

## **Committee: Borough Plan Advisory Committee**

**Date: 09 September 2014**

Wards: all

**Subject: Public consultation Merton's draft planning obligations supplementary planning document starting in September 2014**

Lead officer: Director for Environment and Regeneration, Chris Lee

Lead member: Cabinet Member for Environmental Sustainability and Regeneration, Councillor Andrew Judge

Contact officer: Future Merton strategic policy manager, Tara Butler

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**Recommendations:** That the Borough Plan Advisory Committee advises the Director for Environment and Regeneration in consultation with the Cabinet Member (under Cabinet's delegated authority) on the consultation material.

### **1 PURPOSE OF REPORT AND EXECUTIVE SUMMARY**

- 1.1 In response to feedback from a report to the Borough Plan Advisory Committee on 25 June 2014, this report provides a draft of Merton's Planning Obligations Supplementary Planning Document (SPD) and asks members of the Borough Plan Advisory Committee for their comments prior to public consultation
- 1.2 The report to the Borough Plan Advisory Committee (25 June 2014) and Cabinet (30 June 2014) sets out the background to why the council is drafting and consulting on technical guidance on planning obligations. These reports are available online via [www.merton.gov.uk/planning/bpac.htm](http://www.merton.gov.uk/planning/bpac.htm) and <http://democracy.merton.gov.uk/documents/s4569/Consultation%20on%20Mertons%20draft%20Guidance%20on%20Planning.pdf> and their contents are not repeated here.

### **2 DETAILS**

- 2.1 On 25 June 2014, the Borough Plan Advisory Committee considered a report "public consultation on Merton's draft project lists for CIL funding". Councillors considered the report and resolved to recommend that Cabinet (at their meeting on 30 June 2014):
- 2.2 *That draft new planning obligations guidance for Merton be circulated to the Borough Plan Advisory Committee for their advice [at a meeting in early September] and Cabinet for their approval [at their meeting on 15 September 2014] prior to the start of public consultation.*
- 2.3 At their meeting on 30 June 2014, Cabinet resolved *That approval of the consultation documents and other matters be delegated to the Director of Environment & Regeneration in consultation with the Cabinet Member, and that the Borough Plan Advisory Group is consulted prior to the documents being agreed for public consultation.*

- 2.4 This report advises BPAC of the proposed consultation on the draft planning obligations SPD and seeks their views on the consultation documents prior to seeking delegated authority from the Director in consultation with the Cabinet member to start consultation later in September 2014.
- 2.5 The draft Planning Obligations SPD is attached as Appendix A to this report. It is a technical document to provide detailed guidance on the implementation of planning obligations in Merton. It will be used by planners and other property professionals as technical guidance.
- 2.6 Councillors are asked for their views on this document which will be then be passed to the Director in consultation with the Cabinet member for a decision on whether to start consultation later in September 2014 for six weeks.
- 2.7 Once the consultation has been completed, the responses received will be analysed and reported to the Borough Plan Advisory Committee with recommendations to amend and finalise the draft SPD, before reporting to Cabinet for its adoption.
- 2.8 If it is adopted, this Planning obligations SPD will replace Merton's Planning Obligations SPD 2006.

### **3 ALTERNATIVE OPTIONS**

- 3.1 None for the purposes of this report .(see the previous report of June 2014: <http://democracy.merton.gov.uk/documents/s4569/Consultation%20on%20Mertons%20draft%20Guidance%20on%20Planning.pdf> )

### **4 CONSULTATION UNDERTAKEN OR PROPOSED**

- 4.1 Consultation is proposed to take place from September 2014 for six weeks.
- 4.2 If adopted, this technical guidance will be used by planners and other property professionals and is unlikely to be used regularly (if at all) by people not working in this field.
- 4.3 Therefore this technical guidance, consultation will be specifically targeted towards property professionals that have worked or are working in Merton and London.

### **5 TIMETABLE**

- 5.1. September-November 2014 – six weeks public consultation on the strategic and local infrastructure project lists.
- 5.2. December-January 2015: consider consultation results and finalise the SPD, reporting results and amendments to BPAC for their consideration.
- 5.3. February-March 2015: subject to BPAC's feedback, recommend adoption to Merton's Cabinet.

**6 FINANCIAL, RESOURCE AND PROPERTY IMPLICATIONS**

- 6.1. As set out in reports to the Borough Plan Advisory Committee (25 June 2014) Cabinet (04 July 2013; 30 June 2014 <http://democracy.merton.gov.uk/documents/s4569/Consultation%20on%20Mertons%20draft%20Guidance%20on%20Planning.pdf> ).

**7 LEGAL AND STATUTORY IMPLICATIONS**

- 7.1. Contained within report to the Borough Plan Advisory Committee 25 June 2014  
<http://democracy.merton.gov.uk/documents/s4569/Consultation%20on%20Mertons%20draft%20Guidance%20on%20Planning.pdf>

**8 HUMAN RIGHTS, EQUALITIES AND COMMUNITY COHESION IMPLICATIONS**

- 8.1. None for the purposes of this report.

**9 CRIME AND DISORDER IMPLICATIONS**

- 9.1. Planning obligations may be used to fund infrastructure to reduce crime and disorder, including CCTV. As infrastructure providers, the Metropolitan Police may apply to local authorities for this.

**10 RISK MANAGEMENT AND HEALTH AND SAFETY IMPLICATIONS**

- 10.1. None for the purposes of this report.

**11 APPENDICES – THE FOLLOWING DOCUMENTS ARE TO BE PUBLISHED WITH THIS REPORT AND FORM PART OF THE REPORT**

Appendix A – Merton's draft planning obligations SPD

**London Borough of Merton's**  
**Draft Planning Obligations:**  
**Supplementary Planning Document (SPD)**  
**September 2014**

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## 1. Introduction

2. **Merton's Core Planning Strategy (2011)** sets out where new homes, employment, retail and community uses that are expected to be built in Merton (Merton) over the next 15 years.
3. Developer contributions are required to ensure that the necessary infrastructure is put in place to support new development, using the following mechanisms:
  - Planning conditions.
  - Planning obligations (for example, S106 agreements).
  - Section 278 Agreements to deliver highways works.
  - Community Infrastructure Levy (CIL).
4. This document provides technical guidance to help implement Merton's Local Plan. It will assist prospective applicants by identifying the planning obligations that will be sought by the council if planning permission is granted for development that generates a need for new infrastructure.
5. This document does not contain details the allocation of developer contributions or Community Infrastructure Levy to specific projects.
6. The guidance provided in this SPD will be a material consideration in the assessment of planning obligations.

### **Why are we publishing this draft document?**

7. On 01 April 2014, Merton's Community Infrastructure Levy (CIL) came into effect. The introduction of CIL changes the way in which applicants contribute to the provision of infrastructure in Merton.
8. This document sets out Merton's approach when seeking planning obligations under Section 106 of the Town and Country Planning Act 1991 (as amended) since the introduction of CIL.
9. Once this SPD is adopted, the previous guidance on planning obligations will be withdrawn and replaced by this guidance which takes account of the introduction of CIL.

### **Consultation:**

10. This is a technical document, directed towards planning and property professionals. For a glossary of planning terms, please see Merton's Sites and Policies Plan 2014, Appendix K:  
[www.merton.gov.uk/planning/sitesandpoliciesplan](http://www.merton.gov.uk/planning/sitesandpoliciesplan)

11. Please respond to this consultation by emailing [ldf@merton.gov.uk](mailto:ldf@merton.gov.uk) or writing to us at: Future Merton, London Borough of Merton, 12<sup>th</sup> Floor Civic Centre, London Road, Morden, SM4 5DX **day date month 2014**.
12. For further information regarding this consultation stage, please contact the Future Merton team on 0208 545 3837.

**Next Steps:**

13. Following this consultation period, your feedback combined with local research, national policy changes and any other relevant information will be used to create Merton's final Planning Obligations SPD. It is expected that Merton will adopt this Planning Obligations SPD by March 2015

## 2. Different types of developer contribution

### **Policy framework:**

14. This document is informed by the following (this list is not exhaustive):
  - The National Planning Policy Framework Guidance 2014 (NPPFG);
  - The National Planning Policy Framework 2012 (NPPF);
  - CIL Statutory Updated Guidance 2010 (as amended);
  - The Community Infrastructure Levy Regulations 2010 (as amended);
  - Planning Act 2008;
  - Town and Country Planning Act 1990 (as amended)
  - Merton's Development Plan (various).
  
15. The NPPF asserts the primacy of the statutory Local Plan in making planning decisions. Merton's statutory Development Plan is the London Plan (2011 and 2014), Merton's Core Planning Strategy (2011), the South London Waste Plan (2012) and Merton's Sites and Policies Plan and Policies Map (2014).

### **Developer contributions**

16. Merton's Core Planning Strategy (2011) sets out where new homes, employment, retail and community uses that are expected to be built in Merton (Merton) over the next 15 years.
  
17. Developer contributions are required to ensure that the necessary infrastructure is put in place to support new development, using the following mechanisms:
  - A. Planning conditions.
  - B. Planning obligations (for example, S106 agreements).
  - C. Section 278 Agreements to deliver highways works.
  - D. Community Infrastructure Levy (CIL).

#### **A. Planning conditions:**

18. Planning conditions are used where they relate directly to the actual physical development and its construction on-site. A planning condition may be placed on a grant of planning permission by local planning authorities. Such conditions permit development to commence only if certain conditions are satisfied. Conditions include, for example, time limits on development, undertakings regarding environmental and noise issues and limits on the size and external appearance of a new development.

19. When imposing planning conditions local planning authorities must ensure they meet the following tests, that it is:

- Necessary,
- relevant to planning,
- relevant to the development to be permitted,
- enforceable,
- precise, and
- reasonable in all other respects.

20. Grampian conditions, which are negatively phrased conditions preventing development activity from occurring until certain measures are carried out, can be used to secure site specific measures off-site that would otherwise require a planning obligation. It would be unreasonable for the authority to impose Grampian conditions should it not be possible for the applicant to provide the measures themselves, for example to require an access road over land that the applicant didn't own.

## **B. Planning obligations:**

21. A planning obligation may be required, particularly in circumstances where the desired restrictions go beyond the scope of planning condition, for instance:

- To control the impact of a development, for example, a proportion of housing must be affordable.
- To compensate for loss or damage caused by the development, for example, loss of a footpath.
- To mitigate a development's impact: for example, increase public transport provision.

22. In accordance with Section 106 of the Town and Country Planning Act 1990, the local authority will enter into a legal (Section 106) agreement with the applicant<sup>1</sup> or will expect the applicant to enter into a unilateral undertaking<sup>2</sup> to secure planning obligations.

23. In order to mitigate the impacts of development planning obligations can be:

- financial obligations requiring monetary contributions to the local authority to fund works or services; and,
- in-kind obligations requiring specific actions to be performed by specific parties.

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<sup>1</sup> Including anyone else who has a legal interest in the land.

<sup>2</sup> a legal deed where developers covenant to perform planning obligations; unlike S.106 agreements they don't have to be entered into by the local authority. See [www.merton.gov.uk/s106\\_unilateral\\_undertaking\\_guidance.doc](http://www.merton.gov.uk/s106_unilateral_undertaking_guidance.doc)

### The three statutory tests for planning obligations

24. CIL regulations (Regulation 122) and guidance introduced three tests for planning obligations into law, indicating that:

“A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is -

- 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”.

25. If a planning obligation does not meet all of these tests it cannot legally be taken into account in granting planning permission. For the local planning authority to take account of a planning obligation in granting planning permission it needs to be convinced that, without the obligation, permission should be refused.

### No pooling of Section 106 agreements

26. Since Merton’s CIL Charging Schedule was adopted, Regulation 123 of the CIL Regulations states that the pooling of contributions from five or more<sup>3</sup> separate planning obligations towards a specific type or piece of infrastructure will not be permitted.

27. CIL Charging Authorities are also required to prepare a CIL Project List (also often known as the Regulation 123 List) which sets out infrastructure in that Charging Authority Area that will be funded through CIL. Local authorities are not permitted to secure Section 106 Obligations or Section 278 Agreements for projects on Merton’s Regulation 123 List (Merton’s Strategic Community Infrastructure List).

28. Paragraph 205 of the NPPF states “Where obligations are being sought or revised, local planning authorities should take account of changes in market conditions over time and, wherever appropriate, be sufficiently flexible to prevent planned development being stalled.”

29. The National Planning Policy Framework Guidance (NPPFG) provides further information on viability, developer contributions and planning obligations.

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<sup>3</sup> Looking back at planning obligations secured since April 2010.

### **C. Section 278 Agreements (highways improvements)**

30. A Section 278 Agreement (s278 Agreement) is a legal agreement between an applicant and the highway authority made under s278 of the Highway Act 1980. The agreements ensure that highway works necessary to make a development acceptable in principle are funded by the applicant and implemented by the highway authority or the applicant.
31. Section 278 Agreements are the responsibility of the relevant highway authority. In Merton, this responsibility is divided up as follows:
- the responsibility of roads that are part of the Transport for London Road Network is with Transport for London.
  - The responsibility of roads that are part of the Strategic Road Network, London Distributor Network and Local Distributor Roads are with Merton Council.
32. Merton's Core Planning Strategy *Figure 26.2: Transport Network* provides an illustration of the transport network in the borough. The nature and amount of any s278 Agreement will vary according to the individual circumstances of the development, specifically the impact of the development on the highway.
33. In many instances it will not be possible to secure a s278 Agreement prior to grant of the main planning permission. However, Grampian planning conditions or planning obligations can be used to secure the respective measures to be carried out at an appropriate stage of development.

### **D. Community Infrastructure Levy**

34. The Community Infrastructure Levy (CIL) Regulations (2010 and amended) allows local authorities in England and Wales to raise contributions from development to help pay for infrastructure such as education, health, community facilities, parks and open spaces and other facilities that is needed to support new development.
35. Unlike Section 106 and other agreements, CIL charges are non-negotiable and are usually payable once construction starts (not when planning permission is granted). As the Mayor of London and each London borough have statutory planning roles, two CIL charges apply to most London boroughs: the Mayor's CIL charge and the boroughs' own.

#### Mayor of London's CIL charge:

36. Since 1 April 2012, the council has been collecting the Mayor of London's CIL charge which is levied on most new development in the borough and which is currently set at '£35 per square metre in Merton.

37. The Mayor’s CIL contributes towards funding for Crossrail. This CIL charge is levied on all developments to which CIL can be charged under the CIL regulations except development for education and health uses.

Merton’s CIL charge

38. . Merton’s CIL Charging Schedule came into effect on 01 April 2014 and sets the following charge rates levied on new residential and retail superstores/warehouse only (in addition to the Mayor of London’s CIL):

<b>Table 2: Merton’s CIL Rates 2014</b> (See <a href="http://www.merton.gov.uk/planning/cil">www.merton.gov.uk/planning/cil</a> )		
<b>Use</b>	<b>Charge</b>	<b>Areas</b>
Residential	£220	Colliers Wood, Raynes Park and Wimbledon
	£115	Mitcham, Morden and West Barnes
Retail Warehouse <sup>4</sup> / Superstores <sup>5</sup>	£100	Throughout Merton

39. The charge is calculated on CIL eligible developments<sup>6</sup> at the same time as the applicant seeks planning permission and is usually payable when construction starts (not when planning permission is granted).

40. A broad definition of ‘infrastructure’, for the purposes of CIL funding, is set out in Section 216(2) of the Planning Act 2008 and includes:

- roads and other transport facilities,
- flood defences,
- schools and other education facilities,
- medical facilities,
- sporting and recreational facilities,
- open spaces.

41. Merton is a borough characterised by small sites: over 90% of the planning applications received in the 10 years between 2000 and 2011 are for less than 10 new homes. Merton is also largely already developed, with many sites having existing floorspace demolished or refurbished as part of the planning application. Therefore Merton’s CIL is not expected to result in more than £1million per annum towards funding all the infrastructure necessary to

<sup>4</sup> Retail warehouses: are large stores specialising in the sale of household goods (such as carpets, furniture and electrical goods), DIY items and other ranges of goods, catering for mainly car-borne customers.

<sup>5</sup> Superstores: are shopping destinations in their own right, selling mainly food or food and non-food goods, which must have a dedicated car park.

<sup>6</sup> Please use the following link to access information on Merton’s CIL and CIL eligible developments: <http://www.merton.gov.uk/environment/planning/cil.htm>

support development, this is similar to the average annual contributions received via Section 106 between 2000 and 2010. Most funding for infrastructure will have to come from other sources (e.g. government grants; borrowing); government only expects CIL to pay for 10%-30% of the infrastructure required.

*CIL replaces Section 106 agreements*

42. Since April 2014 CIL replaced most Section 106 agreements as the principal means of collecting developer contributions towards providing the necessary infrastructure to support new development in Merton.
43. Affordable housing, other site-specific matters (for example, on-site tree planting) and non-infrastructure matters (for example, provision of apprenticeships and training) may still be secured through s106 obligations.
44. Mitigation measures that are specific to a particular site to make a development acceptable in planning terms will also continue to be provided through s106 obligations (for example cycle parking) as will planning obligations which are necessary to ensure compliance with adopted Development Plan policy (for example, affordable housing).
45. Therefore many developments will be liable to pay both CIL and to enter into a s106 agreement (for affordable housing, employment and training) and other developer contributions (for example, Section 278 agreements for highways matters). The CIL payment, s106 Obligations and Section 278 Agreements, will cover different infrastructure projects and types, and development will not be charged for the same items of infrastructure through both obligations and the levy.

### 3. Planning obligations - process

#### Exemptions and size thresholds:

46. The ability of different types of development to pay for contributions varies. There are forms of development that may not be charged for technical or practical reasons. They include:

- **Permitted development:** minor development that does not require planning permission, for example putting up a small garden shed
- **Ancillary consents:** such as advertising, conservation area and listed building consent.
- Community facilities that are provided on a **not-for-profit** basis.

47. Any contribution is intended to mitigate the impact of development to make it acceptable in planning terms and will be considered on a case-by-case basis. The council does not intend to set thresholds below which contributions won't be sought as this may prevent the applicant being able to successfully mitigate the impact of their development.

#### Developer contributions – the planning application process

48. There are procedures that the council follows when considering developer contributions (outside of CIL). These are as follows:

- **Pre-application:** The council will encourage applicants to engage with the council at the early stages of development to identify key developer contributions that may be required. This will assist the applicant in assessing the costs, viability and deliverability of the proposed development. However where the development is inherently problematic, for example in terms of form, design, bulk, massing or neighbour amenity and there would be no scope for mitigation then it is unlikely that the council will engage in detailed discussions on specific planning obligations at this stage.
- **Planning applications:** A case officer will contact officers across the council's departments to assess which elements should be included in future agreements (head of terms) where a planning application potentially requires a developer contribution for approval. In some cases, a full consultation exercise may be required with various council services, the members of the public, local groups, councillors, the Mayor of London or other relevant agencies and partners.

As part of the officer recommendation the proposed heads of terms of the planning obligation will be detailed in the report to the Planning Applications

Committee<sup>7</sup> including, where possible, the amount recommended to be subject of a financial contribution. At the planning application stage, the council will seek to agree with the applicant the process used to assess the overall viability of the scheme.

- **Planning Applications Committee:** A planning application has to be brought before committee if the planning obligation has been reduced by negotiation or due to viability or if there are other non-planning obligation reasons. The Planning Applications Committee may agree or disagree with the officer's recommendations. Committee members will determine a planning application on planning issues only and will consider the heads of terms for any planning obligation proposed in this context. Members may not determine applications on the basis of any financial sums that they might consider could be sought through a planning obligation over and above those that are considered necessary in accordance with the statutory tests in the CIL regulations.
- **Resolution to grant permission subject to planning obligation:** Following the Planning Applications Committee's or delegated officer's resolution to grant planning permission subject to legal agreement, the councils' lawyers in liaison with the planning officers and the applicants' and their solicitors will complete the planning obligation in the form of a bilateral deed of planning obligation. Registered as a local land charge, this deed will set out the detailed terms of the planning obligation including any financial contribution amount and provide details as to how the contribution will be spent.
- **Unilateral undertakings:** an alternative form of securing planning obligations via a legal deed where developers covenant to perform planning obligations. However, unlike S.106 agreements, unilateral undertakings don't have to be entered into by the local authority. A unilateral undertaking comes into effect when planning permission to which they are linked is granted. If a decision has been made to grant planning permission, the council may encourage applicants for straightforward planning obligations<sup>8</sup> to enter into unilateral undertakings to minimise delays. The unilateral undertaking would be submitted to the case officer as soon as the heads of terms (including financial figures) have been agreed in principle. If the unilateral undertaking is acceptable to the council and has been signed and dated by the owner of the application site and any party with a legal interest in the land then the planning permission decision notice can be issued without delay following resolution to approve. Unilateral undertakings are the only form of planning obligation that can be used in association with planning permissions granted at appeal. See [www.merton.gov.uk/s106\\_unilateral\\_undertaking\\_guidance.doc](http://www.merton.gov.uk/s106_unilateral_undertaking_guidance.doc) for more information.

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<sup>7</sup> Or in circumstances where a case does not need to go to committee the delegated report.

<sup>8</sup> Without detailed provisions such as clawback or affordable housing provisions.

## How planning obligations funding is bid for in Merton

49. There is a formal process for bidding for financial contributions received. The process in Merton is managed by the CIL and Section 106 Monitoring Officer and requires authorisations from the Head of Service bidding for the money and counter signature from the Head of Sustainable Communities.
50. Bids have to be within the bounds of the signed legal agreement. Also there are varying levels of approval required for schemes as set out in Table 3:

<b>AUTHORISATION</b>	<b>BID VALUE</b>
Head of Sustainable Communities	All bids
Director of Environment and Regeneration	To the value of £30k and above.
Cabinet	To the value of £50k and above.
Full Council	To the value of £500k and above that would require an amendment to the Capital Programme.

51. This helps to ensure that the specific development impacts for which the monies sought are mitigated in accordance with CIL Regulation 122.

### **Pooled contributions**

52. As set out in Chapter 2, since Merton's CIL Charging Schedule was adopted in November 2013 CIL Regulation 123 states that the pooling of contributions from five or more<sup>9</sup> separate planning obligations towards a specific type of infrastructure or infrastructure project will not be permitted (for example, pooling contributions to pay for improvements to Merton's parks).
53. Only in very exceptional circumstances where no more than five separate developments are proposed in close proximity to each other and the cumulative effect will result in the need for a specific mitigating measure which hasn't been pooled since 2010, the council may pool contributions for each of these developments in order to fund the necessary measures.
54. Any pooling of contributions will be in line with CIL regulations and guidance.

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<sup>9</sup> Looking back at planning obligations secured since April 2010.

**Indexation:**

55. The formula for affordable housing and the charge rates for increasing employment opportunities set out in this SPD will be subject to indexation from the date of adoption of this SPD to the date of permission. Where site specific mitigation, or other financial contributions are required through a S106 planning obligation, these contributions will be indexed by reference to the All-in Tender Price Index from the date planning permission is granted until the date that payment is made.
56. Contributions required under S278 agreements should meet the full cost of the required remedial or reinstatement works and will not be subject to indexation.
57. Carbon off-setting contributions will be calculated according to the price of carbon set out in this SPD, or otherwise notified on the council's website, at the date of signature of the S106 agreement or planning permission, whichever is the latter. They will not be subject to further indexation.

**Viability:**

58. Applicants should take potential planning obligations including exceptional costs associated with the development of a site, into account when acquiring the land for development. If, during the identification of Heads of Terms (i.e. before the planning application is submitted) the applicant claims that the cost of fulfilling planning obligations would make sites economically unviable, the council will require applicants to submit detailed 'open book' information to the council at the same time as submitting the planning application.
59. Before reviewing the nature of planning obligations sought, the council may seek viability and valuation advice from an independent third party. All costs incurred by the council in validating claims will have to be met by the applicant.
60. In circumstances where the council has accepted reduced contributions based on current viability information, mechanisms may be put in place to allow additional contributions to be provided later in the scheme should development viability improve. This is likely to take the form of an 'overage' or a 'clawback' provision in the section 106 agreement. In accordance with the NPPF guidance (2014), this will only apply to developments that are phased or are capable of being phased.
61. There are various types of overage provisions that can be used successfully and the council reserves the right to require alternative provisions where appropriate to the specific nature of the development. The mechanism put in

place will usually be based on the following principles (the example used here is for affordable housing but this may apply to other matters):

- Once a Completion Certificate has been issued under the Building Regulations for the development or once a specified number of units have been occupied, the council will require a re-assessment of costs and values of the scheme. This re-valuation will need to be assessed by an independent assessor<sup>10</sup> and these costs should be met by the applicant.
- Any clawback will be secured as additional affordable housing provided on-site in the first instance where this is practicable, otherwise the council will accept financial contributions in lieu of the provision of affordable housing on-site.
- The amount of clawback secured will be limited to the full policy requirement for the scheme.
- Any enhanced value/ profit identified from the scheme should not include any input from grant secured – such grant should be used in full for delivery the infrastructure/ affordable housing required as part of the scheme.

#### **Enforcement:**

62. The council will instigate enforcement action if it becomes evident that the planning obligation is not being complied with. The council will contact the applicant in writing, in the first instance, to remind them of their obligations. If the obligation remains unmet the council's legal services will be instructed to take appropriate action to secure compliance with the terms of the planning obligation. This could include applying to the courts for an injunction.

63. To ensure compliance with the obligation, appropriate clauses will be included in the terms of the legal agreement involving interest for the late payment of financial contributions. This will be written into any planning obligation so that applicants are aware of the implications of late payment and agree to the terms.

#### **Monitoring:**

64. The responsibility will usually be with the applicant to meet their obligations including making payments, without a prior request from the council. Merton's CIL and Section 106 monitoring officer is responsible for ensuring that the applicant fulfils their responsibilities and that any financial contributions received are used to fund schemes in accordance with the

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<sup>10</sup> The viability reassessment undertaken by an independent assessor needs to be different to that who submitted appraisals on the scheme before.

terms of the agreement. Details of the agreement, clauses and triggers are recorded on a database.

65. Legal agreements and unilateral undertakings normally require financial contributions to be paid upon commencement of the development or upon first sale of the first new unit to be sold or first occupation of the development. Some non-financial planning obligations require delivery throughout the life of a project. Such cases will need monitoring to ensure that all payments have been made or the terms complied with over the agreed period.
66. Planning obligations would be logged and monitored in order to ensure effective delivery of the contributions and to provide information for interested parties on the outcome of any agreement. This will help to ensure that the process is open and transparent.
67. The council charges a standard fee for administering and monitoring planning obligations, detailed in Table 4 below, which vary depending on the value of the contribution and the types of heads of terms.

<b>Table 4: Charges for administering and monitoring Planning Obligations</b>	
Head of term or provision	Charge
<b>Financial contributions:</b>	
Up to £25k	£500
£25k to £100k	Plus 2% of the value of the element of the contribution over £25k up to and including £100k.
£100k to £250k	Plus 1% of the value of the element of the contribution over £100k up to and including £250k.
£250k and above	Plus 0.5% of the value of the element of the contribution over £250k.
<b>Example:</b>	
1. £300k financial contribution	$£500 + (2\% \times £75k) + (1\% \times £150k) + (0.5\% \times £50k) = £3.75k.$
2. £30k financial contribution	$£500 + (2\% \times £5k) = £600.$
<b>Non-monetary heads of terms:</b>	
Permit-free	£25 per permit free unit or £500 whichever is the greater (max £3k).
Affordable housing in-kind provision	£50 per affordable housing unit or £250 whichever is the greater (max £6k).
Other non-monetary	At least £250 per head of term (max to be determined on a case by case basis).
<b>Other monitoring provisions:</b>	
Clawback mechanism	£500 per agreement with such a mechanism (does not include costs for verifying or appraising, by independent experts or experts representing the council or applicant, economic viability assessments which will be determined on a case by case basis).
Early payment trigger discount - Financial contribution due upon commencement	£250 discount on the charge for each contribution that is due upon commencement of development (excludes instalments).
Contributions paid by instalments supplement	£250 per instalment.

68. The council's solicitors in consultation with the relevant planning officer(s) will undertake the drafting of the planning obligations. Applicants will be required to pay the legal and professional costs expended in the preparation of the deed of planning obligation, even if the planning application is refused.
69. If issues of viability arise and there is a need for the council to obtain independent valuation advice, it will be expected that the applicant would meet the costs for this. Legal and professional costs will be charged at the council's current hourly rate.



#### 4. Affordable housing and other types of planning obligation

70. Since the adoption of Merton's CIL Charging Schedule, the scope of planning obligations is greatly reduced however, planning obligations will still be sought towards:

- Affordable housing;

and site-specific infrastructure projects not on Merton's Strategic Community Infrastructure List, including:

- Community and sporting facilities.
- Education and Schools Provision.
- Health.
- Open space.
- Transport/ highways.

71. Large major developments, especially residential, typically have greater impacts and so may necessitate site specific infrastructure such as schools, community facilities and transport/ highways improvements which might still qualify for planning obligations under the tighter restrictions governed by the CIL Regulations.

72. For some of these larger sites, development briefs and other planning policy guidance may provide further details. In securing such planning obligations on larger sites, the council will apply the statutory tests and avoid duplication with CIL. Where necessary, development viability will be taken into account on a site-by-site basis in assessing planning obligations, particularly in view of paragraph 205 of the NPPF.

73. Major development is defined as development that proposes over 10 residential units or 1,000sqm of non-residential floorspace.

74. There are a variety of planning obligations that may be necessary for a development to mitigate against its impact on the local area.

#### **Affordable housing:**

75. Merton's Core Planning Strategy (2011) *Policy CS8: Housing Choice* requires all sites capable of providing between 1-9 residential units to provide 20% affordable housing as a financial contribution equivalent to affordable housing provided on-site. For schemes with ten units or more, the council requires that the scheme provides 40% of residential units to be provided on-site as affordable housing in the first instance. Only in exceptional circumstances will the council consider the provision of affordable housing

off-site or financial contributions in lieu of the provision of affordable housing on site.

76. The tenure mix is set out in Policy 3.11: *Affordable Housing Targets* of the London Plan (2011), *Policy CS8: Housing Choice* of the Core Planning Strategy (2011) and Policy DMH3: *Support for affordable housing* of the Sites and Policies Plan. Following the adoption of the NPPF and proposed amendments to the London Plan, the affordable rent tenure should make up the social rented proportion of the scheme.

77. In seeking this policy requirement, the council will have regard to site characteristics such as site size, site suitability and economics of provision such as financial viability and other planning contributions.

78. In circumstances where commuted sum payments are accepted in lieu of the provision of affordable housing on-site, the council uses the following formulae<sup>11</sup>:

*A (open market value) x B (residual land value percentage which is 38.6%) + C (15% site acquisition and preparation/ servicing costs) = D (per unit sum).*

*D (per unit sum) x 20% or 40% (affordable housing contribution required) = financial contribution payable.*

79. This formula should be used as a guide only. To assist applicants, the council provides an electronic calculator on-line to help calculate the expected contribution for 1-9 residential unit schemes: [www.merton.gov.uk/planning/s106-agreements.htm](http://www.merton.gov.uk/planning/s106-agreements.htm) . When assessing development viability, applicants should use commercially available development viability toolkits.

80. As detailed in the policy, the requirement to pay a financial contribution is subject to viability. If it is not viable to provide the contribution, the onus will lie with the applicant to demonstrate through the submission of a development viability appraisal the level of contribution that is viable. Through an open book approach, applicants will be required to submit all the inputs and assumptions used to assess viability of the proposed scheme. Where it is deemed appropriate the council will subject proposals and applicants' submitted residual land value viability assessment(s) to independent examination and will require applicants to meet the costs of the independent examination.

81. Monies received through financial contributions will be used to deliver additional affordable housing units by:

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<sup>11</sup> This formulae is recommended by Merton's Affordable Housing Viability Study (2009): [https://www.merton.gov.uk/lb\\_merton\\_-\\_viability\\_study\\_final\\_report\\_2010.pdf](https://www.merton.gov.uk/lb_merton_-_viability_study_final_report_2010.pdf)

- Purchasing units on the open market.
- Working in joint partnership with the Homes and Community Agency (HCA).
- Working in joint partnership with Merton Prior Homes (MPH) or other Registered Housing Provider.
- Developing the council's own sites.
- Subsidising developments of 10 homes or more to provide more than the council's 40% affordable housing target.

### **Carbon offsetting:**

82. Government has set a legally binding target to achieve zero carbon emission in new residential development by 2016 and in new commercial development by 2019. The Government recognises that this may not always be feasible on-site and is setting a mechanism of 'Allowable Solutions', under which applicants who are unable to achieve zero carbon on-site can offset their carbon emission by making provision for carbon reduction elsewhere.
83. *Policy 5.2: Minimising Carbon Dioxide Emissions* of the London Plan, already requires new development to contribute towards the Mayor's aim to minimise carbon emissions and sets targets for improvements above 2010 Building Regulation requirements.
84. From October 2013, developers of both commercial and residential buildings have been required to meet a standard which delivers a 40% improvement in regulated carbon emissions over the requirements in the 2010 Building Regulations.
85. In April 2014, new Building Regulations came into force which require further improvements in carbon emissions over the previous 2010 Regulations. The Mayor's Sustainable Design and Construction SPG (April 2014) states that he will now seek to apply a target of a 35% improvement in carbon emissions over the 2013 Building Regulations, a figure broadly equivalent to the previous 40% over 2010 Building Regulations. Carbon emission reductions should be delivered on site, but where this cannot be achieved, the shortfall must be provided off-site or through a cash-in-lieu contribution to the relevant borough to be ring-fenced to secure delivery of carbon emission savings elsewhere.
86. In some circumstances there may be limitations on the feasibility and viability of installing some low and zero carbon technologies and consequently it may not be feasible for development to meet Government regulations. Therefore from 2016 some applicants may make use of carbon offsetting through the Allowable Solutions Mechanism.
87. From 2016 the council will require applicants to deliver the maximum feasible and viable carbon emission reduction on-site, but where developments are not able to meet the Mayor's SPG requirement for a 35%

improvement in regulated carbon emissions over the 2013 Building Regulations, carbon abatement should be delivered elsewhere or through a financial contribution to either Merton's, or an alternatively approved, carbon offsetting scheme.

88. The council will secure such financial contributions through S106 planning obligations at an initial cost of £46 per tonne, calculated over a 30 year period. This rate is derived from the Mayor's Sustainable Design and Construction SPG 2014 and the Government's Zero Carbon Hub. It will be periodically updated in line with amendments published by the mayor or the Zero Carbon Hub. These updates will be published on Merton Council's website via . [www.merton.gov.uk/planning/s106-agreements](http://www.merton.gov.uk/planning/s106-agreements)
89. Financial contributions for carbon offsetting will be required on completion of development and prior to occupation. The level of contribution required will be calculated in accordance with Part L of the building regulations methodology and the carbon reduction projections (kg CO<sub>2</sub>/m<sup>2</sup>) set out in an energy assessment submitted as part of the planning application. Applicants may submit a further revised assessment demonstrating levels of carbon reduction and revised off-setting contributions upon completion.
90. Projects and schemes funded by this approach would include providing insulation or other green adaptations to existing buildings and to provide training to Merton's residents to reduce carbon emissions. Projects and schemes that would benefit from this mechanism would not be considered 'infrastructure' as defined in the Planning Act 2008. Funds raised through this mechanism may be used by the council for individual carbon offsetting projects or pooled by the council and the funds invested in carbon reduction schemes both within and outside the borough..
91. In the event that no borough carbon off-set scheme is in place, financial contributions should be made into a recognised carbon off-setting scheme, details of which must be provided to and approved by the council.
92. The Government's preferred solution is for zero carbon standards and requirements for allowable solutions to be incorporated into Building Regulations. If this progresses, it is likely that from April 2016 (for residential development) and from April 2019 (for commercial development), responsibility for ensuring zero carbon standards and delivering offsetting of emissions/allowable solutions will pass from local planning authorities to authorised Building Control bodies.
93. The council will continue to seek planning obligations towards carbon offsetting, in line with the London Plan and the Mayor's SPG, up to and until the proposed national change comes into effect.

### **Increasing local employment opportunities:**

94. Merton's Core Planning Strategy *Policy CS12: Economic Development* and Merton's Sites and Policies Plan 2014 *Policy DME4: Local Employment Opportunities* seeks to increase employment opportunities in Merton.
95. Although taken as a whole, Merton's economy is doing relatively well<sup>12</sup>, there is a significant divide between the west and east of the borough in terms of economic activity, employment, qualifications, skills and income levels, and business and investment opportunities. This is detailed in Merton's Economic Development Strategy, the Local Economic Assessment (2010 and 2010 refresh) and Merton's Employment and Training Action Plan (2013-2014).
96. Policy DME4 requires applicants to increase employment opportunities by providing opportunities for local residents and businesses to apply for employment and other opportunities during the construction of developments and in the resultant end use. 'Other opportunities' includes applicants procuring local companies in the supply-chain and may include offering local residents apprenticeships or work experience/placement.
97. This policy applies to major planning applications with a threshold of 10 residential units or more and commercial developments where the floorspace is 1,000 square metres or more and is subject to viability. Appendix H of Merton's Sites and Policies Plan provides guidance as to how each new major development could contribute to increasing employment and/or training opportunities in Merton.
98. However, on some major schemes, the applicant may find it difficult to provide employment opportunities on-site or in the resultant end-use of the development. Therefore, where applicants demonstrate that it is difficult to provide employment or training opportunities on-site but they can financially provide for this, the council will accept a cash in lieu employment contribution instead.
99. Cash in lieu employment contributions will only be accepted on schemes with a threshold of between 10 to 50 residential units or 1,000sqm to 5,000sqm of commercial floorspace. Eligible schemes will be required to make a financial contribution towards Merton's Increasing Employment Opportunities fund at a rate of *£4 per sqm of additional floorspace*.
100. The cash in lieu employment contribution will be used to directly benefit the end use of the development. This will include but is not limited to, providing relevant qualifications for employment in that premises, initial travel cost and clothing for local employees, computer/ IT training. The council will discuss the necessary skills required with local providers, including the local job centre.

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<sup>12</sup> In the Index of Multiple Deprivation 2010, Merton is ranked 208 out of 326 boroughs, where 1 is the most deprived and 326 the least deprived.

101. The council and its partners will use financial contributions to fund a wide range of employment and training projects from providing apprenticeships and work placements to training and skills. The training and skills provided could include customer service training for retail developments, CSCS cards<sup>13</sup> for construction developments and Computer training for office/ business developments. This training will only be provided to Merton residents who are apply for employment with a Merton-based business.

102. For this purpose of this planning obligation, a Merton resident is described as:

- Any person currently residing within the Local Authority area.
- Any persons who is or was previously 'Looked After' by the Local Authority or who was subject to a 'Supervision or Care Order' (or Child Protection Plan) regardless of their current place of residence.

Also to be considered are non-resident people with a link to the borough:

- Any person who has previously resided within the Local Authority area and who continues to have family links within the Local Authority area.
- Any person who resides in a neighbouring borough but completed their education within Merton Local Authority area.

103. As indicated in the Sites and Policies Plan, applicants should liaise with Merton's Future Merton (Regeneration and Renewal) Team, who can provide advice on the implementation of Policy DME4.

### **Green infrastructure: gardens, parks and open spaces**

#### *Residential amenity* (private or communal gardens)

104. As part of new developments that include residential dwellings, *Policy DMD2: Design Considerations in all Developments* of Merton's Sites and Policies Plan seeks the following amenity space standards for new residential developments:

- For new houses: the council will seek a minimum garden area of 50sqm as a single usable regular shaped amenity space.

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<sup>13</sup> Construction Skills Certification Scheme: This is a mandatory qualification which is required to work on a construction/ building site. If an individual does not have this qualification they are not able to conduct any work on-site.

- For new flats: the council will seek a minimum 5qm of private outdoor space should be provided for 1-2 person flatted dwellings<sup>14</sup> and an extra 1 sqm should be provided for each additional occupant.

105. In circumstances where proposals fail to meet the amenity space standards but are acceptable with regards to all other relevant matters, the council may secure planning obligations to mitigate against the impact of the new development on the local open spaces. This would not apply if the site was within an area deficient in publicly accessible open space. The council will use GIGL (Greenspace Information for Greater London) information to identify if areas deficient in public access to open space.

106. The calculation of developer contributions to secure residential amenity space provision to serve the needs of new developments will be determined through negotiation between the local planning authority and applicant, as every case must be considered on its merits. This planning obligation will be:

- Applied to larger major schemes, and
- Will only be applied in exceptional circumstances, such as the development is located in an area identified as lacking in open space provision, and
- Will only apply where the council has a specific project that would mitigate the developments impact.

*Parks and open space:*

107. For the purposes of this document open space is defined<sup>15</sup> as “All land that is predominantly undeveloped, other than by buildings or structures that are ancillary to the open space use, and bodies of water that are indicated as open space on Merton’s Policies Map. The definition covers a broad range of types of open space within Merton, whether in public or private ownership and whether public access is unrestricted, limited or restricted”.

108. *Policy CS13: Open Space, Nature Conservation, Leisure and Culture of Merton’s Core Planning Strategy*

109. *Policy CS13: Open Space, Nature Conservation, Leisure and Culture of Merton’s Core Planning Strategy and DM01 Open Space* of the Sites and Policies Plan makes it clear that planning obligations may be sought to improve or maintain facilities or to improve access to existing open space and states that the council will support the creation of new open spaces as part of major development proposals where suitable and viable.

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<sup>14</sup> Reference: as specified in the Mayor’s Housing Supplementary Planning Guidance 2012.

<sup>15</sup> Merton’s Sites and Policies Plan 2014 glossary

110. Where new publically accessible open space is proposed as part of major developments, for which it is proposed that the council will take responsibility, the council will require applicants to make contributions towards maintenance for the first five years.

### **Social infrastructure : playgrounds, school places, healthcare and community**

111. The Mayor's London Plan 2011 defines social infrastructure as “ health provision, early years provision, schools, colleges and universities, community, cultural, recreation and sport facilities, places of worship, policing and other criminal justice or community safety facilities, children and young people's play and informal recreation facilities”. For this SPD, the council may seek developer contributions for community services and facilities, education and health services and facilities.

#### Children's play space:

112. London Plan 2011 *Policy 3.6: Children and Young People's Play and Informal Recreation Facilities* and the Mayor's Play and Informal Recreation SPG (2012) and Merton's Core Planning Strategy 2011 *Policy 13: Open Space, Nature Conservation, Leisure and Culture* requires the provision of high quality play space which meets the needs of the development and enhances play provision in the area on-site.
113. The council will secure play space in accordance with the Mayor's Play and Informal Recreation SPG 2012. Where play space is to be provided on-site it should be developed in accordance with and agreed by the planning authority and either:
- be maintained in perpetuity to the agreed standard by the developer or an appropriate agency; or
  - be transferred to the borough for it to manage together with an agreed maintenance sum providing for a minimum 15 year period of maintenance.
114. If there is already a play space within easy access of the development<sup>16</sup> then a contribution towards the provision of play space will not be required. However, where contributions towards play space are required, the council will seek that it is provided on-site in the first instance. In circumstances where this is not feasible, the council will accept a financial contribution in lieu of the provision on-site.
115. The calculation of developer contributions to secure play space provision to serve the needs of new developments will be determined

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<sup>16</sup> Different sized and equipped play spaces have different access requirements, see Merton's Open Space Study 2010 and the Mayor's Play and Informal Recreation SPG 2012 for requirements

through negotiation between the local planning authority and applicant, as every case must be considered on its merits. This planning obligation will be:

- Applied to larger major schemes, and
- Will only be applied in exceptional circumstances, and
- Will only apply where the council has a specific project that would mitigate the developments impact.

Community services and facilities:

116. Community services and facilities include youth centres, places of workshop, meeting places, and cultural and local heritage facilities as defined in the Further Alterations to the London Plan 2014.
117. In accordance with Merton's Core Planning Strategy *Policy CS11: Infrastructure*, planning obligations may be sought to help provide specific projects for community services and facilities, particularly for large residential developments in areas which are already lacking in community services and facilities.
118. Where a community service and facility is provided for the sole use of that development through planning obligation or condition, it will remain as part of the development and all costs for its operation and maintenance in perpetuity are to be met by the developer.

Education and schools provision:

119. Education infrastructure is an important component to creating balanced sustainable communities. Funding secured through CIL will generally be used to address the cumulative impacts of development on school places. The Local Education Authority (LEA), may seek funds to create new school places where they are necessary to support new development. These CIL-funded school places will be mentioned on Merton's Strategic Community Infrastructure List.
120. However, in accordance with Merton's Sites and Policies Plan *Policy DMC2: Education for Children and Young People*, new education facilities may be required (either on or off site) to meet additional need for school places arising from new substantial residential development. The delivery of such projects may be secured through planning obligations. Planning obligations will be sought from developments that would result in a significant demand for additional school places that could not be accommodated in existing educational facilities and are not currently accounted for in the Local Education Authority current infrastructure programme. Please contact the Contract and School Organisation, Children, Schools & Families Department on 020 8545 3289.

121. The council will ensure that school projects secured through planning obligations will not be funded through CIL receipts and that the obligations meet the statutory tests.

122. The following formula will be used in assisting assessment as to what would be the reasonable scale of planning obligation to cover the costs for providing a school place.

$$\text{Child Yield} \times \text{Cost per public place}$$

123. For 'child yield', the applicants are to use the Mayor of London's child yield calculator<sup>17</sup>. Officers will provide the appropriate site specific 'cost per public place' multiplier at pre-application stage.

124. In instances where a site needs to be acquired, these costs, in addition to costs for delivering the project, might be added to the above formula.

#### Health:

125. In accordance with Merton's Core Planning Strategy *Policy CS11: Infrastructure* of the, the council will support the provision of health services by working with the health authorities and developers.

126. Funding to support the development of the borough in relation to public facilities will generally be supplemented by CIL. For some large major developments, accessibility to such services and the need for new provision will be identified through Health Impact Assessments, which needs to be submitted as part of a planning application. The council will work with the NHS and applicant for the provision of these new health services and facilities.

#### Transport/ Highways:

127. Merton's Core Planning Strategy *Policies CS19: Public Transport and CS20: Parking, Servicing and Delivery* clarifies that mitigation measures as a result of new development will be sought, including:

- impacts on public transport, for example upgrades to bus stops,
- Impacts on-site impacts, which may include cycling infrastructure,
- links to public highways, such as junction upgrades/ signalisation of junctions.

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<sup>17</sup> At the time of publication, this would be the child yield calculator for the Mayor's Play and Information Recreation SPG. Website link:  
<http://www.london.gov.uk/priorities/planning/publications/shaping-neighbourhoods-play-and-informal-recreation-spg>

128. Most development generates new travel movements and applicants should provide any necessary additional transport infrastructure to accommodate these new movements or to mitigate impacts as result of new development.

129. The council expects that applicants will incorporate necessary transport infrastructure into proposals secured via planning condition or any necessary alterations to the transport network within the vicinity of new development. This will be secured by Grampian planning conditions, planning obligation or S.278 agreement.

130. Where new developments are built in existing Controlled Parking Zones (CPZ), the council will enter into a planning obligation with the applicant to ensure that this new scheme remains parking free in perpetuity. Therefore, occupiers of these schemes cannot be holders of resident parking permits which are permitted in CPZ areas.

131. Planning permission may be refused, if:

- an applicant is unwilling or unable to meet this requirement, or
- the local authority is not able to require respective planning conditions or S.278 agreements due to restrictions on what it can grant permission, for example due to restrictions under CIL Regulation 123 as amended, or
- could not reasonably be expected to secure alternative funding including CIL revenues to fund the measures.

132. It is expected that wider less direct transport impacts resulting from new development will be funded through CIL such as the proposed tramlink extension. Specific transport related infrastructure requirements may be secured through planning obligations, S.278 agreements and/ or planning conditions.

133. These developer contribution costs will vary from development to development depending on locational factors, such as access to the site. It is therefore hard to create an economic formula. It will also depend on the intended use of the development, as this will affect the level of trips associated with the site.

### **Other Planning obligations**

134. The council reserves the right to seek additional s106 planning obligations to those listed above; where justified by local circumstances and where such planning obligations can meet the statutory tests set out in CIL Regulation 122.

135. Examples of S106 obligations may include, but will not be limited to:

- flood defences and flood prevention measures such as SUDS,

- biodiversity off-setting, and
- site specific air quality monitoring equipment and services and related air-quality impact mitigation measures.

136. Planning obligations may be secured to ensure that provision is made directly on-site or as an appropriate off-site contribution.