

Section 106 planning
obligations in Croydon
and their relationship to the
Community Infrastructure Levy
Non-statutory guidance

April 2013

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1. Introduction to Section 106 and the borough's and Mayoral CIL

1.1 On 1 April 2013, the Croydon Community Infrastructure Levy (CIL) came into force. CIL is a charge which local authorities can levy on most types of new development. All developments permitted after this date in Croydon will potentially be liable to pay the levy. The introduction of CIL changes the way in which developers contribute to the provision of infrastructure in Croydon. The proceeds of the levy will provide new local and sub-regional infrastructure to support the development of the borough in line with Croydon's development plan and infrastructure planning.

1.2 The previous guidance on Planning Obligations has now been withdrawn and replaced by this guidance which takes account of the introduction of the Council's CIL and to better align the Council's requirements within the Infrastructure Delivery Plan. This guidance describes the Council's approach in securing planning obligations and the differences between CIL and Section 106 (S106) agreements, together with the procedures that the Council will employ to collect contributions under both regimes.

1.3 This guidance is non-statutory guidance and supplements the Croydon Local Plan – Strategic Policies. The policies are used to determine applications for planning permission in the borough, along with the London Plan, the UDP Saved Policies 2013 and other planning documents, such as Supplementary Planning Documents.

1.4 This document will assist prospective developers by identifying the planning obligations that will be sought by the Council, through the grant of planning permissions for development, where such development generates a need for new infrastructure. Acknowledgement and preparation for the required planning obligations should be integral to negotiation of land transactions, and the formulation of development proposals.

1.5 The Council will expect developers to enter into discussions on planning obligation requirements with Council officers as soon as possible, preferably at the pre-application stage. The Council's aim is to agree in principle the Heads of Terms of any planning agreement before applications are submitted.

1.6 The aim of the guidance is to provide a transparent and consistent basis for the negotiation of S106 contributions by setting out the following:

- The types of developments that would be subject to planning obligations, in terms of their scale, nature, proposed use and their location;
- The broad range of likely contributions that may be sought, why these may be required and a description of any associated policy documentation; and
- The amount of financial contributions and the means by which it will be calculated.

2. The relationship between the borough's Section 106 planning obligations and CIL.

2.1 The CIL Regulations (Regulation 122) introduced 3 legal tests to be considered when negotiating, securing and implementing planning obligations. These are:

- a) Necessary to make the development acceptable in planning terms
- b) Directly related to the development; and
- c) Fairly and reasonably related in scale and kind to the development

2.2 Whilst it is the Government's intention to replace planning obligations for general types of community infrastructure, planning obligations will still be used for site-specific mitigation measures that are required to make a development acceptable in planning terms.

2.3 Planning obligations or agreements and Unilateral Undertakings are normally entered into in accordance with Section 106 of the Town & Country Planning Act 1990 (as amended). These tend to be referred to on a day-to-day basis as 'Section 106 (S106) agreements' and this term is used throughout this guide. They are intended to make development acceptable which would otherwise be unacceptable in planning terms.

2.4 They can be used to prescribe the nature of the development (e.g. a proportion of the housing must be affordable); to compensate for loss or damage caused by the development (e.g. loss of open space) or mitigate a development's impact (e.g. increase public transport provision). Agreements must be governed by the fundamental principle that planning permissions may not be bought or sold, and they cannot be used to secure a share in the profit from development.

2.5 CIL provides a more consistent and transparent mechanism to raise financial contributions currently sought through planning obligations. In short planning obligations differs from CIL in that the contributions are tailored to a specific development and must be directly related to its impact. where as CIL may be applied anywhere in the borough or on Crossrail

2.6 CIL allows local authorities to raise funds from development to pay for the infrastructure. CIL takes the form of a tariff per m² of additional floorspace. The level of the tariff is set by the local authority based on the needs identified through infrastructure planning, but also tested to ensure that it will not affect the viability of developments. The local levy rate(s) are set out in a CIL Charging Schedule (<http://www.croydon> etc. Charges are index linked.

3. What CIL and Section 106 will fund

3.1 Regulation 123 (Community Infrastructure Levy Regulations 2010 (as amended) restricts the use of planning obligations for infrastructure that will be funded in whole or in part by CIL, to ensure no duplication between the two types of developer contributions (CIL and planning obligations).

3.2 In order to clarify what types of infrastructure will in future no longer fall under S106, the Council has published a list of infrastructure types and projects that it intends will be, or may be, wholly or partly funded by CIL. This is known as the Regulation 123 list. It

will be kept up to date to take into account any changes in circumstances and / or infrastructure needs identified in the future.

3.3 Regulation 122 of the CIL regulations confirms that planning obligations may only be used if they are necessary to make the development acceptable in planning terms. They must also be directly related to the development; and fairly and reasonably related in scale and kind to the development.

3.4 The table below sets out a list of the infrastructure projects or types that Croydon intend will, or maybe, wholly or partly funded by CIL and those projects or types that will be funded by Section 106

Table 1: Comparing CIL and s.106

Infrastructure funded by CIL	Funded by S.106
Provision, improvement, replacement, operation or maintenance of education facilities	
Provision, improvement, replacement, operation or maintenance of health care facilities	S106 for affordable housing
Provision, improvement, replacement, operation or maintenance of those projects listed in the Connected Croydon Delivery Programme dated April 2013 and any projects as may be added to the said Programme after April 2013 as approved by Cabinet ¹	S106 for standard site /design mitigation Development specific mitigation
Provision, improvement, replacement, operation or maintenance of public open space	Public Realm projects or types that do not form part of the Connect Croydon Delivery Programme will be sought from developments through S106 Agreements in accordance with Community Infrastructure Levy Regulations 2010 (as amended) Regulations 122 and 123.
Provision, improvement, replacement, operation or maintenance of public sports and leisure	Employment and skills training
Provision, improvement, replacement, operation or maintenance of community facilities (as defined by the Croydon Local Plan – Strategic Policies)	

The Infrastructure Delivery Plan (IDP)

3.5 In 2010, the Council produced and published for consultation its draft IDP identifying the Borough’s social, physical and green infrastructure needed to support the growth anticipated over the 20 year lifetime of the Local Plan (formerly Core Strategy). The IDP is organised in alignment with the themes of the Vision for Croydon and the Sustainable Community Plan and contains an initial schedule of projects and programmes necessary for the development of the Borough.

¹ The Connected Croydon Programme will be funded from a variety of sources. The Connected Croydon Delivery Programme is an appendix to the Regulation 123 list and details the projects or types name, description and location.

3.6 The IDP continues to be updated both in response to public consultation and to reflect changes to national and local policy and circumstance. A revision of the IDP has been published on the web in March 2012

3.7 The Council also produces a rolling 5 year capital investment programme as part of its budget setting process. The capital investment programme is aligned with the long-term IDP. The IDP will be reviewed annually to ensure it reflects current infrastructure needs and projects that have been delivered.

Using the IDP Report

3.8 The IDP report identifies the need for and justifies a programme of infrastructure projects required to support the growth objectives under the development plan. It sets out:

- S106 monies can be used in accordance with the planning obligations tests; and
- Other strategies or reports which provide additional evidence as to why infrastructure is required.

3.9 The IDP Schedule can be used to identify specific projects relating to this identified need, in relation to the location, consequence of the scale and use of proposed development

The IDP Schedule

3.10 The IDP Schedule is a matrix which is an appendix to the IDP, identifying the infrastructure projects needed in order to deliver the growth objectives over the plan period to 2031. It includes the following information for each infrastructure project:

- The lead partner and any other partners / stakeholders involved in the delivery of the project;
- The delivery mechanism / funding source for each project – including where S106 / CIL is expected to contribute to delivery;
- The cost of the project (if known);
- Location; and
- The timescale for delivery

4. What infrastructure will be deemed as standard site/design mitigation and will be sought through Section 106 Agreements.

4.1 In addition to any CIL payments, the Council will seek to negotiate (within the scope of the revised use of S106) that the developer will mitigate any impact on the environment or local services that arise directly as a result of the development. Affordable housing will also continue to be provided through S106.

4.2 There may be cases where the development proposed results in a specific need for infrastructure (or access to a service) that is not currently available, and has not been identified for investment through CIL or wider investment programmes. For example, a major junction improvement may be required to 'unlock' a site. In such circumstances, the Council would normally expect these aspects to be addressed as part of the proposal at the time planning permission was sought. In which case their delivery will often be secured by a S106 or other mechanisms such as S278 of the Transport Act.

4.3 S106 will also continue to be used for local infrastructure requirements on development sites, such as local access or connection to services. Some of these requirements may be physically off site, but will be secured under S106 where they are clearly linked to the development site and needed to make that particular site acceptable in planning terms.

4.4 Many developments will be liable to both pay CIL and enter into a S106 agreement. The CIL payment and Section 106 obligations will cover different infrastructure projects and types, and developments will not be charged for the same items of infrastructure through both obligations and the levy.

4.5 Planning obligations can be carried out in two main ways: either the developer provides the physical measures or makes a financial contribution towards any works to be carried out by the local authority or its partners.

4.6 Regulation 122 of the CIL regulations confirms that planning obligations may only be used if they are necessary to make the development acceptable in planning terms. They must also be directly related to the development; and fairly and reasonably related in scale and kind to the development.

4.7 As well as the legal tests referred to in the CIL Regulations restrictions were introduced on the pooling of S106 contributions, so that no more than 5 developments may contribute to the same infrastructure project. If the council wants to pool contributions from more than 5 developments to pay for an infrastructure item, it will have to use CIL.

5. Employment and Skills Training

5.1 Croydon has an above average unemployment level within greater London. Croydon's Jobseekers claimant rate for 18 to 24 year olds is above both the London and UK average rate. A number of Croydon wards display all the characteristics of inner city deprivation Skill levels in Croydon are not commensurate with employer requirements.

5.2 The Council is committed to developing, introducing and maintaining training, placement and apprenticeship schemes and views them as being a sustainable way to improve employment prospects for local people. The Council is also keen to ensure that S106 obligations secure placements for local people during the construction phase of building projects and the provision of skills training.

5.3 The Council may require developers to assist with training and employment initiatives via S 106 where the development impacts on the availability of jobs for Croydon residents.

5.4 Policy CS5.1, CS5.14 and CS5.15 of the Croydon Plan – Strategic Policies supports the provision of skills training and further education through the use of planning obligations.

5.5 Training providers who provide training schemes that enable local people to directly benefit from new development, learn new skills and obtain vital work experience alongside a formal college course, will be used. The negotiated agreement will, for instance, include the provision of training hours plus a construction training payment on implementation. This planning obligation will contribute towards increasing employment skills in Croydon. This is considered to provide a sustainable principle, which can be obtained from negotiated agreements

5.6 Where housing developments for 15 dwellings or more, or a commercial scheme of 1,500 sq.m or more are proposed, the Council will negotiate the provision of training hours as part of an on-site construction training scheme. Schemes of this scale are expected to produce an employment and training strategy. The strategy will involve the developer/point of contact meeting with Croydon Council to discuss an employment and skills plan for every phase of the development and liaising with local employment providers to fill vacancies.

5.7 This is to be delivered by a training provider, subject to approval by the Council, in combination with developers / applicants as part of the construction process. The training provider will work with developers / applicants to identify and agree the number of trainee weeks/hours which can be accommodated both on and off site for work placements and/or educational visits.

5.8 Prior to implementation of the scheme, developers / applicants will be required to make a payment for administration of the scheme and provide a construction training strategy. This is to be approved by the Council detailing how the training will be accommodated as part of the development process.

5.9 The Council also seeks to promote local jobs and maximise training and employment opportunities in conjunction with new development. Planning obligations and contributions may be sought from significant major developments for employment development, training to improve skills and business support to encourage new and sustainable business growth. Contributions will be negotiated on a case by case basis.

5.10 The Council expects the Developer to use all reasonable endeavours to source contractors and sub-contractors from within the Borough. Local Suppliers to be provided with information about the development and provided with the opportunity to tender for all appropriate contracts or sub contracts that arise from the development. This will include participating in business support initiatives, supply chain activities and meet the buyer events as required.

5.11 Where the end use occupier of a development is known as part of the S106 the Council will seek an agreement with the developer to provide a specified number of apprentice or trainees place with in the development, Where the end-use occupier is not known the Council will seek an agreement to ensure that its aims and objectives in respect of employment and skills are promoted by brokering a meeting between the new occupier and the Council.

6. The pooling of Section 106 under CIL Regulation 123 explained, including current position

6.1 Regulations 122 and 123 of the CIL regulations (as amended) set out the relationship between S106 and CIL, post the introduction of a charging schedule. The Reg 123 list sets out the infrastructure CIL will fund. The Infrastructure and obligations that do not appear on the Reg 123 list can still be sought through S106, subject to regulations 122 and 123.

6.2 Reg 123(3) was amended by CIL Regs 2011 and came into force on 6 April 2011. This amendment changed the previous S106 pooling arrangements. To avoid a breach regarding pooling the S106 will be required to be specific in detail about the clauses / contribution sought and cannot replicate infrastructure projects and types sought on the Reg 123 list. Advice to applicants/developers on this will be given during the pre application process.

7. Guidance on the application of Croydon Local Plan – Strategic Policies – affordable housing policy (include Housing Technical Paper Flowchart).

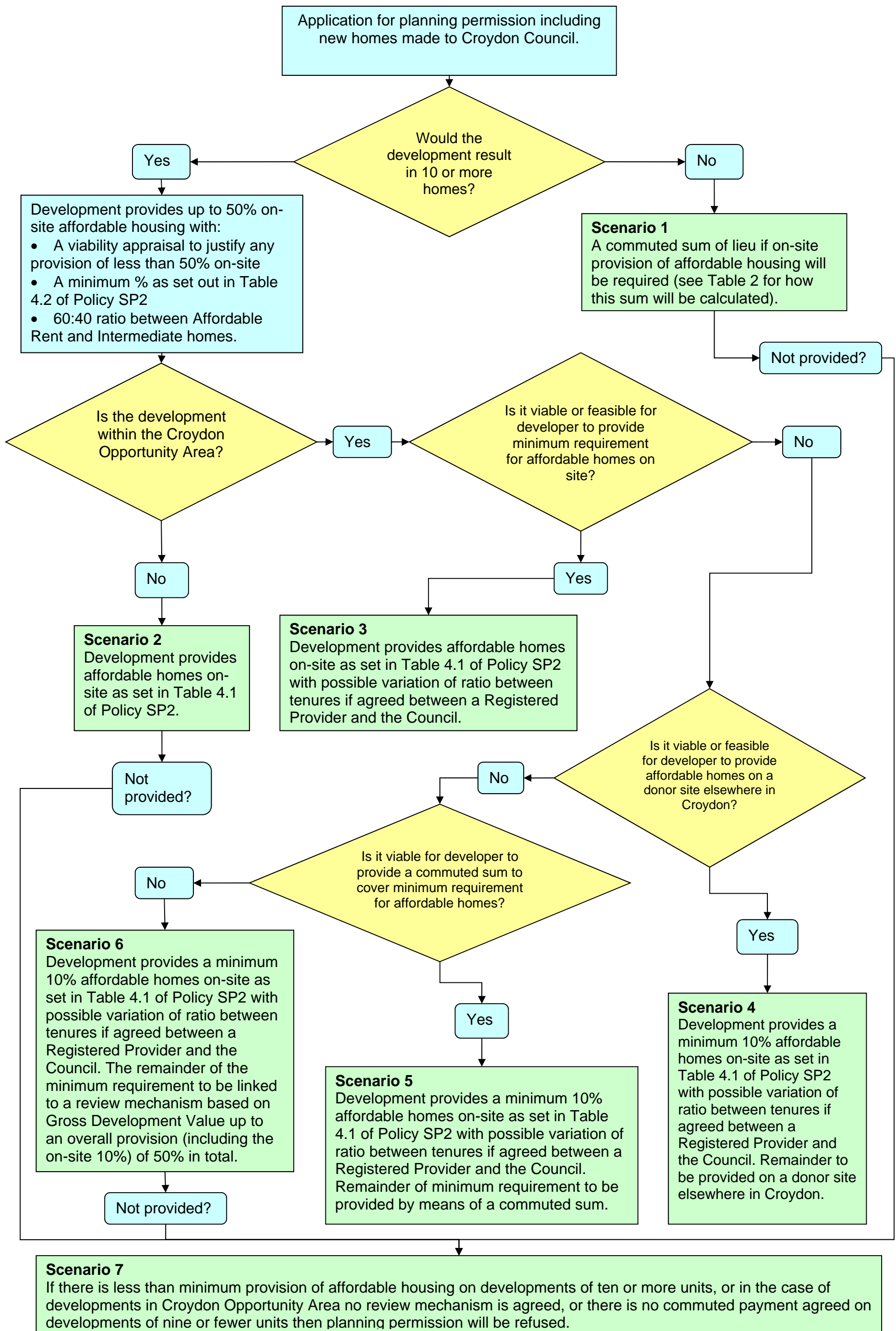
7.1 The Council is committed to maximising the provision of affordable housing in line with policies 3.8, 3.9, 3.10, 3.11, 3.12, 3.13 and 3.14 of the London Plan and CS2.4 of the Croydon Local Plan – Strategic Policies. These policies seek to ensure that the Council achieves mixed, balanced and sustainable communities and to deliver high quality affordable housing for local people in housing need.

7.2 Affordable Housing requirements and negotiations will also be guided by the emerging policy in the Core Strategy. The Council recognises that current market conditions require a pragmatic approach to the amount of affordable housing on each site.

7.3 Policy CS2.4 of the Croydon Local Plan – Strategic Policies state that the Council will negotiate to achieve up to 50% affordable housing provision on sites with ten or more units and require a commuted sum from developments of nine or fewer units cover the cost of providing the equivalent percentage of affordable units. The commuted sum will be used to provide affordable homes through Croydon Council's New Build Affordable Homes programme or by a Registered Provider.

Scenarios of implementing Policy CS2 for on-site provision of affordable housing

7.4 This flowchart on the next page sets out the seven scenarios envisaged by Policy CS2.4 for dealing with the provision of affordable housing in residential developments in Croydon.



8. The mechanism for the calculation of affordable housing commuted payments in accordance with Croydon Local Plan – Strategic Policies – affordable housing policy

8.1 Table 2 below sets out how the council will calculate commuted sums for affordable housing in the specific circumstances listed:

Table 2: Calculating commuted sums for affordable homes

The Council will...	On residential development with nine or fewer units...	Within the Croydon Opportunity Area where a commuted sum or review mechanism is agreed...	In exceptional circumstances on developments of ten or more units where no registered provider can be found to manage on-site affordable units...
Charge a commuted sum based on...	A fixed value for each net additional market unit proposed	A negotiated value for each affordable unit not provided on site	A fixed value for each affordable unit not provided on site up to a maximum of the equivalent of 50% on-site provision (based on the findings of a viability appraisal) with any part affordable unit rounded up to the nearest whole unit
The value per unit will be...	£4,170 per market unit for the first year of the plan	For the first year of the Plan a minimum of £27,800 per affordable unit not provided on site	For the first year of the Plan a value of £27,800 per affordable unit not provided on site

The Council will...	On residential development with nine or fewer units...	Within the Croydon Opportunity Area where a commuted sum or review mechanism is agreed...	In exceptional circumstances on developments of ten or more units where no registered provider can be found to manage on-site affordable units...
Each year...	The fixed value for each unit proposed will change in line with the national All-in Tender Price Index published by the Building Cost Information Service of the Royal Institution of Chartered Surveyors (as at 1st November of the preceding year) and the borough minimum percentage of affordable homes set in Policy SP2.4 ²	The minimum value per affordable unit will change in line with the national All-in Tender Price Index published by the Building Cost Information Service of the Royal Institution of Chartered Surveyors (as at 1st November of the preceding year) ³	The fixed value for each unit proposed will change in line with the national All-in Tender Price Index published by the Building Cost Information Service of the Royal Institution of Chartered Surveyors (as at 1st November of the preceding year) and the borough minimum percentage of affordable homes set in Policy SP2.4 ⁴
In the event of Social Housing Relief for the Community Infrastructure Levy charge being granted...	Waive the commuted sum for any unit subject to Social Housing Relief	Waive the commuted sum for any additional affordable unit subject to or eligible for Social Housing Relief beyond that agreed at the time of granting planning permission	Waive the commuted sum for any unit subject to Social Housing Relief

Affordable housing review mechanism within the Opportunity Area Planning Framework (OAPF)

8.2 Where the Council accepts a lower level of affordable housing (following an open-book assessment of the scheme's costs and revenue) the Council will expect a review mechanism to be agreed which will allow for a payment in lieu of affordable housing to be paid to the Council where higher development values are later realised. The review mechanism aims to set out a clear, simple, and certain method for calculating the

² This figure will be reported in the Croydon Monitoring Report each December

³ As above

⁴ As above

amount of this payment that is understood and agreed at the outset by both the Council and the applicant.

8.3 Where the development plan's expectation of a minimum requirement for Affordable Housing is not met for viability reasons, a Review Mechanism (RM) shall be included in the S106. This payment in lieu would supplement the agreed on-site affordable housing provision. The RM would be structured as follows:

- a) The RM will link the payment in lieu to movements in residential sales receipts. This mechanism caps the level of payment in lieu to a maximum sum based on the full amount of affordable housing required under the Council's policy (i.e. equivalent to 50% on-site affordable housing provision).
- b) Reviews of sales values and payments due will occur at agreed trigger points during the development. Generally this will be at a point where a sufficient level of achieved sales values are known.
- c) Any final review will take place prior to all of the units being sold. This will leave a modest number of units (e.g. 10%, but dependent on the size of the scheme) to be assessed on predicted rather than actual values.
- d) The Council will restrict sales of the remaining unsold units until any payment in lieu is received in full.
- e) The parties would agree a Breakeven Gross Development Value at which the scheme generates a residual land value equal to the sites Existing Use Value (EUV). This would take into account any on-site affordable housing provision.

Table 3: Calculating the payment in lieu payable under a review mechanism

Calculating the payment in lieu	
At each trigger point, the Applicant would submit to the Council the following information:	
A	Sales values achieved for units sold to date; and
B	Predicted values for the remaining unsold units in each phase, provided by a valuation survey.
The additional payment due at any review shall be calculated using the following formula:	
$(A + B) = C$ $(C - X) = Z$	
Where,	
A = Sales values achieved for units already sold at the relevant trigger point	
B = Predicted values for the remaining percentage of unsold units	
C = Current GDV	
X = Breakeven GDV	
Z = Development surplus	
The 'Development Surplus' would be split with the Council with the proportion to be agreed with the Council on a site by site basis. The total payment by the applicant to the Council will not exceed a maximum agreed sum.	

8.4 As a result of the social housing reform changes set out in the Affordable Homes Framework document, issued in February 2011, low cost rented social housing is to be funded and provided principally in the form of Affordable Rent. The Council's

expectation therefore is that the rented element of social housing will in future be delivered as Affordable Rented housing, rather than Social Rented housing (except on schemes where funding for affordable housing was approved before April 2011).

9. Role and function of the Council's Infrastructure Finance Group

9.1 The Council's Infrastructure Finance Group's role is to determine which infrastructure projects will be funded in whole or in part from planning obligations secured by S106 Agreements and from April 2013 from CIL. The Group would ensure that the money allocated would be in accordance with the terms of the S106 and included in the Council's Infrastructure Delivery Plan. / Capital Programme

10. Approach to Section 106 and CIL monitoring and availability / source of information

10.1 Under the CIL Regulations the Council is allowed to retain 5% of the CIL revenues for the purpose of monitoring and administering CIL in accordance with the CIL regulations. An additional charge on Planning Obligation revenues will also apply for the purpose of monitoring and administration the implementation of planning obligations.

10.2 In the majority of cases payment will be due on signing of the agreement. In exceptional circumstances the Council may consider payment up to 60 days before commencement of the scheme and the applicant will need to notify the Council of intended commencement. On large payments of £500K or more the Council may negotiate phased payments.

10.3 Contributions sought from developers will be index linked with a standard clause to this effect included in the legal agreement, in order to maintain the value of the contribution.

10.4 The Retail Price Index (RPI) is the most commonly used index of inflation. Financial contributions for off-site works and longer term projects will typically be required to be received by the Council prior to commencement of the development. Infrastructure works and public realm works directly associated with the development are normally required to have been carried out prior to occupation.

10.5 The use of money collected from both S106 and CIL will be reported via the Croydon Monitoring Report available on the council's website.

Viability

10.6 Developers should take potential planning obligations, and any identifiable exceptional site development costs, into account when acquiring land for development. If, during the identification of Heads of Terms, it is claimed that the economic cost of fulfilling certain planning obligations would prevent development from occurring, it is expected that developers will also submit detailed 'open book' information about the scheme's economics to the Council prior to the formal submission of a planning application. Before reviewing the nature of the planning obligations sought, the Council may seek valuation advice from an independent third party. All costs incurred by the Council in validating viability claims will have to be met by the developer

Review of Section 106 Agreements

10.7 In the event of stalled developments applicants/developers may wish to come back to the Council seeking to review previous agreements with a view to possible deferred payment of contributions, changes to design and/or flexibility of uses. The Council will consider such a scenario on its merits and in accordance with the viability testing

All Section 106 Agreements- Monitoring Fee

10.8 2% on the first £3million pounds or less of the total monetary contributions to be provided under S106 Agreement/ Unilateral Undertaking. Thereafter, the rate of 1% of the total monetary contributions will be applicable on the remainder of the contributions if the total contributions exceed £3million pounds.

Financial Planning Obligations payable to third parties

10.9 £1500 per third party relating to financial obligations .

Non-financial Planning Obligations

10.10 £1500 per head of term relating to non- financial planning obligation.

Affordable Housing Planning Obligations

10.11 One or more of the following contributions will be payable depending on the nature of the application:.

£1500 to cover the provision of Affordable Housing onsite

£1500 to cover the provision of Affordable Housing off-site

£1500 to cover the contribution paid in lieu of the provision of Affordable Housing

10.12 The Review Mechanism

£1500 to cover the Council's costs for time spent on co-ordinating and liaising with the Independent Viability Consultant and liaising with the developer to ascertain if there is deferred affordable housing contribution payable.

Justification

10.13 The monitoring and administration of S106 Agreements is an impact of a development, one which the Council would not have to bear if the development were not to take place .Developers will be required to pay Council's lawyers their reasonable costs for negotiating and preparing an agreement or undertaking. In addition to legal fees, it is legitimate for the Council to recover some costs of agreeing planning obligations and ensuring the obligations are met on site from start to finish. Costs and charges may be levied to cover monitoring fees and in certain circumstances on major schemes project management costs as well.

10.14 In addition to the monitoring fee some major schemes may require the appointment of a viability consultant or the provision of independent advice to validate

specific aspects of the application/agreement/undertaking. The costs of any Consultant appointed by the Council will be required from the Developer(s)

Appendix 1 Worked examples of affordable housing commuted sums

Table 4: Commuted sums for affordable housing for schemes of one to nine units⁵

Number of units	Commuted Payment
1	£4,170
2	£8,340
3	£12,510
4	£16,680
5	£20,850
6	£25,020
7	£29,190
8	£33,360
9	£37,530

Table 5: Commuted sums for affordable housing for schemes of ten or more units where in exceptional circumstances a commuted sum is accepted in lieu of on-site provision⁶

Total number of homes in development	15% affordable provision viable	30% affordable provision viable	40% affordable provision viable	50% affordable provision viable
10	£55,600 (2 affordable units)	£83,400 (3 affordable units)	£111,200 (4 affordable units)	£139,000 (5 affordable units)
15	£83,400 (3 affordable units)	£139,000 (5 affordable units)	£166,800 (6 affordable units)	£222,400 (8 affordable units)
20	£83,400 (3 affordable units)	£166,800 (6 affordable units)	£222,400 (8 affordable units)	£278,000 (10 affordable units)

⁵ The values in this table are valid for the first year of the plan and are thereafter subject to change as set out in Table 2

⁶ As above