Standard planning agreements for medium-sized sites

Question 1
Do you consider that the publication of guidance on title issues would assist with the negotiation of section 106 obligations?
Yes/No/Not Sure

No

Please explain your answer.

It depends on whom the guidance is aimed at and is not required for professionals. While relevant case law addresses why parties may not need to enter into a Section 106 agreement – and is taken into account – the council assesses site-specific obligations to determine who must be a party. We are concerned that the guidance may prompt unnecessary debate on this matter.

Question 2
Do you agree that the definition of "Commencement" used in the templates is appropriate?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Partly Agree

Please explain your answer, including any views on the list of excluded works and activities set out within it.

We consider it essential to retain the definition of "Commencement"; however, we suggest bracketing the exceptions to allow the council discretion in determining what is appropriate to exclude on a site-specific basis.

Question 3
Do you have any views on whether renaming the defined term "Commencement" would be appropriate to avoid confusion with other statutory uses of the term in the future?

We do not believe the defined term 'Commencement' should be renamed.

Please explain your answer.

It is well established among professionals, and changing it would only cause unnecessary confusion. The focus should instead be on improving drafting precision within the agreement and clearly distinguishing it from other statutory definitions.

Question 4
Do you have any other comments on the definitions included in this clause?

Yes, we have several comments regarding the definitions and guidance.

Please explain your answer.

Business Days: For our council, offices are closed between 27 and 31 December. We request that this definition be bracketed to allow individual authorities to amend it accordingly.

Owner's Interest & Leaseholders: The definition of "Owner's Interest" is duplicated. Additionally, the definitions should explicitly include "Leaseholders".

Draft Planning Permission: The guidance suggests appending the draft planning permission to the agreement. We advise against this, as we consider it bad practice that can create unnecessary confusion and risk fettering the council's discretion.

Indexation: The guidance note states indexation runs from the date of the deed until payment. We request the addition of "unless there is published local guidance to the contrary", as our council's published policy applies indexation from 1 April each year.

Site Plan: Where land is held under multiple ownerships, we would prefer the Site Plan to clearly delineate individual ownership boundaries.

Local Government Structure: The definitions appear to be drafted primarily for unitary authorities and do not account for two-tier distinctions (District and Borough Councils). Amendments will be needed to reflect these governance structures accurately.

Question 5
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 6
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 7
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Partly Agree

Please explain your answer, particularly if you disagree.

In reference to clause 4.2, there are certain other provisions outside of the Schedules that need to come into effect on completion, such as payment of legal fees (clause 20), jurisdiction (clause 29), the council's covenants (clause 10), liability (clause 11), and Appeals (clause 5). Where there is an appeal, the inspector's decision needs to be binding at the point the agreement is completed, rather than later when the permission has been implemented. This reduces ambiguity and provides clarity.

Question 8
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 9
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 10
Do you agree that this clause is necessary in circumstances where a developer has no interest in the land, or where their only interest is an option over the land or a part of it?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 11
Do you agree with the drafting of this clause?
Strongly Agree/Agree/Neither Agree nor Disagree/Disagree/Strongly Disagree.

Neither Agree nor Disagree

Please explain your answer, particularly if you disagree.

Generally, we have no issue with the drafting of this clause, provided it includes the phrase 'unless otherwise expressly stated'. This would accommodate situations where a developer has agreed to pay initial fees or wishes to be bound by obligations alongside the landowner. Where the provision states "no liability under this Deed unless and until it is a successor...", this could go further to include the taking of possession of the site or undertaking development of the site.

Why we disagree. - Where an option holder submits the planning application, controls the design, or funds the project, LPA solicitors may require them to be party to the agreement to ensure compliance with pre-commencement obligations and LPA monitoring fees. Rather than excluding developers entirely or exposing them to unintended primary liabilities, LPA lawyers typically prefer a tailored approach. This involves drafting the deed so the developer covenants in a consenting capacity or restricts their liability to obligations within their direct control, while primary land-bound obligations remain with the current landowner until land transfer occurs.

Question 12
Do you agree that the drafting of this clause gives financial certainty, particularly to lenders?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 13
Do you agree with the drafting of this clause?

Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 14
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 15
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 16
Do you agree that this clause should include drafting to allow for ringfencing of liability for obligations?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Partly Agree

Please explain your answer, particularly if you disagree.

While we agree that medium-sized sites rarely involve multiple owners – making the ring-fencing of liability largely unnecessary – any site with distinct land ownerships should constitute an exceptional reason under the NPPF to depart from the template drafting. As we have not encountered this specific clause wording previously, we would not want to commit to a standardised approach that restricts future flexibility.

Where we strongly disagree, however, is on the principle itself: the role of the LPA is to secure a cohesive, comprehensive development. Fracturing liability across separate parcels risks the profitable phases coming forward while leaving less profitable, but essential, infrastructure unbuilt (such as public open space or non-residential elements). Mechanisms already exist outside of the Section 106 agreement to apportion liability between landowners without exposing the LPA to this delivery risk.

Question 17
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 18

Are you aware of instances where exemptions for individual owners and occupiers of residential dwellings and/or commercial units have hindered the effective enforcement of planning obligations against developers?

We are aware of another LPA that does not include an exemption for individual occupants, and this has proven in practice to be extremely useful to ensure developers undertake obligations in a timely fashion.

Where individuals want to purchase a new property, but the obligations have not been fulfilled, or the developer is in breach, the potential purchaser is made aware when carrying out searches with the Local Land Charges department. This ensures in practical terms that the developer continues to fulfil their obligations as necessary. This position has been tested and upheld at appeal.

Please explain your answer.

Question 19
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Neither Agree nor Disagree

Please explain your answer, particularly if you disagree.

It can be useful not to have the carve out - the LPA still retains discretion against whom to enforce.

Question 20
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 21
Do you agree that a title warranty is necessary to include alongside the title information supplied by the applicant to the LPA?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

If so, please explain your answer and provide relevant examples of where a title warranty has been useful (or has alternatively been a hindrance), where possible.

This ensures that all relevant parties are a party to the s106 Agreement and that the owner has considered this as part of their consideration of the draft. For example, there may be a lessee of the site, but because the lease is for less than 7 years it wasn’t revealed on the Land Registry Title.

Question 22
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 23
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Partly Agree

Please explain your answer, particularly if you disagree.

This LPA also refers to s73A and 96A for clarity.

Question 24
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 25
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 26
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 27
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Partly Agree

Please explain your answer, particularly if you disagree.

We suggest brackets around this clause. LPA may need additional notifications to match obligation triggers as required.

Question 28
Do you agree that a clause on enforcement costs is necessary and reasonable?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Sets out clear expectations that costs will be payable for breach.

Question 29
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Partly Disagree

Please explain your answer, particularly if you disagree.

Disagree with including 20.4 (b). If the LPA incurs costs, these should be paid. It should not be the case that the LPA only recovers costs if it has served a notice and allowed the owner a reasonable time to comply. The council will have incurred enforcement costs associated with investigating and securing compliance; these should be recoverable.

Question 30
Do you have any views on which indices are appropriate and should be applied to particular types of contributions?

Unfortunately, we find that the most appropriate index cannot always be used because the council does not subscribe to it. Subscribing to specific indices would involve significant additional costs for the council, which is why we typically use RPIX. For this reason, we would resist prescribing which index must be used.

However, we would also wish to highlight that regardless of the council's subscription arrangements, the appropriate type of indexation for the contribution should be applied.

Please explain your answer, particularly where guidance may be helpful in clarifying which indices to use in the template.

Question 31
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

We agree with the drafting/wording of the clause. The council believes that all contributions should be index linked but that the specific index type should be based on the nature of the contribution.

Question 32
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.
Strongly Agree

Please explain your answer, particularly if you disagree.

Question 33
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 34
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 35
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 36
Do you agree that the proposed timescale of 20 Business Days strikes a balance between giving the parties a reasonable timescale to work towards, without imposing an absolute obligation on the LPA?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Partly Disagree

Please explain your answer, particularly if you disagree.

We typically prescribe 30 Business Days (for BNG) that is usually accepted. Developers will also want this processed asap; however, Councils are increasingly under a strain when it comes to resources. Perhaps bracket the time period so this can be amended as appropriate.

Question 37
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Partly Disagree

Please explain your answer, particularly if you disagree.

Clause 26.1 provides approvals shall not be conditioned. We disagree with this; it may be approved subject to a condition. Clause 26.3 provides for approvals subject to conditions in any event, so is clause 26.1 an error in this regard?

Question 38
Do you agree with the proposed timescales in this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Disagree

Please explain your answer, particularly if you disagree.

Disagree with the entirety of this clause. See below.

Question 39
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Disagree

Please explain your answer, particularly if you disagree.

This clause weakens the LPA's negotiating position and adds cost and delay. There is no need for this mandatory clause, as there are existing mechanisms to resolve disputes through the courts, which provides an incentive on parties to agree on a compromise before disputes escalate. In certain circumstances, where necessary its inclusion can be negotiated between the parties, so this clause should be bracketed.

Question 40
Please provide any examples of how existing dispute resolution provisions have been used in practice for medium sites.

N/A - not used.

Question 41
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 42
Do you have any views on the use of email to serve notices, consents, and approvals and on streamlining the s106 process?

Modernising delivery mechanisms for Section 106 agreements by enabling official notices, consents, and formal approvals via email offers significant efficiency gains over traditional post or physical delivery. However, this depends on each LPA's resources and set up as to whether this is appropriate so should be bracketed.

Please explain your answer.

Question 43
Would supplementary guidance be useful to support parties in the electronic delivery of notices via email?
Yes/No/Not sure.

Yes

Please explain your answer, including any views on what would be helpful to include in this guidance.

It should be akin to Civil Procedure Rules, e.g. if sent after a certain time, or on a certain day, then the date of receipt is the next Business Day.

Question 44
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 45
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 46
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Question 47
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Disagree

Please explain your answer, particularly if you disagree.

This clause is unnecessary. We sign agreements electronically or via wet ink for hard copies without reference to this clause.

Question 48
Do you agree with the drafting of this clause?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Partly Agree

Please explain your answer, particularly if you disagree.

Delete clauses 34.2 and 34.3, as they are unnecessary.

Question 49
Would guidance on the timing of contributions be useful?
Yes/No/Not Sure

No

Please explain your answer, particularly any views on what would be helpful to include in this guidance.

We consider this should be left for councils to decide what is right for their area, based on their policies and internal procedures.

Question 50
Do you have any views on the timing of payment of contributions?

The timing of payment of contributions depends on the development and what is appropriate, taking into account the nature of the service or facility that is to be provided.

Please note as CIL charging authorities, very few financial contributions are now secured through s106 on medium sized developments. The s106 contributions secured on sites of this nature are mostly limited to street signage, waste bins and, in some cases, public art.

Please explain your answer.

Question 51
Do you agree with the drafting of this Schedule?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Partly Agree

Please explain your answer, particularly if you disagree.

It may be helpful to include an obligation permitting the council to incur expenditure and deduct from contributions when received in advance of receiving the contribution, (pursuant to the purpose for which the contribution is intended).

We would propose the clause to read as follows: "If, prior to the receipt of any contributions payable pursuant to the terms of this Agreement, the District Council and/or the County Council incurs any expenditure in providing additional facilities to which it was intended to apply any such contribution (or in consequence of arranging for the provision thereof) by the letting of a contract or otherwise, including any design costs, whether in anticipation of or as a result of the Development, then the District Council or the County Council (as the case may be) may, immediately following receipt of such contribution, deduct therefrom a sum equivalent to such expenditure incurred. For the avoidance of doubt, it is hereby further agreed that any such proportion of the contribution shall not be the subject of any requirement to repay or account for it, or any interest accrued thereon, pursuant to the terms of this Agreement, and that such monies shall be and remain the property of the District Council or the County Council (as the case may be) and shall not otherwise be bound by the terms of this Agreement."

Question 52
Do you agree with the drafting of this Schedule?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Partly Agree

Please explain your answer, particularly if you disagree.

It appears restrictive to explicitly state how the interest should be used, other than that the contribution should be held in an interest-bearing account and repaid with interest where required to do so in accordance with the agreement so that the payee is not financially prejudiced. The interest may not be necessary for the provision of the obligation. If the level of interest is to be explicitly used for the purpose of the obligation, it could lead to a slippery slope where interest becomes part of the calculation for the whole payment, creating uncertainty about delivery.

From an infrastructure delivery perspective, it would be beneficial for the interest accrued to be ringfenced for the same purpose, but this should be the councils' decision and not set out in the s106 agreement.

Also-
1. Paragraph 1.5 (Written request): Limit to one request per year.

2. Paragraph 1.6 (Allocated funds): Should also include instances where funds are allocated to be spent (e.g., a formal decision made by the Council to allocate the contribution to a specific scheme).
Proposed clause - “Any contribution or part of a contribution which the District Council has contracted to expend or has allocated prior to the date of receipt of such written request shall be deemed to have been expended, contracted, or allocated by the District Council prior to that date.”

Paragraph 1.6 (Unclaimed funds): Repayment term should be at least 10 years. Paragraph 1.6 provides that action is taken upon receiving a written request from the Owner. It needs to clarify what happens if the Owner fails to make a written request. Our template provides as follows:

“…any other sum required to be deducted by law, provided that such written request shall only be made within one (1) year, commencing from the date such written request can first be made in accordance with this paragraph. In the event that no written request is made within such period, any unexpended sum shall be released to the District Council free of any liability or obligation.”

Question 53
Do you agree that discharged planning obligations should be removed from the local land charges register?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Upon written request of the owner.

Question 54
Do you agree with the requirement for contributions to be held in an interest-bearing account and that, in the case of any repayment, this should include interest accrued?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Please explain your answer, including whether you envisage any difficulties in ringfencing or accounting for the interest.

Question 55
Do you agree with the default timescale of 5 years for repayment?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Disagree

Please explain your answer, particularly if you disagree.

This should be 10 years or in accordance with published LPA policy/guidance.

Question 56
Where contributions have not been spent but there has been no request for repayment from the Owner, would it be appropriate to have a provision to allow the LPA to spend the contribution on other mitigation for the development in the vicinity of the development?
Yes/No/Not Sure.

Yes

Please explain your answer, including how long after the expiry of the default period for return of unspent contributions should the LPA have to wait before being allowed to do this.

See comments above to Q52. Furthermore, there should be 1-year, unrestricted expenditure, otherwise issues for the council with money sitting in account/unable to spend.

The council would also request that clear timeframes are introduced in which repayments must be requested back by developers – for example, if there is no request for repayment within 6/12 months, this obligation is negated and the local planning authority can use these contributions for other mitigation purposes.

It is noted that this use would not be CIL compliant unless additional wording for the 'purpose' of a contribution to enable this flexibility is added in. Also, it is unclear whether such a paragraph would allow the payee to contractually accept the use for that purpose after the relevant period has passed.

Question 57
Do you agree that the affordable housing tenure definitions included in the template are appropriate?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Partly Disagree

Please explain your answer, including whether any tenures should be added, removed, or defined differently.

The NPPF definitions are accepted as the national standard, and the draft definitions broadly capture the essence of the core affordable housing tenures. However, there should be discretion for local amendments where locally adopted policies, affordability considerations, or area-specific requirements differ from national assumptions. In our view, definitions should be set out within the Section 106 agreement itself, rather than simply referring to the NPPF, to provide clarity and avoid ambiguity.

Whilst the proposed definitions capture the broad characteristics of each tenure, some products, particularly Affordable Rent and Shared Ownership, are overly simplified and do not sufficiently address affordability considerations, which can vary significantly between local planning authorities (LPAs). If the intention is for the detailed operation of these products, such as rent setting, service charges, and rent on unsold equity, to align with Homes England guidance, this should be expressly referenced within the definitions. Without additional detail or clear cross-reference to relevant guidance, there is a risk of uncertainty regarding the tenure to be delivered.

For Affordable Rent, the definition should either include, or explicitly refer to, Homes England guidance on how market rent levels are established for the purpose of calculating Affordable Rent. Consideration should also be given to specifying the type of tenancy expected to be offered and the basis on which service charges should be calculated. In areas of particularly high unaffordability, LPAs should retain flexibility to cap rents at Local Housing Allowance (LHA) levels where necessary to ensure genuine affordability.

For Shared Ownership, the definition should specify a minimum initial purchase share and allow LPAs flexibility to require a lower rent on unsold equity where this is necessary to achieve affordability objectives. The definition should also clarify how service charges are to be levied, either directly or through reference to applicable Homes England guidance.

The three tenures included in the draft appropriately capture the principal forms of affordable housing. However, standardisation should not prevent LPAs from requiring additional affordable housing products, such as First Homes, where these are supported by local policy or identified local need. More generally, any standardised approach should preserve the ability of local authorities to apply locally adopted affordable housing requirements where these differ from the assumptions contained within the template.

Question 58
Do you agree that changes to affordable housing provision and tenure mix should be capable of being agreed in writing with the LPA without requiring a deed of variation?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Partly Disagree

Please explain your answer, particularly if you disagree.

Whilst this proposal may enable development to proceed more quickly and reduce costs for developers, it raises significant concerns in relation to transparency, legal certainty and the long-term monitoring of planning obligations by Local Planning Authorities (LPAs).

Requiring a deed of variation ensures that any agreed changes are formally recorded, legally robust and visible to all parties seeking to understand the obligations attached to a planning permission. Allowing changes to be agreed solely through written correspondence risks circumventing the established legislative process and creates uncertainty as to the obligations that are in force.

From a monitoring perspective, a formal deed of variation provides a clear audit trail, helping LPAs accurately track the delivery of affordable housing in the short, medium and long term. LPAs frequently receive queries regarding historic affordable housing units where the tenure being reported by Registered Providers or Affordable Housing Providers does not align with the original planning permission or recorded communications. In such cases, officers must spend considerable time establishing what changes were agreed and when. The absence of a formal, easily accessible audit trail increases the administrative burden on LPAs and heightens the risk of human error when recording and interpreting tenure changes over time.

If the Government nevertheless intends to allow changes to be agreed in writing, it should introduce a standardised national process or template for recording such changes. This should include the date of the agreement, the parties involved, the precise change being made and the reason for the change. The record should be retained alongside the planning obligation and relevant monitoring records. This would preserve some of the intended efficiency benefits whilst reducing the risk of an unclear or incomplete audit trail.

Question 59
Do you agree that the template should include provisions to regulate service charges for affordable housing?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

A standardised approach to regulating service charges for affordable housing would be very useful and remove ambiguity around its application. However, this should also be considered in the context of each LPA area and how it can best be applied to reduce the risk of further affordability strains on local residents. Our template is explicit in that Homes England’s good practice guidance

for affordable housing rents and associated service charges; the combined rent and service charge is not to exceed the Local Housing Allowance.

Question 60
Do you agree with the approach to defining "eligibility"?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Partly Agree

Please explain your answer, particularly if you disagree.

It is good that these definitions make explicit references so that it is clear there is criteria applied to all.

LPAs should retain the flexibility to link these definitions to existing Housing Allocations Policy's which already define eligibility criterion for specified tenures in their administrative areas. There should also be flexibility to include eligibility criteria for other forms of affordable housing which may not be covered within an existing policy (First Homes, Discount Market Sale etc).

Question 61
Do you agree that eligibility criteria should be required to be in line with the Local Authority allocation scheme, rather than specifying the precise criteria in the agreement?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Yes, definitely. Being able to link directly to a policy/allocations scheme (and any superseding policies) retains the flexibility in the instance where local connection criteria are amended in the future to align more closely with local needs or changes in geographical administrative areas.

Question 62
Do you agree with the drafting of this definition?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Partly Disagree

Please explain your answer, particularly if you disagree.

Drafting note 5 (that goes with point (d) of the definition) provides requirements in relation to matters such as space standards, design, requirements to specified numbers of affordable housing units as wheelchair accessible or adaptable units should be dealt with by planning conditions, however, it is helpful to have it in the s106 Agreement so that all of the affordable housing requirements are in one place for transparency of requirements/ all in one place. Our template also includes: proposals to secure the transfer of the Affordable Housing to a Registered Provider at a price to be agreed between the Owner and the Registered Provider. The transfer shall contain a declaration that the Affordable Housing Units are transferred subject to and with the benefit of this Agreement; and (d)details of the Registered Provider who will manage the Affordable Dwellings once completed (if available).

It would also be useful for the definition to capture a requirement for the external appearance and materials used for properties to ensure affordable housing is indistinguishable, and for a requirement for the submission of Affordable Housing Provider details who will take on the

affordable homes once completed, or what work has already been conducted to try and partner with one.

Question 63
Do you agree with the proposed approach to securing the delivery and transfer of affordable housing?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Partly Agree

Please explain your answer, including any aspects of delivery, transfer arrangements or Affordable Housing Provider requirements that you think should be amended.

The proposed approach and obligations are clear throughout various points of the delivery timeline.

Depending on the size and make-up of the scheme, it would be helpful to retain flexibility of additional occupation triggers (e.g., no more than 50% market until 75% affordable housing occupied AND no more than 75% market until 100% affordable housing transferred to Provider pursuant to contract).

However, the draft doesn't provide if there is a fractional unit and payment of a contribution for the fractional unit, this should be required.

Question 64
Do you agree with the drafting of these provisions?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Partly Agree

Please explain your answer, particularly if you disagree.

Largely, yes. However, it would be helpful for LPAs to retain the flexibility to include additional detail around the use of Affordable Housing Units (and tenures) to avoid any future ambiguity (e.g., dwelling occupation by spouse or partner, continued occupation by surviving spouse or partner etc).

Question 65
Are there any requirements that tend to create difficulty in securing an Affordable Housing Provider or delay the transfer of affordable housing?

No requirements that are drafted. Early engagement and Affordable Provider involvement has always been at the epicentre of any difficulties. Would be good to capture this or reference to the published National Section 106 Affordable Housing Engagement Guidance.

Please explain your answer.

Question 66
What are the implications of the current drafting of paragraph 4.1 of the Full Planning Permission schedule and 3.1 of the Outline Planning Permission schedule for Affordable Housing Providers' financing?

In our experience, Affordable Housing Providers have strongly preferred the drafted wording in agreements as it allows them to leverage a greater charge against the properties for borrowing

purposes for them to continue development and further affordable housing investment. The inclusion of these clauses has largely been seen as a positive.

Our LPAs have already adopted these mortgagee clauses in line with wording published by the National Housing Federation and receive a number of deed of variation requests for the clauses to be amended in historical agreements.

Please explain your answer, particularly your views on the implications of increasing or reducing the specified 3-month time period.

The implications of the specified 3-month time period have never come to fruition thus far, so difficult to provide a view on an increase/decrease. However, we would like to highlight that 3 months is a tight timescale to find an RP and complete a transfer of AH Units.

Question 67
Do you agree with the drafting of this paragraph?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Drafting strongly aligns with known Affordable Housing Provider preferences and supports them in raising more finance to put towards their own operations and, ultimately, the continues development of affordable housing.

Question 68
Do you agree with the inclusion of a discretionary cascade mechanism where affordable housing cannot be delivered on site?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Disagree

Please explain your answer, particularly if you disagree.

LPA tenure mix policies ensure a proportionate tenure split of affordable housing based on housing need requirements established by a multitude of evidence bases developed for the submission of their Local Plans.

Inclusion of a cascade clause would undermine these evidence bases and not provide the certainty that the appropriate mix would be delivered for those in this evidence-based housing need.

A failure to secure an Affordable Housing Provider should not, in itself, demonstrate that the agreed affordable housing tenure is undeliverable. Temporary funding, capacity or programme constraints affecting individual Providers may not mean that there is no demand for the agreed tenure. Any request to change the agreed affordable housing mix should therefore be supported by evidence of genuine delivery difficulties, including evidence of appropriate engagement with multiple potential Affordable Housing Providers where relevant.

In addition, the clause’s inclusion would permit a developer-driven tenure change, rather than a tenure split pursuant to policy-led, evidenced based decisions. Inclusion of the clause would remove local authority control over the affordable housing products it has established a need for and would undermine the policy position.

Any amendment, or request for amendment, should be considered based on circumstances prevailing at the time of a modification request, rather than in advance through the inclusion of it in any legal agreement. Inclusion of the clause is premature, as there is no guarantee that issues around securing an Affordable Housing Provider to contract with on the affordable housing units will occur. The clause would provide a means for changing the tenure and tenure mix of affordable homes without submission of a formal application which could result in the policy compliant percentages being varied without a formal application.

The potential lack of a clear audit trail of change could also have implications on the LPA from a monitoring perspective and the resources required to ensure that the correct affordable housing mix is being delivered in the right manner and relevant obligations are being met.

Any change to an affordable housing scheme should be a positive and collaborative one between the LPA and landowner. The onus should fall on the LPA to set out what is required of the landowner for alternatives to be considered, including supporting evidence that needs to be submitted (e.g., copies of communications with Affordable Housing Providers).

An approach like this should be set out as guidance for an LPA to deal with such issues (such as the published roadmap), rather than a legally binding commitment where the landowner retains an element of control over appropriate affordable housing delivery.

Inclusion of the clause and it's proposed wording (including "reasonable endeavours") increases the risk of dispute and ambiguity, which would require interpretation that could require legal input, multiple meetings and back-and-forth correspondence, adding to administration time and cost, therefore defeating the likely objective of the cascade (speeding up and avoiding the stalling of development). Any subsequent dispute resolution referral would further add to timeframes and does not guarantee a timely resolution.

Question 69
Do you agree with the proposed operation of the cascade mechanism, including the order of stages, marketing opportunities and associated timescales?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Partly Agree

Please explain your answer, particularly if you disagree.

The stages of the proposed cascade mechanism appear logical in respect of ordering and reasonable in respect of timescales.

However, the process should not create an expectation that an Affordable Housing Provider must be secured within a fixed period where there remains a reasonable prospect of securing a Provider and delivering the policy-compliant affordable housing provision. The provider may need to go through internal procedures before committing to a scheme.

Clarity would be needed as to when the 6 month period should begin (i.e., following granting of permission, commencement of development etc).

Question 70
Do you agree with the proposed approach of including local authorities as potential purchasers/providers of the affordable housing units at the first stage of the cascade mechanism?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Partly Agree

Please explain your answer, particularly if you disagree.

If applicable to that particular local authority, then it seems sensible to give them the opportunity to consider. However, the time limits involved may create further disputes as it may be likely that local authorities need to following specific (and occasionally prolonged) democratic processes to arrive at a decision, so patience will be needed, but also the acceptance of no guarantee.

Question 71
Do you agree that Affordable Housing Contributions payable following the operation of the cascade mechanism should be paid at the same stage of occupation as the affordable housing would have been delivered otherwise?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

Yes, any subsequent contribution should be expected at the earliest reasonable opportunity, and it seems logical to align this with existing affordable housing delivery triggers.

Question 72
Do you agree with the proposed approach for the calculation of Affordable Housing contributions?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Strongly Agree

Please explain your answer, particularly if you disagree.

If the LPA already has a relevant policy for the calculation of financial contributions, this should take precedent. It seems logical for any calculation to be captured in an agreement from the outset and Index-Linked appropriately so that there is no dispute if/when one needs to be calculated and the risk of negotiating a sum at the point development is underway is removed.

Question 73
What further details would be useful to include in guidance on the calculation of Affordable Housing contributions for the development of LPA policies?

Tenure specific guidance and expectations. Some LPA policies have a blanket calculation across all affordable housing and do not address the nuance of differing values per affordable tenure. It would be helpful for guidance to set out what percentage of market value an LPA should reasonably expect from a landowner for all tenures, so that a more accurate sum which is reflective of the anticipated in lieu affordable housing delivery can be calculated. This would also make equivalent sum calculations clearer to landowners before reaching that stage. For efficiency, any methodology should be made as simple and resource-light as possible.

Please explain your answer, particularly your views on including an approach based on a comparison of the Gross Development Value (GDV) of the proposed scheme with the GDV of the scheme assuming affordable housing was provided on-site.

Question 74
Which approach to the geographic use of Affordable Housing contributions do you prefer?

- **contributions should be capable of being spent across the LPA area from receipt**

- **the permitted geographic area should widen over time if contributions remain unspent**
- **contributions should be subject to more limited geographic restrictions**
- **another approach**
- **not sure**

Contributions should be capable of being spent across the LPA area from receipt.

Please explain your answer.

The flexibility of this approach allows an LPA to address LPA area wide needs, without being time restricted. For example, if an opportunity arises to address an affordable housing need in an area which is of a higher population than where the contribution was secured for, there is a freedom to utilise this contribution immediately, rather than needing to wait for the contribution to become available at which point the opportunity may have passed. Some areas which secure contributions may not have as great a need as others, so that tighter restriction could be counterintuitive.

Question 75
What should be the default approach to the repayment of unspent Affordable Housing Contributions?

- **no repayment provision should apply**
- **repayment should apply after 5 years**
- **repayment should apply after 10 years**
- **repayment should apply after a different period**
- **another approach**
- **not sure**

No repayment provision should apply

Please explain your answer.

The landowner is obliged to make contributions to affordable housing, so returning payment would ultimately mean that that obligation would not be fulfilled. No repayment provision should apply to allow LPAs to have a longer-term approach to housebuilding/grant funding.

At the same time, there needs to be Government direction which holds the LPA accountable and encourages the spend of contributions so that they are not left unspent. Not sure on a specific approach which could be taken to achieve this.

Question 76
What approach should be taken to payment triggers for Affordable Housing Contributions that are agreed at the outset instead of on-site provision?

- **contributions should be paid earlier in the development process**
- **contributions should be paid in phased instalments linked to development progress**
- **contributions should be paid at a later stage of development**
- **another approach**

Another approach

Please explain your answer.

The approach should be case-by-case dependant. Ideally the starting position should be that contributions should be paid earlier in the development progress or prior to commencement to ensure obligations are met and avoid them not being adhered to. However, LPA's should retain

flexibility to seek the payment at a later stage if the land owner can robustly justify that it is not viable for them to provide payment until development progress is further down the line and revenue from market sales has been achieved.

Question 77
Do you agree with the drafting of this provision?
Strongly Agree/Partly Agree/Neither Agree nor Disagree/Partly Disagree/Strongly Disagree.

Partly Agree

Please explain your answer, particularly if you disagree.

Largely agree. However, it would be good for the table to include greater detail in respect of unit type (house, flat etc.), bed spaces (3 bedroom, 6 person etc.) and minimum space standard unit size (in sqm) to avoid ambiguity (e.g., 2 bedroom, 4 person house, 79 sqm).

There should also be flexibility to include the table within the Affordable Housing Schedule, rather than in an Annex as currently drafted.

Question 78
Do you have any comments on any potential impacts for you, or the group or business you represent, and on anyone with a relevant protected characteristic that might arise under the Public Sector Equality Duty as a result of the proposals in this document?

Question 79
Is there anything that could be done to mitigate any impact identified?

Question 80
Do you have any views on the implications of these proposals for the considerations of the 5 environmental principles identified in the Environment Act 2021?

No, if there were any impacts on a site-specific basis, then the s106 would be drafted accordingly.