APPENDIX 2

1. BACKGROUND TO PLANNING OBLIGATIONS

1.1 Planning obligations under s.106 of the Town and Country Planning Act 1990 (as amended), known as s.106 agreements, are a mechanism which make a development proposal acceptable in planning terms, that would not otherwise be acceptable. They are focused on site specific mitigation of the impact of development.

1.2 S.106 agreements are often referred to as 'developer contributions' along with highway contributions and the Community Infrastructure Levy (CIL).

1.3 The use of planning obligations is governed by the principle that planning permission may not be bought or sold. It is not acceptable for development to be permitted because of benefits or inducements offered by a developer.

1.4 Similarly, planning obligations should never be used as a means of securing for the local community a share in the profits of development or as a means of securing a "betterment levy".

1.5 Planning obligations are used to secure affordable housing, and to specify the type and timing of this housing; and to secure financial contributions to provide infrastructure or affordable housing. These are not the only uses for a s.106 obligation. A s. 106 obligation can:

- restrict the development or use of the land in any specified way
- require specified operations or activities to be carried out
- require the land to be used in any specified way
- require a sum or sums to be paid to the authority on a specified date or dates or periodically.

1.6 The legal tests governing the use of s.106 agreements are set out in regulation 122 and 123 of the CIL Regulations 2010 as amended. The tests are:

Necessary to make the development acceptable in planning terms; to bring a development in line with the objectives of sustainable development as articulated through the relevant local, regional or national planning policies. Development plan policies are a crucial as they set out the matters essential for development to proceed.

Directly related to the development; obligations must so directly related to proposed developments that the development ought not to be permitted without them. For example, there should be a functional or geographical link between the development and the item being provided as part of the developer's contribution. This does not limit the use of the obligation to the ward where the development takes place.

Fairly and reasonably related in scale and kind to the development; what is sought must be reasonably related in scale and kind to the proposed development. For example, developers may be expected to pay for or contribute to the cost of all, or that part of, additional infrastructure provision which would not have been necessary but for their development. This investment may provide wider benefit on the community but payments should be directly related in scale to the impact of the proposed development. Planning obligations should not be used to resolve existing deficiencies in infrastructure provision or to secure contributions to the achievement of wider planning objectives that are not necessary to allow planning permission to be given for a particular development.

2. USE OF PLANNING OBLIGATIONS

2.1 **Prescribing the nature of the development to achieve planning objectives**

Planning obligations can be used to secure the implementation of a planning policy to make acceptable a development proposal that would otherwise be unacceptable in planning terms. For example, where not possible through a planning condition, planning obligations can be used to secure the inclusion of an element of affordable housing in a residential or mixed-use development where there is a residential component.

The general presumption is that the affordable housing provided through planning obligations should be provided in-kind and on-site. However, there are circumstances where provision on another site or a financial contribution maybe appropriate.

If a proposed development would give rise to the need for additional or expanded community infrastructure, for example, a new school classroom, which is necessary in planning terms and not provided for in an application, contributions maybe sought towards this through a planning obligation.

2.2 **Compensating for loss or damage caused by a development**

Planning obligations may be used to offset through substitution, replacement or regeneration the loss of, or damage to, a feature or resource present or nearby. For example, a landscape feature of biodiversity value, open space or right of way. A reasonable obligation will seek to restore facilities to a quality that existed before the development.

3. PAYMENTS

3.1 Payments can be made in the form of a lump sum or an endowment or as phased payments, related to defined dates, events and triggers.

3.2 Where contributions are secured through planning obligations towards the provision of facilities which are predominantly for the benefit of the users of the associated development, the developer may make provision for maintenance and physical upkeep (sometimes in perpetuity).

3.3 Generally where an asset is intended for wider public use, the costs of subsequent maintenance and other recurrent expenditure associated with the developer's contributions should normally be borne by the body or authority in which the asset is to be vested.

3.4 Where contributions to the initial support ("pump priming") of new facilities are necessary, these should reflect the time lag between the provision of the new facility and its inclusion in public sector funding streams. Pump priming maintenance payments should be time-limited and not be required in perpetuity.

3.5 For all maintenance payments, local authorities and developers should agree the type of payments to be made, for example regular payments, or commuted sums, all with a clear audit trail.

3.6 'Pooled Contributions' intended to provide common types of infrastructure for the wider area can be sought. Where the combined impact of a number of developments creates the need for infrastructure, it may be reasonable for the associated developers' contributions to be pooled, to allow the infrastructure to be secured in an equitable way.

3.7 In some cases, individual developments will have some impact but not sufficient to justify the need for a discrete piece of infrastructure. In these instances, local planning authorities may wish to consider whether it is appropriate to seek contributions to specific future provision.

3.8 When an item of infrastructure is needed by the cumulative impact of a series of developments the later developers may be required to contribute the relevant proportion of the costs. This practice can still meet the requirements of the policy tests if the need for the infrastructure and the proportionate contributions to be sought is set out in advance. In the White City Opportunity Area to provide as much certainty as possible concerning the infrastructure needed to support development the Council prepared a Development Infrastructure Funding Study (DIF). The DIF identified the estimated costs of the infrastructure and the extent to which developers were expected to contribute.

4. ENFORCEMENT

4.1 The obligation becomes a land charge. If the s. 106 is not complied with, it is enforceable against the person that entered into the obligation

and any subsequent owner. The s.106 can be enforced by injunction. In case of a breach of the obligation the authority can take direct action and recover expenses.

5. CHANGING PLANNING OBLIGATIONS

5.1 Planning obligations can be renegotiated at any point where the local planning authority and developer wish to do so. Where there is no agreement to voluntarily renegotiate, and the planning obligation is over 5 years, an application may be made to the local planning authority to change the obligation where the original obligation "no longer serves a useful purpose" or would continue "to serve a useful purpose in a modified way".