

**Cyngnor Bwrdeistref Sirol Merthyr Tudful
Cynllun Datblygu Lleol Amnewid (2016 - 2031)
Merthyr Tydfil County Borough Council
Replacement Local Development Plan (2016 - 2031)**

**Supplementary Planning Guidance (SPG) Note 2: Planning
Obligations**



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1 Introduction

- 1.1 The built environment affects us all. The planning, design, management and maintenance of the built environment and its interaction with the natural environment, has a long-term impact upon people and communities. It is widely acknowledged that our quality of life, prosperity, health and wellbeing are heavily influenced by the 'place' in which we live, work and spend our leisure time.
- 1.2 Planning obligations are a mechanism used to address the additional impacts that new development can place upon local communities. Obligations have a key role in ensuring positive planning so that new development supports and enhances our social, environmental, economic and cultural wellbeing, in order to create and maintain sustainable local communities.
- 1.3 This Supplementary Planning Guidance (SPG) Note
- explains how the Council will use planning obligations;
 - identifies the type of developments from which obligations will be required; and
 - outlines both the legal content and the procedures involved when entering into obligations.
- 1.4 The overall aim is to provide clarity to developers, statutory consultees, local residents and other stakeholders involved in the planning and development process.

2 Policy Context

- 2.1 Section 106 of the Town and Country Planning Act 1990 (as amended) gives powers to local authorities for agreements to be negotiated within the context of the granting of planning consent. Such agreements enable developer contributions to be made towards the infrastructure and services necessary to facilitate development.
- 2.2 Section 106 Agreements (bilateral or multilateral) or Unilateral Undertakings provide an important means by which benefits or obligations to the community are legally secured, particularly when such obligations cannot be met by the imposition of planning conditions.

2.3 *Welsh Office Circular 13/97, 'Planning Obligations'*, provides local planning authorities (LPAs) with the Welsh Government's guidance and sets out the benefits which can be secured from such Agreements together with the role of development plan policy. The circular states that planning obligations should only be sought where they are:

- necessary;
- relevant to planning;
- directly related to the proposed development;
- fairly and reasonably related in scale and kind to the proposed development; and
- reasonable in all other aspects.

2.4 Community Infrastructure Levy (CIL) has been in place in Merthyr Tydfil since June 2014 and this results in a significant change as to how the Council approaches planning obligations. Regulation 122 of the CIL Regulations (as amended) brings into law the tests to be applied to the use of planning obligations and states that planning obligations may only constitute a reason for granting planning permission where they are:

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

The relationship between CIL and other planning obligations is explained in Section 4 of this guidance note.

2.5 Policy SW9 of the Replacement Local Development Plan covers planning obligations and states that following:

Where appropriate and having regard to development viability, planning obligations will be sought for:

1. **On site provision of affordable housing on sites of 10 homes or more at a level of:**
 - **10% in the Primary Growth Area.**
 - **5% in the Other Growth Area.**
2. **A financial contribution towards the provision of affordable housing:**
 - **On sites of between 5 and 9 homes or;**
 - **On sites of 10 or more homes, where on-site provision is not appropriate.**

- 3. The provision of open space on sites of 10 homes or more, where there is an identified need.**
- 4. Other relevant obligations not included within the Council's Community Infrastructure Levy (CIL) Regulation 123 List of Infrastructure.**

2.6 Criterion 4 of Policy SW9 allows enough flexibility in regard to securing appropriate planning obligations, whilst ensuring that the policy approach complies with the CIL regulations.

3 Types of Contribution

3.1 Planning obligations will be negotiated on individual schemes as appropriate. The circumstances of each development can be unique, therefore a variety of different mechanisms are available for use:

- One-off payments – A single payment to the Council for a new facility as a result of the demand created directly from a new development. The facility should be provided either within the site or within close proximity to it in order to be accessible to the community that has created the increased demand. The timing of the payment can be negotiated during the application process.
- Financial contributions – A standard contribution paid by the developer to the Council for the creation or improvement of a facility within the vicinity of a development. These contributions could be paid in a number of instalments as a development progresses e.g. half of the total contribution to be paid prior to the commencement of development, the remaining half to be paid after the completion of a certain number of dwellings.
- On-site provision or development in kind - Where a developer is providing a facility in kind, the Council will ensure that the facility is either incorporated into the proposed development (i.e. on site) or is in close proximity to the development, and that the S106 Agreement states the necessary build standards and specification for the facility. Should the facility be transferred to the Council, a commuted sum would be expected from the developer for the on-going maintenance of the facility for the next 20 years (see below).

- Phased payments – When a development itself is phased, and where the scale of payment or facilities is significant relative to the size of the development it may be appropriate to phase obligation payments or provision. The Council will ensure that the S106 Agreement clearly sets out the stages within the development process when payments are to be delivered – known as 'trigger points'.
- Maintenance payments – a financial contribution that contributes towards the physical upkeep of infrastructure or facilities for a set period of time once development on site has finished (normally 20 years). The Council and developer should formally agree the expected time period for which maintenance payments will be made, and when they will be due, normally on a monthly or yearly basis. The Council recognises that in some cases it may be preferable for the money to be paid as a 'commuted sum'; this gives the Council greater certainty for the future funding of the facility and saves cost for the developer as they are not tied to making relatively small payments over a longer period of time. In some cases it may also be beneficial for a management company to be established to manage the facilities in perpetuity.
- Pooled contributions – It is recognised that, in some cases, the essential infrastructure required to make a development acceptable (e.g. the provision of a new access road, or junction improvements) may go beyond the scope of an individual project. In such cases, it may be appropriate to pool contributions from several developments to achieve the required provision. Where a pooled contribution is required, it will be necessary for all parties concerned, including the Council, to enter into an agreement regarding the timescale within which the money is to be spent. However, since the CIL regime has been in place, contributions from 5 or more developments cannot be pooled together to provide a piece of infrastructure.

4 Categories of Obligation

- 4.1 Whilst the introduction of the CIL charge in the County Borough does limit the amount and type of planning obligations sought through other mechanisms, there will still remain scenarios where securing planning obligations through S106 agreements and conditions will be appropriate. This

section will identify the main areas in which S106 obligations will be sought, and how they will be secured.

4.2 The MTCBC Regulation 123 List of Infrastructure (October 2019) states that the following types of infrastructure projects are eligible for CIL funding:

- Core Highway Network Improvements;
- Strategic Drainage Network;
- Education Provision (schools);
- Strategic Waste Management Infrastructure;
- Upgrade existing Leisure facilities provision;
- Off-site formal leisure facilities;
- Strategic Public Transport Infrastructure

To avoid any 'double counting' in regard to securing planning obligations, a financial contribution towards any of the items listed above cannot be secured through a S106 agreement.

4.3 The primary obligations that the Council will seek to secure through S106 agreements are affordable housing (on-site or a financial contribution), and on-site open space provision on sites of 10 dwellings or more.

4.4 Any planning obligations mentioned in this document do not represent an exhaustive list of what the Council may seek, but are likely to give an indication as to what the more commonly sought areas of planning obligations are likely to include.

4.5 The following table gives examples of various S106 obligations and how they may be secured.

Table 1: Summary of potential obligations

AFFORDABLE HOUSING	
	<ul style="list-style-type: none"> • The provision of affordable housing lies outside the remit of CIL. On-site provision will be secured through a S106 agreement or via planning condition. • A financial contribution towards affordable housing will be secured through a S106 agreement. • Further information in regard to providing affordable housing can be found in SPG Note 1: Affordable Housing.
OPEN SPACE PROVISION (including formal play provision)	
	<ul style="list-style-type: none"> • On-site provision of new open space will be sought on

developments of more than 10 dwellings in accordance with any identified need. This can be secured through either a S106 agreement or planning condition.

- A commuted sum towards maintenance of the new on site facility may be secured.
- Financial contributions towards the improvement of existing facilities cannot be sought as this is covered by CIL.
- Financial contributions towards open space provision that is not directly related to the development cannot be sought as this would not satisfy the legal tests for obligations, and this area is also covered by CIL.

EDUCATION PROVISION

- Financial contributions towards education provision cannot be secured through S106 agreements as this area is included in the CIL Regulation 123 List of Infrastructure.
- If a single development was large enough to warrant a new education facility of its own, then this facility could be secured through a S106 agreement. Developments of this scale are unlikely in Merthyr Tydfil – in order to justify a new primary school, a development of at least 700 dwellings would be needed, and to justify a new secondary school a development of over 1000 dwellings would be needed.

HIGHWAY INFRASTRUCTURE IMPROVEMENTS

- Financial contributions towards improvements to the core highway network cannot be secured through S106 agreements as this area is covered by CIL.
- If specific, physical highway improvements are required as part of a development, then these can be secured through condition or S106 agreement, provided the legal tests for planning obligations are met. Examples of these types of improvements could include a road widening scheme to improve the access to a development, or a new junction/roundabout to facilitate a new development.

NATURE CONSERVATION/BIODIVERSITY/LANDSCAPE

- Financial contributions towards any of these areas may be secured through S106 agreements, provided that the reason they are being sought does not conflict with the CIL Regulation 123 List of Infrastructure (i.e. the money cannot be spent on an item that is included on the CIL Regulation 123 List of Infrastructure)
- On-site provision of biodiversity/landscape enhancements can

be secured through condition or S106 agreement, provided the legal tests for planning obligations are met.

- Contributions towards these areas may include measures such as enhancing existing features such as hedgerows, woodlands and grasslands; habitat creation; restriction of development in certain sensitive areas; and the improvement of access to areas of biodiversity/landscape interest.

5 Securing Planning Obligations

- 5.1 A planning obligation will not be required for every planning application, only those that would create a significant impact, or create a need above that which already exists. Planning obligations will not be sought to rectify existing under provision or deficiencies in facilities unless the proposed development would exacerbate the situation. The potential need for planning obligations should be assessed at the beginning of the planning process as part of the pre-application discussions and, where they are required as part of a development, their provision should form part of the planning application.
- 5.2 It is anticipated that the majority of planning contributions, and certainly any that involve financial sums, will be secured through the completion of a Section 106 Agreement. This is a legally-binding agreement between the Council and a landowner in association with the granting of planning permission. Where possible, the Council may seek to condition an obligation/contribution if it is deemed that condition is the most appropriate mechanism to secure the contribution.
- 5.3 A Section 106 Agreement will usually contain the following details:
- Date of the Agreement, and the parties involved.
 - Definition of words or phrases contained in the Agreement, which may require referencing or clarification.
 - If the Agreement is being drawn up during the processing of the planning application, it will include the condition that planning permission must be granted for the Agreement to be valid.
 - The Applicant's liabilities and how they are affected following any sale of the land.
 - Land Registry registration details.
 - Site details and nature of development.

- Provision or restrictions required in the Agreement (i.e. detail of the actual undertaking). This may include a description of provisions required and an explanation of important elements.
 - Signatures of applicant, landowners, Council officials and witnesses. This is subject to amendment depending on the issues involved. Applicants can be assured that all the issues will be explained fully to prevent any uncertainty.
- 5.4 When an obligation is entered into by Agreement, this is usually drafted by the Council's in-house solicitors, although, there is no objection to the developers arranging for their own solicitors to draft the Agreement if preferred. The Agreement will contain covenants (the planning obligations) covering the matters the landowner agrees to carry out and/or agrees not to carry out, and the circumstances and timescales within which these matters will occur.
- 5.5 As an alternative, Unilateral Undertakings may be undertaken. These are usually drafted by the developer's solicitors, and the Council will only consider them where they are appropriately worded. A Unilateral Undertaking is a simplified version of a S106 Agreement and is only entered into by the landowner. The document usually states that if a developer receives planning permission and decides to implement the development, certain payments must be made to the Council in the form of planning contributions
- 5.6 In most cases, where appropriate, the Agreement or Unilateral Undertaking will be accompanied by a plan showing the land to which it relates.
- 5.7 Whether an Agreement or Unilateral Undertaking is used, the developers will be responsible for the Council's legal costs incurred in relation to the process of drafting, approving and completing any Deed of Obligation, including costs of title investigation which is necessary to ensure the correct parties enter into the Deed. The Council's legal costs must be paid even when the development does not go ahead. In addition to covering the legal costs, the developer will be expected to pay a Monitoring Fee, which covers the Council's costs incurred in entering into early negotiation and ongoing monitoring of the obligations. Applicants will be expected to contractually agree within the legal agreement that they will make this payment prior to, or on the commencement of development (as defined by Section 56 of the Town and Country Planning Act 1990) – further information on Monitoring Fees and Maintenance are outlined in Section 8 of this report.

- 5.8 The Council will seek to agree the Heads of Terms of the legal agreement prior to the planning application being presented to Planning Committee or receiving a resolution to grant planning permission. The planning report accompanying the recommendation will detail the draft Heads of Terms together with the reasons that they are being requested. Following the date of a resolution to grant planning permission subject to the completion of a legal agreement to secure planning obligations, the applicant will have a period of 6 months to finalise and sign the legal agreement. Any agreement that has not been signed in this period and cannot be signed imminently, will need to be reconsidered by delegated powers or by Planning Committee. It is the Council's intention to finalise all legal agreements well within the six-month period in the interests of good practice and facilitating sustainable development across the County Borough.

6 Site Viability and prioritisation of obligations

- 6.1 Developers should make themselves aware of the likely planning obligation liabilities at the earliest opportunity to ensure that these obligations are reflected in any land value assumptions and site layouts, where necessary.
- 6.2 Depending on the nature and complexity of the proposed development scheme, the Council will seek verification of viability information either from the Council's own Estates Department or from the District Valuer; the latter at the expense of the developer. The Council uses Development Viability software which enables a determination of the economic viability of a development based upon a variety of circumstances. The District Valuer may be engaged to undertake a development appraisal for larger-scale and more complex schemes, or where an applicant wishes an independent third party to carry out the assessment.
- 6.3 Where a development appraisal indicates the planning obligations should be reduced in order to make a scheme viable, any subsequent reduction in obligations is only likely to be justified where there may be planning merit and/or public interest in the site being developed, e.g. the development of a contaminated site or regeneration of an urban area. Each case will be considered on its own merits and any decision to reduce obligations will not constitute a precedent in relation to future development schemes.

7 Phasing and Trigger points

- 7.1 When assessing major developments or large mixed-use schemes, phasing will often be an important consideration. Therefore, the Council will employ the use of legal agreements to secure the timely and appropriate delivery of development and infrastructure.
- 7.2 Legal agreements for phased developments generally contain 'trigger points' which specify when a particular planning obligation is due with a view to ensuring the delivery of that obligation in a timely manner. Trigger points are normally placed at key stages of the implementation of the planning permission such as 'commencement of development' or 'first beneficial occupation'. When deciding upon appropriate trigger points, the Council and the developer will need to consider when the facilities or services to be provided under the planning obligation are required to serve the development. It is essential that the trigger points are clear, specific and enforceable to ensure that planning obligations will be delivered.
- 7.3 Where a site is to be sub-divided, the Council will treat such sites in their totality. In these circumstances, each sub-subdivided site will be required to provide a contribution towards the relevant obligation proportionate to its size and relative to the impact of the development. Where the new development involves more than one developer, the Council may seek joint contributions from developers to mitigate the combined impacts.
- 7.4 When stipulating phasing obligations, the Council will have regard to planning objectives, site-specific circumstances, and viability issues.

8 Monitoring and Enforcement

- 8.1 The Planning and Countryside Department will monitor planning obligations to ensure that they are complied with in full. It should be noted that it is the responsibility of the developer to notify the Council upon commencement of development and also when any triggers specified in an agreement are reached.
- 8.2 The costs incurred by the Council in the management and monitoring of the obligations will be contained in the Section 106 Agreement or Unilateral Undertaking. For further details of how the fees are calculated, please refer to Appendix 1.

- 8.3 The Council has created a register to record and monitor all planning obligations and establish whether or not the terms have been adhered to. The Planning and Countryside Department has the responsibility for monitoring this process to ensure that all obligations are met. The register is available for public viewing, and further information relating to planning obligations can be found in the Council's LDP Annual Monitoring Report, which is published each October.
- 8.4 Where it is found that an agreement is not being complied with, the Council will, in the first instance, informally seek to enforce compliance with the legal agreement. If this approach remains unsuccessful, the breach will be recorded on the Local Land Charges Register and the County Borough Solicitor will consider the most appropriate course of action to be taken. This may comprise serving a Mandatory Injunction upon the landowner and/or signatory of the agreement, or debt recovery proceedings to ensure compliance.

9 Further information and advice

- 9.1 Copies of this guidance and other relevant documents can be downloaded from the Council's website at www.merthyr.gov.uk

Further information is available from:

Planning Policy
Merthyr Tydfil County Borough Council
Unit 5,
Triangle Business Park,
Pentrebach,
Merthyr Tydfil.
CF48 4TQ.
Tel: 01685 726277
Email: devplanning@merthyr.gov.uk

Appendix 1 - S106 Monitoring Fees

The S106 monitoring fee is based on the time spent on each type of obligation; either a financial contribution monitor or a physical monitor (a site visit), further to this the hourly rate charged by the Council is based on the monitoring officer's salary and supporting infrastructure costs such as Telephone, Personal Computer, office, transport costs etc.

Estimated costs of financial monitoring

Hourly rate £35

7 hours average officer time handling the contribution

£245 per financial monitor

Estimated costs of physical monitoring

- Hourly rate £35
- Checking triggers – Assuming a commencement/completion check on a 6 visit cycle per year basis throughout the duration of development (e.g. 6 visits = £210 per clause)
- A minimum monitoring period of 1 year should be applied. If it can be shown that monitoring will be for a greater period of time, the charge will be increased proportionately.
- For obligations where there is not a definitive timescale, a maximum 10 years should be used with a quarterly monitor, e.g. 1 clause to be monitored indefinitely would incur a charge of £35 x the number of quarterly visits over 10 years (40) = £1400

Where there is only physical monitoring to be carried out, refer to the table below.

Clauses	6 (1 year)		18 (3 years)	24 (4 years)	30 (5 years)
1	£210	£420	£630	£840	£1,050
2	£420	£840	£1,260	£1,680	£2,100
3	£630	£1,260	£1,890	£2,520	£3,150
4	£840	£1,680	£2,520	£3,360	£4,200
5	£1,050	£2,100	£3,150	£4,200	£5,250
6	£1,260	£2,520	£3,780	£5,040	£6,300
7	£1,470	£2,940	£4,410	£5,880	£7,350
8	£1,680	£3,360	£5,040	£6,720	£8,400
9	£1,890	£3,780	£5,670	£7,560	£9,450
10	£2,100	£4,200	£6,300	£8,400	£10,500

General Example

In order to arrive at a monitoring fee it will be necessary to consider the number of clauses which require financial monitoring and multiply this by £245 (at current rates). So, for example, 2 financial clauses would result in a charge of £490.

This would then be added to the charge applied for physical monitoring by considering the number of clauses that require a physical monitor. For example, if the above financial clauses each required trigger checks (ie payments due at different stages of development) the charge should be applied as follows.

2 clauses: £210 per clause per annum. (Assuming 2 year development period) = £840

Total monitoring charge for this development would therefore be £490 + £840 = £1330

Appendix 2 – CIL Regulation 123 List of Infrastructure

MTCBC CIL Regulation 123 List of Infrastructure

INFRASTRUCTURE PROJECT	TYPE
Core Highway Network Improvements (as identified in the Replacement LDP Infrastructure Schedule and Site Allocation Details)	PHYSICAL
Strategic Drainage Network	PHYSICAL
Education Provision (schools)	SOCIAL
Strategic Waste Management Infrastructure	PHYSICAL
Upgrade existing Leisure facilities provision	SOCIAL
Off-site formal leisure facilities (eg Sports pitches and changing facilities, Multi-use games areas, Neighbourhood equipped area for play)	GREEN
Strategic Public Transport Infrastructure (does not include site specific links to strategic network such as new bus stop within a development to improve accessibility, or short length of cycleway to link a site to national or local route)	PHYSICAL