

ANNEX 1

Oxfordshire County Council (OCC)

Security Bond Policy

May 2020 v2

1. Background

1.1. Introduction

This policy addresses the issue of the use of bonds in relation to payment of Section 106 contributions and direct delivery of key strategic infrastructure like schools and highways.

Bonds/Security deposits relating to Section 278 and Section 38 works (different categories of highway work as defined by the Highway Act 1980) are not included in this report as they are a standard requirement. Likewise, this report does not deal with bonds further to the Advance Payments Code under statutory mechanisms of the Highway Act.

1.2. Context

Section 106 Agreements (S106 agreements) defined in the Town and Country Planning Act 1990 are contractual agreements between people with an interest in land (landowners / developers) and local planning authorities which seek to mitigate the impact of the development on local infrastructure and services and make it acceptable in planning terms. Section 106 obligations (S106 obligations) can also be provided by unilateral undertaking and for the purpose of this policy, S106 agreements should be read to include unilateral undertakings made under s106 provision in the Act.

In the context of County Council Services, the s106 agreement could include contributions towards the cost of providing, or direct delivery, of new school places, public transport and strategic highway infrastructure and on occasion other council infrastructure like fire stations and libraries.

These contributions can be for relatively small sums directly related to mitigating the development but can also be for larger sums linked to key area wide infrastructure or strategic infrastructure aiding the delivery of a Local Plan supporting infrastructure, including elements that have been forward funded by Government funding agreements. For those that relate to large key pieces of infrastructure where works would have to be tendered and contract awarded linked to delivery and payment schedule, this can give rise to a substantial risk for Oxfordshire County Council (OCC) if these are not paid in a timely manner or at all.

2. Methods of managing financial risk

2.1. Staged payments

Most developments, other than very small ones, have deferred or staged payments to assist with viability and 'cash flow' of the development. They also assist OCC by maintaining the real value of the contribution by applying indexation up to the time of payment; and provide longer more realistic longstops (e.g. the developer can call for a refund of unspent monies after 10 years from the date of the last instalment paid).

ANNEX 1

The disadvantages are that if development stalls, triggers for contributions may not be reached which puts risk on OCC that the cost of mitigating the impact of the development already built out is not met. However, the risk can be reduced by using time related triggers in addition to triggers relating to occupations.

For large developments above 400 dwellings, it is usual to have at least 10% of the aggregate s106 contributions payable prior to implementation and the remaining contributions payable by $\frac{2}{3}$ of the development build out or occupations. This provides a reasonable number of occupations left against which enforcement action could be taken, reducing the risk on deferring payments. Ideally, payments should not be in arrears, i.e. after the buildings to which the amounts pertain, have been occupied.

For smaller developments, less than 400 dwellings, there is a higher risk in defaulting. The contributions will be phased to ensure 50% of contributions are received prior to implementation of the development and all paid prior to first occupation. However, smaller developers may find the high outgoings at the start of a development cause cash flow issues, and therefore there will need to be some flexibility to allow remaining contributions to be paid by a third of the development being built out and again ideally not in arrears of occupations.

2.2. Legal Mechanisms

A Section 106 agreement is a legally binding contract and it is good practice for contributions under a S106 agreement to be framed both positively and negatively, for example:

- a) positively, e.g. commitment to pay to OCC the Education Contribution on or before the occupation of the xth Dwelling at the Site and,
- b) negatively, e.g. not to occupy more than xth Dwellings at the Site until the Education Contribution has been paid to OCC

Thus, if the developer defaults on payment the outstanding S106 agreement payments which are not paid when due, will be collected in line with the Council's Credit Control Policy and Debt Recovery process:

- a) OCC may claim (and if necessary, instigate legal proceedings) for payment of the outstanding contribution; and
- b) Apply to the courts for an injunction to prevent further occupations because of breach of the negative restriction.

It must be borne in mind that even in cases where the court is willing to determine the matter rapidly (this may apply in some injunction cases) court proceedings can be costly and time consuming. There can be no absolute certainty as to the outcome known as the litigation risk.

Furthermore, an injunction is “an equitable remedy” where the Court can exercise its discretion and only grant an injunction when it considers that to do so is fair.

2.3. OCC experience of legal proceedings

OCC has instigated legal proceedings for non-payment under a S106 agreement on two occasions during the last 15 years. In the most recent matter OCC was successful in recovering all outstanding contributions after going to the High Court. Proceedings relating to S106 agreements should be taken in the High Court, where appropriate and

ANNEX 1

assessed by the Assistant Directors within Planning and Place, Head of Corporate Finance and Principal Litigation solicitor and then approved to proceed to court by the Director for Planning & Place and Director of Finance (s151 Officer). The Litigation team will be able to advise as to usual timescales and cost of instigating court proceedings in the High Court.

3. Legal Mechanisms avoiding Court action

By statute Section 106 planning obligations are automatically enforceable against any successor in title to the development land. Thus, if the original landowner developer sells on part of the development site then the buyer developer and the original developer owner will both be liable.

It is OCC standard practice to release future homeowners and occupiers from all obligations to make payments i.e. positive commitments as identified at point above however negative/restrictive controls as identified at point 2.2 are required to remain in place.

Certainly, the County Council does not want to enforce such restricting provisions against individual householders in occupation (i.e. requiring them to move out of homes they have recently moved into), but this negative provision can be a good practical incentive to secure prompt compliance by developers. It may well be that mortgage companies for prospective house buyers wish to be certain that there are no outstanding breaches of restrictive controls before they release mortgage funding.

Financial Incentives

If an invoice is not paid indexation on contributions will be continue to be accrued until payment is received, and in addition interest (termed late payment interest) is required generally at 4% per annum above the bank (e.g. Lloyds Bank PLC) base rates compounded annually. Late payment interest is calculated from the date payment is due to the date of actual payment. This provides an in-built incentive to make payments on time; where payment is not made in a timely manner, OCC receives extra payments (these late payments are monitored by the Planning Obligations Team).

Planning Obligations Officers also monitor the progress of site delivery against the S106 agreement. Therefore, should a developer delay informing OCC that a payment trigger point has been reached, late payment interest may also be charged from the date the payment trigger was reached, up to the date of receipt of payment.

Late payment interest provision is standard. It is important to note that this is not a penalty interest. In the event contributions are not paid at the appropriate time the likelihood is OCC will have to fund the necessary mitigating infrastructure itself. This creates a cost to OCC with regard to finding those funds, which will mean either having to divert funds from other projects or using funds that should more probably have been invested in some manner. The interest charged on late payment is unlikely to cover the costs to OCC of finding those funds and diverting them to necessary infrastructure that should have been funded from another source.

4. Renegotiation of payment schedule

OCC's Planning Obligations Team will continue to monitor all s106 agreements and their associated development to minimise cases where developers default.

ANNEX 1

If they see that there is a pattern of default by a developer, then this will be flagged, and more investigation and conversation is had with the developer. The District Planning Authority or County Council as planning authority, is notified and an assessment is made whether there is a similar pattern with the District/City's payment of contributions. An assessment into the finances of the company and other developments they have been involved with will also be looked at.

If it is appropriate and there are exceptional circumstances the Obligations Officer notifies the Negotiator and they go into renegotiation of the payments schedule with the developer to ensure that the payments are suitable for both OCC and the developer. This will be assessed on a case by case basis on how many times the S106 agreement triggers can be renegotiated. However, if it is deemed that a developer has acted unreasonably and defaulted again, then enforcement process will start and evidence of the default will be passed to OCC's litigation team in Legal Services.

5. Performance/ Security Bonds

5.1. Current arrangements

The current policy is where Section 106 contributions (in aggregate) have been agreed to be deferred to post implementation and the total County Council contributions for the development exceed £1m (after indexation) then a bond from an approved security is required. The S106 agreement will include an obligation on the developer to provide the bond, normally before implementation of the development. Bonds are not positively encouraged in either the National Planning Practice Guidance (NPPG) or the National Planning Performance Framework (NPPF). OCC however consider it essential to minimise financial risk to the Council and ensure the necessary infrastructure is provided to making development acceptable in planning terms to seek security bonds in certain circumstances.

5.2. Future Security and Bond requirements

- a. Bonds will be required where:
 - i. the developer is required to contribute 25% or more of the cost of a piece of infrastructure costing £7.5m or more (including indexation) i.e. a new primary school, new secondary school or strategic transport infrastructure and the triggers for the payment of the contributions are or likely to be after the letting of the contract for the works.
 - ii. Where the developer is direct delivering a school or other works in kind of a value in excess of £7.5m on behalf of OCC
 - iii. Where the developer is providing or contributing to a new or enhanced bus service supporting the development, and the aggregate value of the bus service contribution payable post implementation exceeds £1m (including indexation)
- b. A bond may also be required where:
 - i. Payments are significantly in arrears of occupations
 - ii. There is a concern about the financial position of the developer
 - iii. There is a history of late or non-payment to OCC

ANNEX 1

- iv. Any other reason that in the opinion of the Assistant Director of Finance and Assistant Director of Growth and Place that a bond is required to protect OCC's position.

OCC needs to minimise the delays in the negotiation of S106 agreements where developers refuse to provide bonds due to the additional cost to the development. Therefore, the requirement for a bond is to be indicated and the reason in line with the policy will be outlined in Single Response advice to the Local Planning Authority. Calculation of the value of the bond takes place once contributions and timings are further clarified.

The bond sum shall be calculated considering the due date of the payments to be bonded as referred to above and the likely indexation on the contributions up to the due date of payment to ensure that the real value of the contribution at the time of payment is secured.

If a bond is required, and during negotiations a developer refuses to agree to the provision of a suitable bond, the risk should be reported to the Assistant Director Growth & Place and Assistant Director of Finance for determination as to further action. (e.g. remove option of direct delivery or push payments forward).

The bond must be provided by a third party who is approved by the Council's Finance Team as a reputable financial institution which is invariably a bank or an insurance company whose business includes the provision of bonds, and they will underwrite the contributions required to be paid to the County Council. This gives a considerable degree of security that if the developer refuses to pay, fails to complete the outstanding work, fails to make a payment or goes into insolvency then the payment can be claimed from the bondsman.

There are various bond models that OCC apply with developers and these can be quite sophisticated. There are means to assist the developers to keep costs low such as:

- a. Reducing bonds are standard i.e. reduced as and when payments are made but taking account of the need to retain sufficient bond to cover the real value of the outstanding payments or in the case of primary schools – delivering the works (i.e. the payments including indexation).
- b. Rolling bonds can be provided – These are fixed term bonds (say over 3/5 years) which need to be replaced before the end of the term.

6. Conclusions

Bonds should be seen as one means of seeking to manage risk and are used by OCC for large pieces of high value infrastructure. Although it is not nationally encouraged, it is an appropriate mechanism of mitigating large financial risk burden from OCC. Moreover, there may be agreements when a developer is to pay the cost of construction of a new school with stage payments broadly linked to payments under the construction contract. These are only tenable where there is a bond so that OCC can be certain before entering into the construction contract that it will secure payment of the full contribution.

Other mechanisms and measures need to be used in the majority of cases where the risk of non-compliance with the S106 obligations, or value of infrastructure is low to

ANNEX 1

medium and is directly related to the development. However, the best tool for managing risk will be the efficient and timely monitoring of planning obligations in S106 agreements.

6.1. Summary of policy

- a. Officers are to aim that no contribution should be payable in arrears of occupations and all contributions should be paid by 2/3rds of occupations.
- b. Bonds shall be requested where there is a substantial contribution (over 25%) towards new or strategic piece of infrastructure or service.
- c. Outstanding S106 agreement payments which are not paid when due will be collected in line with the Council's Credit Control Policy and Debt Recovery process, and
- d. take court action where necessary and appropriate for developers when they are in breach of S106 planning obligations (subject in each case to the approval of the Director for Planning & Place in conjunction with the Director for Finance and Director for Law and Governance).

It should be noted that failure to pay the total agreed amount is comparatively rare.

6.2. Review Period of the Policy

This policy will be reviewed annually to ensure that it is affective and meeting the objectives of:

- Reducing the risk to the Council,
- simplifying the approach to bonds and,
- speeding up issuing planning permissions by quicker resolution over the provision of bonds.