



Department  
for Education

# Securing developer contributions for education

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# Contents

Summary	3
Expiry or review date	3
Who is this publication for?	3
Introduction	4
Purpose	4
Mechanisms for securing developer contributions	5
Evidence of pupil yields from housing development	7
Costs of provision	9
Identifying education projects	10
Safeguarding land for schools	11
Strategic developments and new settlements	12
Annex	16
Developer delivery of new schools	16
State Aid	17
Public contracts and OJEU procurement	18

## **Summary**

This publication provides non-statutory guidance from the Department for Education (DfE). It has been produced to help local authorities secure developer contributions for education so that housing developers contribute to the cost of providing the new school places required due to housing growth. The guidance promotes good practice on pupil yield evidence, engagement with local planning authorities and the delivery of expanded or new schools with funding from housing development.

## **Expiry or review date**

This guidance will be reviewed as necessary (for example, in response to changes in legislation or government policy).

## **Who is this publication for?**

This guidance is for local authorities with a responsibility for providing sufficient school places under the Education Act 1996. It may also be a source of information for local planning authorities and other stakeholders involved in the delivery of schools.

## Introduction

Government is committed to ensuring that there are enough good new school places to meet local needs, while also driving forward an ambitious housing agenda to increase housing delivery, home ownership and the creation of new garden communities. The timely provision of infrastructure with new housing is essential in meeting these objectives to secure high quality school places where and when they are needed.

DfE expects local authorities to seek developer contributions towards school places that are created to meet the need arising from housing development. You should consider the recommendations in this guidance alongside National Planning Practice Guidance on the evidence, policies and developer contributions required to support school provision.

This guidance is for local authorities with a responsibility to provide sufficient school places under the Education Act 1996. The guidance does not:

- Advise the construction/development industry on its duties or responsibilities in paying for infrastructure;
- Replace or override any aspects of other DfE publications such as guidance on [SCAP](#) and the [Admissions Code](#), or policy/guidance produced by other government departments;
- Make recommendations for individual schools or academy trusts on managing their capacity or published admission numbers;
- Propose new DfE policy on setting up new schools ([central](#) or [presumption](#) route), parental preference or the academy system.

## Purpose

As a local authority with education responsibilities, you already provide evidence of education need and demand for use by planning authorities in plan- and decision-making. This guidance draws on existing good practice and is intended to help you establish a robust and consistent evidence base, underpinned by the following principles:

- Housing development should mitigate its impact on community infrastructure, including schools;
- Pupil yield factors should be based on up-to-date evidence from recent housing developments;
- Developer contributions towards new school places should provide both funding for construction and land where applicable, subject to viability assessment when strategic plans are prepared and using up-to-date cost information;
- The early delivery of new schools within strategic developments should be supported where it would not undermine the viability of the school, or of existing schools in the area.

There is great value in detailed local methodologies and guidance that explain to all stakeholders the process and reasons for the collection of developer contributions for

education in that area. This guidance is not intended to replace local approaches, which often provide detail on:

- The approach to seeking contributions for education from affordable housing.
- Types/sizes of homes that will be excluded from calculations of developer contributions.
- Education projects developer contributions may fund.
- The minimum viable size of new schools.
- Assumptions about the schools children from a development will attend, when assessing available capacity in affected schools.
- Minimum surplus capacity to allow for fluctuations in demand and parental choice, not counted as available when calculating developer contributions.
- Contributions 'in kind' (land and/or construction).
- Requirements on size and suitability of school sites, including checklists, exemplar layouts and facility specifications.
- Standard planning obligation clauses.

As local approaches to securing developer contributions for education are reviewed, they should take account of updated National Planning Practice Guidance, this guidance, and the Department's emerging national methodology for the calculation of pupil yields from housing development.

## **Mechanisms for securing developer contributions**

1. Developer contributions for education are secured by means of conditions attached to planning permission, a planning obligation under Section 106 of The Town and Country Planning Act 1990, or the Community Infrastructure Levy (CIL). CIL revenues are intended to help fund the supporting infrastructure needed to address the cumulative impact of development across a local authority area. CIL can be used to fund the provision, improvement, replacement, operation or maintenance of a wide range of infrastructure, including education. Alternatively, a Section 106 planning obligation secures a contribution directly payable to the local authority for education (or direct provision of a school 'in kind'), though a planning obligation must comply with the following tests set out in the CIL Regulations<sup>1</sup>, requiring it to be:

- Necessary to make the development acceptable in planning terms
- Directly related to the development
- Fairly and reasonably related in scale and kind to the development

2. The CIL Regulations (as amended in September 2019) no longer impose a 'pooling restriction' on the use of planning obligations to fund the same type of infrastructure or infrastructure project, and an infrastructure project may receive funding

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<sup>1</sup> Regulation 122 of [The Community Infrastructure Levy Regulations 2010](#).

from both CIL and Section 106. We advise you to work with local planning authorities in devising their approaches to securing developer contributions, to consider the most appropriate mechanism (Section 106 planning obligations and/or CIL) to secure contributions from developers towards education alongside other infrastructure funding priorities. Also, when CIL charging schedules are prepared, this engagement with local planning authorities should ensure that school developments are among those D1 uses that are viability tested. A nil rate can be applied if the viability evidence indicates this is appropriate. Local planning authorities should be made aware of the considerable public investment in community infrastructure that a school represents.

3. It is important that the impacts of development are adequately mitigated, requiring an understanding of:

- The education needs arising from development, based on an up-to-date pupil yield factor;
- The capacity of existing schools that will serve development, taking account of pupil migration across planning areas and local authority boundaries;
- Available sources of funding to increase capacity where required; and
- The extent to which developer contributions are required and the degree of certainty that these will be secured at the appropriate time.

4. The local authority providing children's services is not always the charging authority for the purposes of collecting and distributing CIL. Effective on-going communication between teams responsible for planning and education is essential to ensure that education needs and costs are factored into decisions about policy requirements and delivery mechanisms. In two-tier areas where education and planning responsibilities are not held within the same local authority, planning obligations may be the most effective mechanism for securing developer contributions for education, subject to the tests outlined in paragraph 1. The use of planning obligations where there is a demonstrable link between the development and its education requirements can provide certainty over the amount and timing of the funding you need to deliver sufficient school places. We recommend that planning obligations allow enough time for developer contributions to be spent (often this is 10 years, or no time limit is specified).

5. Central government basic need grant, the DfE free schools programme and other capital funding do not negate housing developers' responsibility to mitigate the impact of their development on education. When the DfE free schools programme is delivering a new school for a development, we expect the developer to make an appropriate contribution to the cost of the project, allowing DfE to secure the school site on a peppercorn basis and make use of developer contributions towards construction. National Planning Practice Guidance explains how local planning authorities should account for development viability when planning for schools within housing developments, including an initial assumption that both land and construction costs will

be provided.<sup>2</sup> Given that basic need allocations do not explicitly factor in funding for land acquisition, it is particularly important that education land required within larger development sites is provided at no cost to the local authority wherever possible, and pooled developer contributions (Section 106 and/or CIL) are secured for the purchase of standalone sites for new schools.

6. While basic need funding can be used for new school places that are required due to housing development, we would expect this to be the minimum amount necessary to maintain development viability, having taken into account all infrastructure requirements. Where you have a reasonable expectation of developer funding being received for certain school places,<sup>3</sup> and you have declared this in your SCAP return (or plan to do so), then basic need funding should not be considered available for those school places other than as forward funding to be reimbursed by developer contributions later.

7. There are other options besides basic need grant for forward-funding school places, including the use of local authority borrowing powers where necessary. Where new schools or school expansion is necessary to mitigate the impacts of development, and those new facilities are to be forward funded (for example by local authorities borrowing money to fund school development prior to receiving Section 106 monies or by using capital reserves), it may be possible to secure developer contributions to recoup the monies spent, including interest, fees and expenses as well as the principal sum spent. Where this model is envisaged, we recommend that you engage with the local planning authority before forward funding occurs to ensure that the local planning authority supports this approach. The CIL Regulations prohibit borrowing against future CIL receipts, so this method of forward-funding only applies to planning obligations. Local authorities can bid for funding under government grant programmes such as the Housing Infrastructure Fund (HIF) as they become available, while developers delivering schools directly as an 'in kind' contribution may be eligible for loan funding from DfE or Homes England, allowing a new school to be delivered at an earlier stage in the development than would have been possible otherwise.<sup>4</sup>

## Evidence of pupil yields from housing development

8. Pupil yield factors should be based on up-to-date evidence from recent local housing developments, so you can forecast the education needs for each phase and type of education provision arising from new development. As well as being useful for pupil place planning across your area, pupil yield factors allow you to estimate the number of

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<sup>2</sup> [National Planning Practice Guidance](#). Construction costs include ICT and furniture and equipment required for the delivery of the school.

<sup>3</sup> In accordance with a local plan's viability assessment, policies and/or an infrastructure funding statement.

<sup>4</sup> Guidance on the [Home Building Fund](#) and DfE [Developer Loans for Schools prospectus](#).

early years, school and post-16 places required as a direct result of development, underpinning the contributions agreed in planning obligations. We are working on a detailed methodology for calculating pupil yields from housing development (including assessment of available capacity in existing schools), to be published in due course. In the meantime, local approaches to calculating pupil yields remain valid.

9. While many early years settings fall within the private, voluntary and independent (PVI) sector, local authorities have a duty to ensure early years childcare provision within the terms set out in the Childcare Acts 2006 and 2016. DfE has scaled up state-funded early years places since 2010, including the introduction of funding for eligible 2 year olds and the 30 hours funded childcare offer for 3-4 year olds. The take-up has been high, increasing demand for early years provision. All new primary schools are now expected to include a nursery. Developer contributions have a role to play in helping to fund additional nursery places required as a result of housing growth, however they may be provided, in particular where these are proposed as part of school expansions or new schools.

10. You are also responsible for ensuring sufficient schools for pupils receiving primary and secondary education up to the age of 19. Furthermore, you must secure sufficient education and training provision for young people with an Education, Health and Care (EHC) plan, up to the age of 25.<sup>5</sup> Pupil yield data should identify the number of students living in recent housing developments, aged 16-19 (without an EHC plan) and up to the age of 25 (with an EHC plan). We advise you to seek developer contributions for expansions required to sixth form and special educational needs and disabilities (SEN) provision, commensurate with the need arising from the development.

11. To determine the need for SEN provision, pupil yield data should identify the number of pupils/learners within recent local housing developments who attend special schools, pupil referral units or alternative provision, SEN units and resourced provision within mainstream schools. It is reasonable and fair to seek developer contributions for SEN provision in direct proportion to the needs arising from planned housing development, applying the same principle to SEN provision as to mainstream. There is no standard capacity assessment applicable to special schools and other types of non-mainstream education, as their ability to accommodate pupils depends on the specific needs of each child. However, an increase in housing will lead to an increase in SEN, and we advise you to seek developer contributions for all special school/SEN places generated by a development, where there is a need for additional SEN provision. Greater travel distances to special schools and alternative provision should not affect your

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<sup>5</sup> [Participation of young people: education, employment and training.](#)



consideration of whether a planning obligation meets the legal tests outlined in paragraph 1.

12. We advise you to identify a range of SEN or other non-mainstream projects and ensure that planning obligations allow you the flexibility to direct funds appropriately within a 10 year period. Non-mainstream provision does not conform to standard class sizes, these being determined according to need. While it may be appropriate to pool contributions towards a new classroom in a special school or SEN unit at a mainstream school, it is equally valid to seek contributions for school building alterations that increase a school's capacity to cater for children with SEN, such as additional space for sensory rooms, facilities to teach independent living skills or practical teaching space.

13. It is not necessary to disaggregate the SEN pupil yield factor according to different complex needs. All education contributions are based on an assessment of probability and averages, recognising that the precise mix of age groups and school choices cannot be known before a development is built. Site-specific factors will always need to be taken into account, but a robust local authority-wide pupil yield factor based on evidence of recent developments will often be sufficient to demonstrate that this need is reasonably related in scale and kind to the development.

## Costs of provision

14. The amount of money that you seek to secure through developer contributions for education provision should reflect the cost of providing school places, linked to the policy requirements in an up-to-date emerging or adopted plan that has been informed by viability assessment.

15. We advise that you base the assumed cost of mainstream school places on national average costs published in the DfE school place scorecards.<sup>6</sup> This allows you to differentiate between the average per pupil costs of a new school, permanent expansion or temporary expansion, ensuring developer contributions are fairly and reasonably related in scale and kind to the development. You should adjust the national average to reflect the costs in your region, using BCIS location factors.<sup>7</sup> We recommend the use of index linking when developer contributions are discussed at planning application stage and in planning obligations, so that contributions are adjusted for inflation at the point they are negotiated and when payment is due.

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<sup>6</sup> [School places scorecards](#).

<sup>7</sup> Further guidance on doing this is available with the school place scorecards (see the technical notes) for 2018 onwards.

16. Developer contributions for early years provision will usually be used to fund places at existing or new school sites, incorporated within primary or all-through schools. Therefore, we recommend that the per pupil cost of early years provision is assumed to be the same as for a primary school. Similarly, further education places provided within secondary school sixth forms will cost broadly the same as a secondary school place.

17. Special schools require more space per pupil than mainstream schools, and this should be reflected in the assumed costs of provision. We recommend that developer contributions for special or alternative school places are set at four times the cost of mainstream places, consistent with the space standards in Building Bulletin 104.<sup>8</sup> You can also refer to the National School Delivery Cost Benchmarking report for the costs of delivering SEN school places.<sup>9</sup>

18. Where there is local evidence of higher costs for a particular project, such as a bespoke feasibility study or known site abnormalities, these can be used in preference to the adjusted national average.

## Identifying education projects

19. Local plans and other planning policy documents should set out the expectations for contributions from development towards infrastructure, including education of all phases (age 0-19) and special educational needs.<sup>10</sup> We advise local authorities with education responsibilities to work jointly with relevant local planning authorities as plans are prepared and planning applications determined, to ensure that all education needs are properly addressed, including temporary education needs where relevant, such as temporary school provision and any associated school transport costs before a permanent new school opens within a development site. This does not mean double funding the same school places, but allows development to be acceptable in planning terms when it is not possible to open a permanent new school at the point of need. When a permanent new school is delivered (or the relevant financial contribution is received), no further contributions to temporary provision should be required.

20. We recommend that you identify a preferred and 'contingency' school expansion project in a planning obligation, as long as both would comply with the Section 106 tests. This will help you respond to changing circumstances and new information, such as detailed feasibility work leading you to abandon a preferred expansion project.

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<sup>8</sup> [Primary and secondary school design guidance.](#)

<sup>9</sup> [National School Delivery Cost Benchmarking: Primary, Secondary and SEN Schools](#)

<sup>10</sup> [National Planning Practice Guidance](#)

21. We advise you to consider the realistic potential for schools in your area to expand or increase capacity through other alterations, in discussion with academy trusts, and identify site options for any new schools (within proposed housing developments or on standalone sites). Including suitable projects in the local planning authority's infrastructure funding statement will ensure that developer contributions are clearly identified as the funding source where new schools, expansions or alterations are required due to housing growth. This background work will also minimise the risk of a specified school project in a planning obligation proving undeliverable. Planned expansions to academies may require an agreement between the local authority and academy trust to ensure that school places provided by developer contributions are commissioned/delivered appropriately.

## Safeguarding land for schools

22. National Planning Practice Guidance advises on how local planning authorities should prepare plans and take account of education requirements. We advise you to work with local planning authorities and developers to ensure your long-term pupil place planning objectives are reflected in the development plan (and supplementary planning documents which do not form part of the development plan, but which are material planning considerations).<sup>11</sup> Precise policies can aid decision-making later, setting out the total amount of land required for education, and the approach to securing equitable developer contributions when one developer provides the land for a new school, though the need for the school is generated by more than one development or phase.

23. You may wish to safeguard additional land when new schools within development sites are being planned, to allow for anticipated future expansion or the reconfiguration of schools to create a single site. 'Future-proofing' can sometimes be achieved informally through a site layout that places open space adjacent to a school site. Where there is a forecast need for new school places that is not linked exclusively to a particular development, the development plan can allocate specific areas of land for new schools or school expansion, and safeguard specific parcels of land within wider development sites for education use. Safeguarded land within larger site allocations can be made available for purchase by the local authority within an agreed timescale, after which the land may be developed for other uses.

24. While developers can only be expected to provide free land to meet the education need from their development, the allocation of additional land for education use within a development plan will make it more difficult for land owners to secure planning consent

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<sup>11</sup> The development plan is defined in Section 38 of the [Planning and Compulsory Purchase Act 2004](#), and comprises the spatial development strategy, development plan documents and neighbourhood development plans.

for alternative uses on that land, enabling you to acquire the site at an appropriate cost that reflects the site allocation. This ensures that land is reserved for education uses, and prevents such land being usurped by uses with a higher development value. Land equalisation approaches can be used in multi-phase developments to ensure the development 'hosting' a new school (and any additional safeguarded land) is not disadvantaged. Nevertheless, the market price for the land will depend on its permissible uses. Land allocated for educational use in a local plan would usually have limited prospect of achieving planning permission for any other uses. Independent land valuation may be required to establish an acquisition cost. National Planning Practice Guidance provides advice on land valuation for the purposes of viability assessment.

25. Compulsory purchase may have a potential role in supporting the delivery of new education facilities. However, it is a tool of last resort and compulsory purchase orders (CPOs) will only be confirmed (i.e. approved) if there is a compelling case in the public interest. Where an acquiring authority seeks to acquire land for the purposes of providing education facilities, its justification for doing so may be strengthened if the site is allocated for such a use in an up-to-date development plan. Planning policy is also taken into account for the purposes of assessing compensation payable to affected landowners.

26. Where new schools are planned within housing developments, we advise you to consider whether direct delivery by the developer would represent the best value for money, subject to an appropriate specification and pre-application support from the local planning authority. Advice on complying with state aid and public procurement legislation is provided in the Annex.

## **Strategic developments and new settlements**

27. Garden communities are an increasingly popular way of planning for housing growth at the scale required to meet the country's housing needs. The government is supporting a number of garden communities under the Garden Communities Programme. We have published guidance on education provision in garden communities, to assist local planning authorities and Homes England in delivering schools as part of garden communities.<sup>12</sup> We advise you to consider this in conjunction with this guidance on securing developer contributions for education.

28. Strategic planning of urban extensions and new settlements often includes place-making objectives about the early provision of infrastructure, to establish a sense of community and make the place attractive to residents. Early delivery of a school can be problematic if it precedes new housing and draws pupils from existing schools,

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<sup>12</sup> [Education Provision in Garden Communities](#)

threatening their viability and resulting in unsustainable travel-to-school patterns. We advise local authorities with education responsibilities to work jointly with local planning authorities and other partners to agree the timing of new school provision, striking an appropriate balance between place-making objectives, education needs and parental preference.

29. Schools can be delivered in single or multiple phases; the best approach will depend on local circumstances and characteristics of the development. Where appropriate, for instance in the early stages of development while the need for school places is growing, developer contributions can be secured for temporary expansions to existing schools if these are required, and transport costs for pupils travelling further than the statutory walking distance.<sup>13</sup> This will allow a permanent new school to be provided in a single construction phase once the development has generated sufficient pupil numbers, rather than phased construction over a longer period. While the existing pupil cohort may not switch schools initially, children living in the development will usually have priority for admission to the new school and will take up these school places over time.

30. As far as possible (and often in relation to primary schools only), new settlements and urban extensions should be expected to meet their full education requirement. Where an onsite school is required, it should be large enough to meet the need generated by the development. As a general rule, the capacity of existing primary schools beyond the statutory walking distance does not need to be taken into account when calculating developer contributions for permanent onsite schools in new settlements and urban extensions. This promotes sustainable and healthy travel patterns for young people.

31. When a permanent new school is proposed to be built early in the development of an urban extension or new settlement, you will naturally consider the effect this might have on parental demand and the viability of existing schools. To minimise detrimental impacts on existing schools while supporting local planning authorities to plan new communities, you should work with school providers and the relevant Regional Schools Commissioner to promote Admission Arrangements and opening strategies that will maintain equilibrium in school populations across your area. This can include phased delivery, with the initial phase future-proofed for future expansion (such as an oversized assembly hall and dining area) and land safeguarded for the school's expansion when need builds up over a long period, though it is important to secure commitment to the delivery of later phases.

32. You should also work with local planning authorities to ensure that planning policies and planning obligations require a suitable school site to be made available at

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<sup>13</sup> The statutory walking distances are set out in the [Home to School Transport guidance](#)

the appropriate time. If early school delivery is required, the school site must be identified and agreed at an early stage, giving consideration to its accessibility and condition at the point of transfer.

33. If a new school opens in a single phase below its full capacity while it awaits pupils moving to the development, this does not represent an available surplus for other developments assessing their own impact and mitigation, unless the development delivering the new school will not be completed or generate enough pupils to fill the school. Complementary uses that share the school site can be considered for a temporary period while a new school fills. In practice, you may prefer to deliver the school in phases using modular construction methods, linking capacity more closely to emerging need, though the initial phase must still provide a viable sized school.

34. New housing tends to attract more young families than older housing, yielding higher numbers of pupils particularly in the pre-school and primary age groups, though this stabilises over time until the development resembles the mature housing stock.<sup>14</sup> We advise you to respond to initial peaks in demand, such as planning for modular or temporary classrooms, securing a large enough site to meet the maximum need generated by the development. Where new settlements are planned, you may wish to carry out demographic modelling to understand education requirements in more detail, taking account of similar developments and different scenarios such as an accelerated build rate.

35. Where a requirement for both primary and secondary schools has been identified, we recommend you consider if there would be cost efficiency, space saving and educational benefits in providing an all-through school.

36. There may also be sustainability, efficiency and educational benefits in relocating an existing school, for example where a development is large enough to require a new secondary school but it would be too close to an existing secondary school, both of which would be relatively small. Such reorganisation of the school estate, relocating and expanding an existing school on a development site, may be necessary to make the development acceptable in planning terms, if the alternative distribution, size or condition of schools would be unsustainable. Proposed changes are subject to following the relevant process, depending on the category of the school.<sup>15</sup> We advise that you work collaboratively with local planning authorities to ensure your objectives for the school estate are reflected in planning policies and decisions.

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<sup>14</sup> This phenomenon is widely reported in local authority evidence, such as for [Central Bedfordshire](#) and [North Essex Garden Communities](#).

<sup>15</sup> [School organisation guidance and transparency data](#).

37. There is often a degree of uncertainty around the delivery of urban extensions and new settlements, in view of the long timescales involved, multiple developers and changeable market conditions. The build rate of development may be slower than anticipated, while land provided for a school may need to be returned to a developer if it is not used within an agreed period. Therefore, it is important to consider carefully the clauses within planning obligations if they impose any time restriction on the use of transferred education land, and the potential for the overall phasing of developer contributions to cause delays. Where land has to be returned to a developer, this should be on the same terms as it was given; land provided by free transfer should be returned as such.

38. We also advise you to consider any potential uplift in the value of a development following the grant of planning permission and before all housing units are sold or let. It may be possible to secure the full education contribution, where this had previously been reduced on viability grounds, using planning obligation review mechanisms. National Planning Practice Guidance advises further on how viability should be assessed during the lifetime of a project. We recommend that you work with local planning authorities to set out in plans the circumstances where review mechanisms in planning obligations may be appropriate, allowing you to maintain policy compliance on education contributions when circumstances have changed.

39. To support the delivery of strategic development at pace, you may need to forward-fund school provision within an urban extension or new settlement, using basic need funding or local authority borrowing if necessary and recouping these costs later through developer contributions secured by a planning obligation. While we recognise there are some inherent risks to this, our position on the use of basic need funding and other forward-funding options is set out in paragraphs 5-7 above.

# Annex

## Developer delivery of new schools

1. Direct delivery of new schools by housing developers may represent good value for money. This model of delivery should not contravene state aid or public procurement rules. While we advise you to seek your own project-specific legal advice when necessary, this annex sets out the department's view on the legal position at the time of publication. Local authorities should keep abreast of emerging case law that may have a bearing on this advice, and any legislative changes following the UK's exit from the European Union.<sup>16</sup>

2. While the department supports developer delivery of schools in principle, we recognise that local circumstances vary and it will not always be the preferred option. Nevertheless, high quality design and performance for developer-built schools are achievable through the planning and building control process, and compliance with national standards such as the DfE building bulletins, output specification and other design standards and guidance.<sup>17</sup>

3. When developer delivery is proposed, we recommend a partnership approach between the local authority, academy trust (where relevant) and developer to negotiate a brief and design specification (see further advice below regarding procurement); such collaboration is good practice and helps to avoid disputes.

4. We recommend that planning obligations or other mechanisms provide detail on how local authorities intend to step in and deliver the school if developer delivery falls through but the school is still required. Longstop clauses should ensure that the land for the school is transferred early enough for the local authority to intervene and provide the school at the right time. In these situations, the planning obligation should also require financial contributions to be made in lieu of the 'in kind' provision of the school by the developer, making use of review mechanisms where necessary to respond to changing circumstances. Even in cases where a planning obligation is silent on this subject, Section 106(6) of The Town and Country Planning Act 1990 provides that the local authority may enter land to carry out works required by a Section 106 agreement where the developer is in default, although where a risk of non-delivery is identified, we

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<sup>16</sup> At the time of publication, current rules are expected to be preserved in domestic law. See [The State Aid \(EU Exit\) Regulations 2019](#) (draft) and [EU Exit guidance on public-sector procurement](#).

<sup>17</sup> [School design and construction guidance](#).



recommend that specific planning obligations are secured to mitigate that risk (for example through performance bonds).

## State Aid

5. In some cases, all relevant parties will support developer delivery of a new school, but the local authority accepts that the developer cannot fully fund the new school and its delivery would need a degree of public subsidy. It is important this this does not constitute unlawful state aid to the developer.<sup>18</sup>

6. The question is whether a contribution by a local authority to the cost of the school (otherwise being funded by the developer under a planning obligation) is a grant of incompatible state aid to that developer. The answer depends on the circumstances that give rise to the local authority's contribution. There are two principal questions. Has the public contribution arisen:

- (a) Because planning law/policy only requires the developer to make a partial contribution; or
- (b) Because the local authority has otherwise volunteered to make this contribution?

### Planning law/policy only requires the developer to make a partial contribution

7. This is unlikely to give rise to incompatible state aid (unlawful). If planning law/policy only requires the developer to make a partial contribution then no incompatible state aid should arise merely because the local authority (or another public sector body) funds the balance of those costs. This is subject to the relevant public sector body satisfying itself (through benchmarking and/or a cost consultant's report) that the developer's costs of building the school are not more than market costs. This would apply even if the initial application of planning policy dictated that the developer makes a full contribution but after applying planning viability principles (taking account of the total infrastructure burden on the development) the developer's contribution was reduced.

8. National Planning Practice Guidance says that for the purpose of plan making, an assumption of 15-20% of gross development value may be considered a suitable return to developers, in order to establish the viability of plan policies. A local authority's contribution to school delivery which supports a higher profit margin for a particular developer may be considered a voluntary contribution (see below) and a selective benefit to one developer, which may amount to unlawful state aid.

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<sup>18</sup> Guidance relating to [state aid](#) and [CIL](#), and [The State Aid \(EU Exit\) Regulations 2019 \(draft\)](#).

9. The rationale for this assessment is that the key state aid test to be applied to the developer is whether it has selectively benefitted from the local authority's contribution. For example, if under planning law/policy it (or any other developer) would have only been required to fund 60% of the school's costs then it has not selectively benefitted as another developer (in identical circumstances) would also only be required to make the same 60% contribution. The extent of the local authority's contribution (if required) will usually be determined through viability assessment.

### **The local authority has otherwise volunteered to make this contribution**

10. A voluntary contribution by the local authority would raise an issue that its funding may grant a selective benefit to the developer and could amount to incompatible state aid (unlawful).

11. The local authority may require a larger school than the development must provide, such as an increase to two forms of entry (2FE) when the development generates a need for a 1.5FE school. This may constitute a voluntary contribution but would not provide a selective benefit to the developer, provided any other developer in identical circumstances would receive the same contribution for additional school places, so in such circumstances the risk that this would amount to incompatible state aid is considered low.

### **Public contracts and OJEU procurement**

12. Under the Public Contracts Regulations 2015 (PCR), a contract for a pecuniary interest may be considered a 'public contract'. If there is consideration being provided by the contracting authority, either directly or indirectly, then the contract will be subject to the PCR.

13. UK Case law makes a distinction between planning obligations and other contracts, recognising that the public body is exercising its planning powers in order to regulate the development of land, rather than procuring an economic benefit.<sup>19</sup> Therefore, where a Section 106 agreement places an obligation on a developer to provide land/or buildings for a new school because this is necessary to make the development acceptable in planning terms (a prerequisite for a planning obligation), that Section 106 agreement does not constitute a public contract.

14. A separate development agreement with a developer may constitute a public contract, specifically a public works contract, which would require the local authority to undertake procurement under the Official Journal of the European Union (OJEU) or the

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<sup>19</sup> *Faraday Development Ltd. and West Berkshire Council and St Modwen Developments Ltd. [2018] EWCA Civ 2532 and Helmutt Muller GmbH v Bundesanstalt für Immobilienaufgaben (C-451/08)*

equivalent following the UK's exit from the EU. it is important that a number of principles contained in relevant case law<sup>20</sup> are complied with:

- a) there is no positive works obligation on the developer (either immediate or contingent) to build the school in any event (meaning could the public authority force the developer to build the school even if that developer never implemented its planning permission); and/or
- b) The public body has no 'decisive influence' on the design of the school. (The public authority is entitled to contribute to discussions about, be consulted on and set parameters about the building (e.g. compliance with national standards) but not have the ultimate decision about the works specification). Ultimately, it is for the courts (and the European Court of Justice) to rule upon the lawfulness of any public works funding.

15. As set out above, where a Section 106 agreement secures the provision of a school as a planning requirement and no consideration arises, it is not likely to be a public contract so is unaffected by considerations around positive works obligations and decisive influence over design. If a local authority then enters into a separate contract with a developer in addition to the planning obligation, it is important that the developer would not be legally obligated to perform the works and could walk away from them at any time, until the development commenced.

16. The extent to which a contracting authority can become involved in the design of works before it is deemed to be "specifying" such works has been explored in case law and guidance.<sup>21</sup>

17. A contract would only be deemed a public works contract if the contracting authority took measures to define the type of work to be undertaken by the developer partner or at the very least had a "decisive influence" on its design. "Requirements specified by the contracting authority" has been taken to exclude the exercise of a public authority's urban planning powers in examining building plans presented to it, or the decision to apply its planning powers in relation to a particular project.

18. The former Office of Government Commerce (OGC) provided further interpretation of the land exemption. In particular they were of the view that:

- (a) national or local land-use planning policies, requirements or restrictions for a site would not in themselves comprise a requirement specified by the contracting authority;

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<sup>20</sup> The Queen (on the application of Midlands Co-operative Society Limited) and Birmingham City Council [2012] EWHC 620 (admin); Helmutt Muller GmbH v Bundesanstalt für Immobilienaufgaben (C-451/08); Faraday Development Ltd. and West Berkshire Council and St Modwen Developments Ltd. [2018] EWCA Civ 2532

<sup>21</sup> Helmutt Muller GmbH v Bundesanstalt für Immobilienaufgaben (C-451/08) and Office of Government Commerce (OGC) Information Note 12/10 (30 June 2010).

- (b) a broad invitation that a site should be developed in accordance with applicable or national local land-use planning policies but with the developer free to put forward its own intentions, proposals and specifications within these parameters is unlikely to trigger a requirement specified by the contracting authority.

19. Although the OGC no longer exists as a distinct government department, their guidance note has been referenced by the domestic Courts and it is still considered useful guidance in the UK. However, reliance on OGC views may need to be reviewed if their position is overruled by the European Courts or the Commission, or by domestic Courts following the UK's exit from the EU.

20. When school construction is complete, an academy trust takes on responsibility for the building and its operation. In terms of procurement law, it is the entrustment by the contracting authority of the obligation to undertake the works that is relevant, not the reasons for doing so, or the beneficiary of the works.<sup>22</sup> The fact that a school is to be transferred to an academy trust post-construction does not affect consideration of whether the procurement amounts to a public works contract.

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<sup>22</sup> Jean Auroux v Roanne (C-220/05).



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