordable housing) –identifying requirements for seeking obligations, negotiating them and then ensuring the S106 agreements are met and monitoring collection and spend of financial contributions.

## 5.6 Working with Elected Members

5.6.1 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 Planning Obligations sought by the council are to be given priority).

5.6.2 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. 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.

5.6.3 Member involvement and training should not be seen as a one-off activity. Over time, new councillors will become involved in decisions about affordable housing (either new to the council or new to this role) and established councillors will need to be kept up to date. Workshops for Elected Members can be particularly useful in exploring the issues which are of most concern to councillors and building up a common understanding between councillors about the development and operation of local policies and the way individual planning applications are dealt with.

5.6.4 There is no single best way of working with Elected Members but good practice ensures that councillors understand the issues surrounding policy and delivery of affordable housing and the basis for individual planning decision.

### **Examples of ways of keeping Elected Members fully involved**

#### *Example 1*

Regular general training sessions for councillors (e.g. over a half day) which are very practical in content and cover, for example, how affordable housing works in mixed tenure sites, how it is delivered, funding and rural issues. Important that the RSL and developer perspective is explored.

#### *Example 2*

Specialist mini training sessions on particular issues e.g. development economics and scheme viability, operation of S106 agreements, use of rural exception sites.

#### *Example 3*

Member briefings on schemes which raise particular issues.

#### *Example 4*

Networking sessions between councillors with housing and planning responsibilities to mirror strengthened corporate working at officer level.

## **5.7 Building relationships with housing providers**

5.7.1 TAN 2 states that Registered Social Landlords (RSLs) and private developers also have key roles in the provision of affordable housing. They have a good understanding of, and different perspectives on, local housing markets and therefore have an important role in contributing to the assessment of housing requirements and generating the additional resources necessary to provide affordable housing. They are also important for the construction and management of affordable housing.

5.7.2 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.

5.7.3 RSLs have skills and practical knowledge to bring to the process that may be overlooked by the Local Authority. Where an RSL is not involved until late in the process – sometimes after the S106 agreement has been signed – the RSL may not be able to sign up to the agreement and/or it will require extensive and time consuming revision before it is acceptable. The following is not an exhaustive list but illustrates the kind of expertise an RSL can bring to the process:

- knowledge of the funding regime and realistic financial relationship between the developer and the affordable housing provider;
- understanding of build standards which will be required where grant is involved;
- understanding of the operation of neutral tenure housing;
- knowledge of the criteria for successful layouts for mixed tenure schemes; and
- understanding of how service charges operate and implications for occupiers.

5.7.4 Where there is a known RSL involved in a scheme, 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.

5.7.5 Where a known RSL is not involved in a scheme at the time the S106 is being negotiated, the Local Authority could refer issues around the delivery of affordable housing to the housing associated consortium operating in its area (or, by agreement, to one of the consortium in its area). However it is achieved, it is good practice for Local Authorities to ensure it is using the skills and knowledge of local housing associations in negotiating S106 agreements.

## 5.8 Key Points

- ❖ *Pre-applications discussions are a very useful approach. They enable the Local Authority to make its requirements clear and give the developer more chance to factor these into their own negotiations with the landowner. Pre-application discussions enable difficult issues to be identified early and allow more time for solutions to be found;*
- ❖ *The use of model S106 agreements or model clauses can provide a useful starting point for negotiations;*
- ❖ *Protocols for dealing with S106 agreements should be drawn up in consultation with affordable housing providers. They should set out clearly the procedures and processes which the authority will follow in dealing with applications which involve affordable housing. They should indicate what information the developer will be expected to provide and when and set out who in the authority will be involved at different stages in the negotiation process;*
- ❖ *A close working relationship is required between housing, planning and legal departments. Inter-departmental working groups may be useful, and/or a dedicated S106 affordable housing co-ordinating officer;*
- ❖ *The support for affordable housing policy from Elected Members is vital. Elected Members should be included in drawing up policy and protocols. Training sessions can be held to increase awareness of not only the need for affordable housing but also how the development process works;*
- ❖ *It is important to build good relationships with developers and affordable housing providers. Registered Social Landlords have skills to bring to negotiations and should be included as early as possible in the negotiating process.*



## STEP 6: MONITORING AND RESOURCES

Monitoring is usually at the end of any guidance but this does not reflect its importance. This section covers monitoring and crucially, the need to set aside resources to enable good monitoring to take place.

### 6.1 Monitoring

6.1.1 TAN1 requires Local Authorities to monitor affordable housing completions and to include relevant information in their Annual Monitoring Report.

*“Local planning authorities should integrate development plan and JHLA processes. JHLA studies provide an important part of the evidence base for plan preparation. They provide information on previous house building rates and the current supply of land for housing as inputs to the Local Development Plan (LDP) strategy and policy development process. Information on past housing completions (market and affordable) and future housing land supply should be included in the AMR.” (TAN1 Para 4)*

6.1.2 Research evidence suggests that most Local Authorities recognise the importance of monitoring affordable housing provision and are putting in place mechanisms to deal with it, sometimes in conjunction with bringing in an officer specifically charged with monitoring S106 contributions.

6.1.3 At a minimum it is advisable to monitor:

- 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; and
- provision of affordable housing on rural exception sites.

6.1.4 In addition Local Authorities may find it useful to know:

- the number of affordable units granted planning permission;
- provision of affordable housing (or commuted sums) by size of site (particularly important when reviewing or setting thresholds); and
- units lost through the Right To Acquire (and use made of capital receipts generated).

6.1.5 Effective monitoring of affordable housing provision will require co-operation between Housing and Planning Departments within Local Authorities. The information compiled should be reported to both Housing and Planning Committees and should feed into development of and review of both the Development Plan and the Housing Strategy. Monitoring will also enable authorities to be able to assess

whether the processes and mechanisms in their S106 agreements are proving effective and relevant.

## **6.2 Resources for Monitoring**

6.2.1 Effective monitoring is vital if Local Authorities are to have a clear picture of how much affordable housing is being provided through the planning system. It needs to be properly resourced with responsibility clearly lying with one or more identified officers. (See section 30 above on reclaiming an authority's costs for preparing and monitoring a Section 106 Agreement via the agreement itself.)

6.2.2 It can be valuable for monitoring officers from neighbouring authorities to meet several times a year to share ideas and expertise. This is an invaluable resource when a monitoring officer leaves and a new person takes over the post.

## **6.3 Key Points**

- ❖ *TAN1 requires Local Authorities to monitor affordable housing completions but further information about affordable housing can be collected to provide a rounded picture of progress with the delivery of affordable housing;*
- ❖ *Effective monitoring needs to be properly resourced and can benefit from sharing experience between officers in neighbouring authorities.*



## FURTHER RESOURCES

'Golden Triangle' S106 Guide:

[http://www.leeds.gov.uk/Advice\\_and\\_benefits/Housing\\_advice/Low cost home ownership/Golden Triangle Partnership affordable housing good practice manual.aspx](http://www.leeds.gov.uk/Advice_and_benefits/Housing_advice/Low_cost_home_ownership/Golden_Triangle_Partnership_affordable_housing_good_practice_manual.aspx)

West Midlands S106 Guide:

[http://www.wmra.gov.uk/Housing/Affordable Housing Guide.aspx](http://www.wmra.gov.uk/Housing/Affordable_Housing_Guide.aspx)

North East S106 Guidance:

<http://www.northeastassembly.gov.uk/document.asp?id=515>

National Audit Office - Building more affordable homes: Improving the delivery of affordable housing in areas of high demand:

[http://www.nao.org.uk/publications/nao\\_reports/chronindex.asp?type=vfm](http://www.nao.org.uk/publications/nao_reports/chronindex.asp?type=vfm)

ATLAS large developments:

[http://www.atlasplanning.com/page/topic/index.cfm?coArticleTopic\\_articleId=56&coSiteNavigation\\_articleId=56](http://www.atlasplanning.com/page/topic/index.cfm?coArticleTopic_articleId=56&coSiteNavigation_articleId=56)

PAS – Constructive Talk – Investing in Pre-Application Discussions:

<http://www.pas.gov.uk/pas/core/page.do?pagelId=39012>

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:

<http://www.englishpartnerships.co.uk/landsupplypublications.htm>

Audit Commission - Route map to improved Planning Obligations (2006)

<http://www.audit-commission.gov.uk/reports/NATIONAL-REPORT.asp?CategoryID=&ProdID=4BF841CC-E93C-418c-9B20-62240BA961D1>

CLG - Planning Obligations: Practice Guidance (2006)

<http://www.communities.gov.uk/publications/planningandbuilding/planningobligationspractice>

CML Advice Note on Low Cost Home Ownership

<http://www.cml.org.uk/cml/policy/issues/166>

Planning Officers Society for Wales - Section 106: Guidance on the use of Planning Obligations for Welsh Local Authorities (2008)

<http://www.rtpi.org.uk/cgi-bin/library.cgi?action=detail&id=4680>

Welsh Assembly Government - A Review of the Homebuy scheme in Wales (2007)

<http://new.wales.gov.uk/topics/housingandcommunity/housing/publications/homebuyreview/?lang=en>



## Annex 1: Glossary

**Source:** TAN2

<http://wales.gov.uk/topics/planning/policy/tans/tan2?lang=en>

**Affordable Housing** - housing provided to those whose needs are not met by the open market. Affordable housing should:

- meet the needs of eligible households, including availability at low enough cost for them to afford, determined with regard to local incomes and local house prices; and
- include provision for the home to remain affordable for future eligible households, or if a home ceases to be affordable or staircasing to full ownership takes place, any subsidy should generally be recycled to provide replacement affordable housing.

This breaks down into two sub-categories:

- **social rented housing** - provided by Local Authorities and *registered social landlords* where rent levels have regard to the Assembly Government's *guideline rents* and *benchmark rents*; and
- **intermediate housing** - where prices or rents are above those of social rented housing but below market housing prices or rents. This can include equity sharing schemes (for example *Homebuy*). Intermediate housing differs from low cost market housing, which the Assembly Government does not consider to be affordable housing for the purpose of the land use planning system.

**Benchmark rents** - the 'Regulatory Code for Housing Associations in Wales', published by the Assembly Government, sets out the key expectations of the way in which Housing Associations (see *Registered Social Landlords*) are to operate. Compliance with the Assembly Government's rent benchmark guidance is a key expectation. The rent benchmark system requires Housing Associations to charge rents for key property types which, when averaged, are no greater than the benchmark rent.

**Guideline rents** - determined by the Assembly Government and relate to Local Authorities. They are calculated using statistical information provided by individual Local Authorities.

**Homebuy** - scheme operated by *Registered Social Landlords* under which existing social housing tenants and those on housing waiting lists can purchase a home with an interest-free equity loan.

**Housing demand** - the quantity and type/quality of housing which households wish to buy or rent and are able to afford. It takes account of both preferences and ability to pay.

**Housing market (area)** - geographical areas within which there are clear links between where people both live and work. These areas can be defined by the patterns of household movement. These patterns are influenced by factors such as proximity to family, friends, employment, education and other facilities, and are likely to operate across local planning authority boundaries.

**Housing need** - refers to households lacking their own housing or living in housing which is judged to be inadequate or unsuitable, who are unlikely to be able to meet their needs in the housing market without some financial assistance.

**Housing requirements** - refers to the total amount and type of housing necessary to accommodate a given (or projected) population at appropriate minimum standards. Includes both *housing needs* (as defined above) and housing likely to be demanded in the market.

**Joint Housing Land Availability Study (JHLAS)** - local planning authorities must ensure that sufficient land is genuinely available or will become available to provide a 5 year supply of land for housing, judged against the strategy contained in the development plan. The purpose of these studies is to:

- monitor the provision of *market housing* and *affordable housing*;
- provide an agreed statement of residential land availability for development planning and control purposes; and
- identify the need for action in situations where an insufficient supply is identified.

**Local Development Plan Annual Monitoring Report (AMR)** - local planning authorities are required under the Planning and Compulsory Purchase Act 2004 to make Annual Monitoring Reports to the National Assembly following adoption of their Local Development Plans and to publish them. The AMR should include an assessment of:

- whether policies (such as those on *affordable housing*) and related targets have been met or progress is being made towards meeting them; and
- what aspects, if any, of the development plan need adjusting or replacing because they are not working as intended or are not achieving the objectives of the strategy and/or sustainable development objectives.

**Local Housing Market Assessment** - local planning authorities' assessments of the requirement for both *market housing* and *affordable housing* in their local *housing market area(s)*. These assessments should be carried out in accordance with the Welsh Assembly Government's 'Local Housing Market Assessment Guide', 2006.

**Market housing** - private housing for rent or sale where the price is set in the open market.

**Occupancy cascade** - a mechanism to ensure that occupants who fulfil the occupancy criteria will always be found for *affordable housing* when such housing is vacated. This mechanism might set out the geographical areas and/or types of households that would be eligible for such housing.

**Planning conditions** - conditions on a planning permission which can enable a development proposal to proceed where it would otherwise be necessary to refuse planning permission.

**Planning Obligations (or Section 106 Agreements)** - arrangements to overcome obstacles which may otherwise prevent planning permission from being granted. May be used to offset negative consequences of development, to help meet local needs or to secure benefits which would make a development more sustainable.

**Registered Social Landlord (RSLs)** - technical name for social landlords that own or manage social housing and are registered with, and regulated by, the Assembly Government. Most RSLs are Housing Associations (independent, not-for-profit organisations which are able to bid for Social Housing Grant funding).

**Right to Acquire** - a scheme which gives qualifying tenants of *Registered Social Landlords* a right to purchase their homes if they were provided using *Social Housing Grant*, or transferred from a Local Authority after April 1997. Some types of property are exempt from the scheme including those in designated rural areas.

**Right to Buy** - enables qualifying tenants of Local Authorities and some *Registered Social Landlords* to buy their homes at a discount on market value. Some types of property are exempt and restrictions to subsequent sales apply in designated rural areas.

**Rural exception site** - small scale housing site, within or adjoining existing rural settlements for the provision of *affordable housing* to meet local needs, which would not otherwise be allocated in the development plan.

**Social Housing Grant** - capital grant provided by the Assembly Government to Local Authorities to fund *Registered Social Landlords* to fully or partially fund investment in social housing.

**Sustainable communities** - places where people want to live and work, now and in the future. They meet the diverse needs of existing and future residents, are sensitive to their environment and contribute to a high quality of life. They are safe and inclusive, well planned, built and run and offer equality of opportunity and good services for all.



## **Annex 2: Acceptable Cost Guidance (ACG)<sup>11</sup>**

### **Purpose**

ACG is used to benchmark value-for-money appraisals of social housing schemes that are proposed by Welsh Registered Social Landlords (RSLs) and in respect of which they will be applying for by public subsidy. They are not cost limits and schemes are regularly approved where costs are above, as well as below, ACG. ACG is neither designed nor intended to be used for any other purpose.

When the total cost of a scheme submitted for approval is at or below ACG it is not usual to apply detailed scrutiny unless there are other features that suggest that scheme costs should be well below ACG, for example, where land is free or heavily discounted.

Schemes are not usually approved for grant where costs exceed 120% of ACG.

### **Origins**

ACG is simply the sum of target works cost and expected land value for a range of the more usual types of dwelling units. The ACG includes an allowance to cover fees and administration.

The works cost for a given type of unit is the product of an assumed area and an assumed construction cost per square metre. The unit size is based on a range of plans developed and published by the WAG to illustrate compliance with Design Quality Standards. The assumed construction cost per square metre varies according to unit type and size.

The land value for a given unit type is the quotient of an assumed value per acre and an assumed planning density for the unit type.

Assumed construction costs have an empirical base and are updated periodically using Building Cost Information Service indices. Assumed bulk land values are obtained from the Valuation Officer Service. Both assumptions are periodically reviewed, usually annually.

### **Currency and reliability**

Because the usual review is annual, the cost of schemes may have a variable relationship with ACG according to movements in construction costs and land values within the currency of a published ACG set. Typically, inflation will cause schemes submitted soon after a review to have a more favourable relationship with ACG than those submitted shortly before a review.

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<sup>11</sup> This wording was provided by the Assembly Government.

Reported land values are grouped into six bands and for ACG purposes it is necessary to apply a single value to a community council area. Actual land values do not, of course, behave in such an ordered manner. Within an assumed value band there may be both “hot” and “cool” spots. A site close to a boundary with a higher or lower value band area is likely to reflect the neighbouring value. Smaller infill sites suitable for development of a few dwellings are likely to be proportionately more expensive than larger sites.

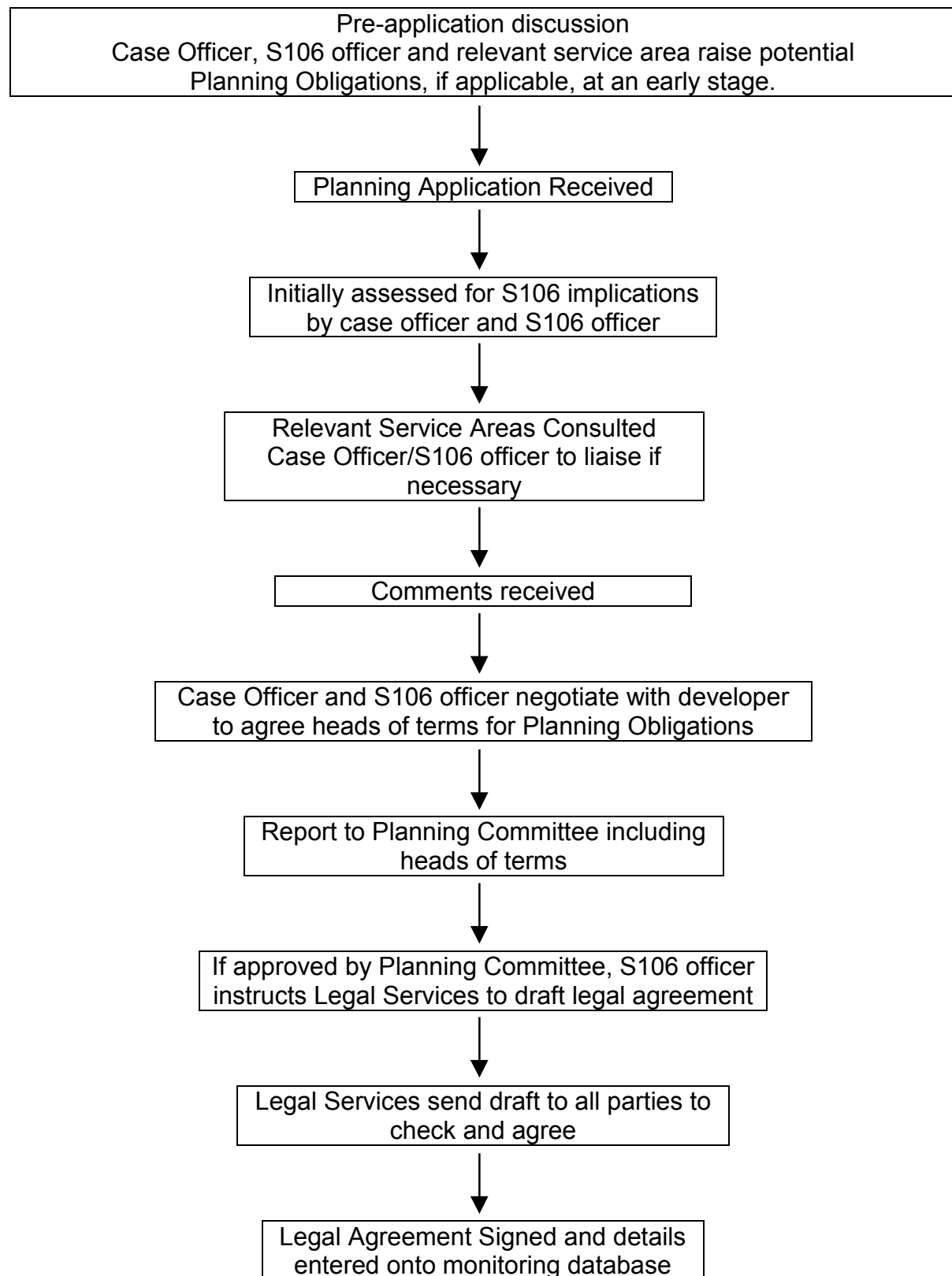
These variables can be, and are, taken into account when making value-for-money judgements but can present difficulties if ACG is used to negotiate land purchase or section 106 planning agreements.

ACG is designed to estimate the likely cost of developing schemes. It is not a measure of value. In some areas the cost of providing new dwellings might exceed the market value of those dwellings. The relationships between costs and market values is likely to vary in time, adding to the difficulty of restricting future sales values to some proportion of ACG.



## Annex 3: Vale of Glamorgan Protocol

### Planning Obligation Process – Negotiation



## Planning Obligation Process – Monitoring

