

Using obligations to protect and improve theatres

Summary

This advice note looks at the tools that exist to require developers to support investment in new cultural buildings and how these tools can also be used to ensure these buildings are appropriate spaces.

[This is one of a series of advice notes – others can be found on our website.](#)

Who is this note for?

This advice note is aimed at local authority planning departments and theatre owners and operators.

Thanks to our funders

This advice note was updated in April 2023 as part of our Resilient Theatres: Resilient Communities programme with funding from The National Lottery Heritage Fund, the Pilgrim Trust and Swire Charitable Trust.

When theatre buildings are lost or where large new residential buildings are created, tools exist to require developers to support investment in new cultural buildings to ensure there remains provision for the local community. These either take the form of an agreement for the developer to provide a replacement and direct support to an organisation or a financial contribution to the council to make the investments into the community infrastructure themselves. Theatres Trust can support councils and arts organisations to help make sure that the agreements encompass the requirements of theatre buildings and help them to make the case for the allocation of community infrastructure levy toward cultural buildings. These tools do not only exist to protect theatres and culture but they can help to secure appropriate spaces for them. With this guidance we hope to help make them fit for purpose.

What are planning agreements?

Section 106 agreements are legal agreements between applicants and local planning authorities as part of planning permission for new development in England and Wales. In Northern Ireland this is known as a Section 76 planning agreement and in Scotland it is Section 75. In this guidance we will refer to them as Section 106 agreements but they are equally applicable in Scotland and Northern Ireland.

Their purpose is to mitigate the impact of the new development on the surrounding area, with contributions being combinations of financial, in-kind support and restrictions. Dependent on the scale and nature of development typically Section 106 agreements will include:

- payment to local authorities towards local infrastructure provision
- delivery of affordable housing
- delivery of facilities such as community centres, medical centres and schools (on larger developments)
- delivery of features which improve the environment for occupants and surrounding communities such as footpaths, landscaping, street furniture and public artwork
- highway improvements
- works to surrounding properties or land
- re-provision of existing uses on a new site or within the new development
- support for current or future uses by way of discounted or peppercorn rent
- contributions towards fit-out costs or other in-kind support
- commitments and restrictions on activities taking place, whether over the development phase or over the life of the development

These agreements, while broadly calculated consistently, are individually negotiated and will differ dependent on the individual scale, nature and constraints of each development.

Section 106 agreements are only possible where they are in accordance with the council's local planning policy; Theatres Trust consult with local authorities to try to

protect cultural buildings within local plans. It is important that local people support the need for cultural buildings and lobby councillors to include provision for culture in policies so that tools like Section 106 agreements can be used.

What is the Community Infrastructure Levy?

The Community Infrastructure Levy (CIL) is a planning charge set by local authorities within **England** and **Wales** (a similar approach in **Scotland** called the **Infrastructure Levy**, referred to within the Planning (Scotland) Act 2019, is part of the Scottish Government's Programme for Government scheduled for 2023-2024.) and is placed on new development to help deliver infrastructure within the authority boundary. It applies to developments of particular types that exceed minimum thresholds, within authorities that have set such a charge. Rates vary between authority, and even between different parts of the same authority. Most new development that creates net additional floor space of 100 square metres or more, or creates a new dwelling, is potentially liable for the levy although generally some types of uses such as community facilities (which includes theatres) are exempt or eligible for relief.

As such, the only opportunity to influence how the bulk of CIL receipts are collected and spent is when local authorities consult on their CIL charging schedules and on how they intend to distribute these funds (known as a Regulation 123 list). Theatres Trust is notified of planning policy consultations within every local authority and makes representations in support of cultural facilities where required.

How do Section 106 agreements and CIL differ?

Section 106 obligations in terms of financial contributions and other conditions apply specifically to a particular development, and are therefore variable depending on the nature of the development and the impacts it has on nearby or related land or uses. In contrast, CIL is a standard defined charge that is formally published and adopted by local authorities and applies to all developments consistently. Whereas S.106 receipts will go towards general infrastructure within an area (such as education, health facilities and transportation) which is at least tangentially linked to the development and/or on specific facilities or sites as directed, CIL receipts are collected and spent on types of infrastructure defined by the local authority, which may be located anywhere within the authority boundary.

Can a development be subject to a Section 106 agreement and CIL?

Yes. The two act in different ways and have different purposes. Whereas contribution to general infrastructure is now largely captured by CIL (within local authorities that have a CIL charge in place) there remains a role for Section 106 agreements where development-specific impacts and obligations need to be addressed and/or funded.

How might Section 75/76/106 or CIL be used for theatres?

Generally, CIL will only be used for theatres where there is assessed need for a new theatre within a local area, or where funds have been allocated to the improvement / development of community / cultural facilities. However, 15% of CIL receipts are set aside as a 'Neighbourhood Portion'. This is distributed amongst local areas (often council wards) and typically there will be opportunities to apply for funding from that budget for projects which benefit the community. This could be used for theatre projects, particularly for small-scale and amateur/volunteer-run theatres. Where local areas have adopted Neighbourhood Plans this portion rises to 25% from developments within the area).

Section 75/76/106 agreements are more definitive as these will apply directly to a current, future or re-provided theatre and will be prescriptive legal agreements.

This agreement might require the provision of a cultural space to replace a previous space on the site or to offset other planning requirements. The scope of these agreements can be broad and they can detail the standards and conditions for such a space as well as the level of financial contribution that the developer must make.

It is both through our role within planning and our general advice work that we have been involved in Section 75/76/106 agreements for new and replacement theatre buildings. Below are some key points to be taken into account when considering such agreements, together with example projects.

There are valuable lessons that can be learnt from previous projects – the above are just a few examples. These are a great starting point to ensure the right brief and the right documentation is in place to ensure that we get great cultural buildings that are fit for purpose and truly do improve and enhance new developments.

Early engagement between stakeholders

Early dialogue between all stakeholders – for example developers, councils, local residents groups, arts organisations and theatre operators – is invaluable to ensure that there is benefit for all parties around a shared goal. Theatres Trust can also get involved at this early stage to help secure a good theatre and avoid complications when the scheme comes in for planning.

Case study: New Diorama Theatre

Opened in 2010, this is an 80-seat theatre in the heart of a new development and was provided through a Section 106 agreement. The original site of the development comprised office blocks and one of the largest inner London housing estates. It was bought by British Land over 30 years ago with the ambition to transform the area. The developer worked with local residential and faith groups, Camden Council Planning department and local arts organisation, Diorama Arts, to develop proposals for jointly making the area a better place to visit, live and work. The final scheme included

commercial and residential development, public realm improvements and the new theatre.

The redevelopment has proved very successful – and early engagement with the stakeholders has been key to this. In terms of the benefits afforded by the new theatre, British Land have acknowledged that without the theatre they would not have been able to attract such a wide range of visitors and local people across the economic spectrum to the area. The theatre and its links to the community has also helped British Land to be connected locally to various groups and organisations in a far deeper way.

Operator involvement

It is always preferable to have an operator on board. Theatres are complex buildings and different operators will have different requirements to meet their specific business plans, whether additional spatial requirements – such as the need for rehearsal rooms, dance studios and workshops – or technical requirements – including get in requirements for different scales of performance, flexibility and arrangement of auditorium, or increased loading capacity in the grid to allow for aerial work etc. Operator involvement will also help to establish the required brief and therefore scale of fit-out costs and hence financial contributions from the developer.

Where it is has not been possible to get an operator involved, ensure that a detailed viability study has been undertaken. This will allow a good understanding of the arts requirements for the development / area and shape the development brief. Also ensure that appropriate specialist consultant advice has been sought to develop the proposals. It is further recommended that the Section 75/76/106 specifies a tender process for the selection of an operator which should include information on how the brief is to be drawn up, specify members of the selection panel etc.

Example 1: Arts Theatre, Westminster

This is a current scheme for the redevelopment of the West End site containing the current Arts Theatre with new hotel development, commercial restaurant space at ground floor and basement theatre. Westminster City Council required that an operator had been secured for the theatre space prior to granting planning permission for the redevelopment. It was also necessary for the developer and the operator to agree a sum for the developer contribution to the fit out costs prior to planning being granted.

Example 2: The Streatham Space Project

The Streatham Space Project is a new build community theatre on the site of the old Gaumont Cinema. The scheme did not have an operator on board at the time of agreeing planning obligations, however, specialist advice was brought on board to ensure that the needs of the community were understood, a specialist consultant commissioned to ensure that the proposals were fit for purpose and the right of the council to nominate an operator included as part of the s.106 agreement. Theatres Trust advised both on the tender documentation and was involved in the tender selection process. Early input from a specialist consultant ensured that the design proposals were fit for purpose and enabled establishment of the appropriate level of developer contribution to the fit-out costs.

Communication

Remember, even if an operator is on board theatre operators do not always understand construction language / what a developer's scope encompasses / how the negotiation process works. They will need help.

Good communication should also extend to in-house communication within councils – ensuring that the arts officer, planning case officer, development officer, and where applicable building control / fire officers are in discussion over proposals. Do also involve Theatres Trust – we can provide valuable advice based on previous case work.

Example 1: Theatre Peckham

Theatre Peckham was granted a new building under a Section 106 agreement when its old site was redeveloped for student accommodation. However, the expectations of the theatre and those of the developer were very different. Whereas the developer had envisaged providing a standard shell and core for the theatre to fit-out, Theatre Peckham had expected a fully designed, fit for purpose theatre. Fortunately the situation misunderstanding was discovered and resolved. The developer was persuaded to commission a theatre consultant for the design of the space and provide a venue that fitted the requirements of Theatre Peckham. The developer also met the entire cost of building the new theatre.

The majority of arts organisations, like Theatre Peckham, will not have the funds behind them to carry out their own fit out works, and it is an enormous undertaking – both in terms of the amount of funds that it will be necessary to raise and also the time that is needed to raise the money - to embark on such a fundraising project. Developer contribution towards / entire payment of fit out costs will be necessary in the vast majority of cases.

Example 2: Negotiations with developers

Be aware of 'gentleman's agreements'. We are currently advising on a scheme where a potential operator has been persuaded into supporting a scheme based on discussions had with the developer but that had not been formalised into an agreement as to the contribution towards fit-out costs, heads of terms etc. The operator has been shocked to find themselves needing to re-negotiate items that they believed they had agreed already. It is important that the real situation is reflected in the Section 106 / planning obligations, that operators are made aware of what is legally binding, and that they are helped through the negotiation process to ensure venues that are fit for purpose and viable.

Specialist advice

In the same way that many arts organisations have never embarked on a capital works project before and do not necessarily understand the language, developers – and their design teams – have often never undertaken arts projects before and do not always understand the complex technical requirements. Ensure that the project has the right specialist design advice – otherwise there is a risk of being left with a space that cannot be used due to inappropriate design and/or unrealistic levels of fit-out costs for the operator.

Example 1: Theatre Peckham

See above

Example 2: Streatham Space Project

The early involvement of a specialist consultant in this project resulted in changes to the scheme that would have been very difficult to achieve at a later date. The changes included, amongst others, enlarging the size of the theatre building to enable a more flexible theatre and community space and better backstage and dressing room facilities; increasing the height of the auditorium from the more commercial height of 3.4 m to 4.7 m, a height more fit for theatre studio space; and spatial rearrangement to both give the theatre a greater street presence (an important and often overlooked consideration) and changes in the design to help reduce the potential noise transmission between theatre and new residences. The specialist advice gave not only the technical understanding of the building's needs but also allowed the appropriate level of developer contribution towards fit-out costs to be established (a substantial increase from the initial estimate).

Lease payments

Think about how the lease agreement will affect operation. Consider, for example, the requirement for peppercorn rents. It is unlikely a small-scale or mid-scale theatre could operate on commercial rent arrangements. A peppercorn rent is usually appropriate for this style of operation.

Take note of the maintenance responsibilities and any service charge that the developer may be able to levy on shared areas. Be clear how the monitoring of utilities will be separated and metered from the rest of the development.

Example 1: Streatham Space Project

In this instance the theatre was ensured a peppercorn rent for 25-years.

Example 2: The Other Palace

Formerly the St James Theatre, this was built under a Section 106 for redevelopment of the former Westminster Theatre. However, there was also a separate Section 106 agreement through a different development (the adjacent Cardinal Place scheme) which provided start-up funding for the theatre for the first 5-years of operation.

Incentivising the developer to meet their cultural obligations

Consider whether it is appropriate to place restrictions on occupation of other areas of the development. It is common to limit the main revenue generating use until the theatre is occupied. Also ensure that the planning obligations restrict the use of the space to the specified use so that it cannot be put to other (commercial) use at a later date.

It is important to consider within the agreement what would happen if the chosen operator was to fail. Theatres operate on fragile business models so this is always a possibility and does not necessarily demonstrate that a theatre space is not viable. Councils may write in the option to take on the lease or nominate a new operator within a reasonable period if an operator fails.

Example 1: The Other Palace

The Section 106 for The Other Palace contained a table of phased occupation for the residences that related to various agreed stages of capital works project for the theatre. Completion of the theatre was necessary prior to all new residences being occupied. The Section 106 also ensured that, should the operator named in the Section 106 agreement pull out of the project, the space be occupied by another theatre operator, to be approved by the council and the Theatres Trust.

Example 2: Streatham Space Project

The Section 106 for the Streatham Space Project ensured the delivery of the theatre prior to occupation of residential units.

Theatres require volume

Planning permissions relate gross internal areas (GIAs), however, theatres need to consider volume / height requirements and ensure that these are not only adequate at initial planning stage but protected against any subsequent changes within developments. Theatres may find their volumes squeezed under minor amendment applications where the floor space is not affected.

Example: Value engineering

Theatres Trust has recently been involved in a case where a renegotiation of the planning permission by the developer due to constructional pressures had started to impact on volumes thereby making the theatre unworkable. The new proposals have subsequently been amended.

Neighbourly consideration

Theatres are not necessarily happy bedfellows with residential units – careful design is required to minimise disturbance from get ins, from people leaving the auditoria, from bar noise, noise break out / break in to the auditorium etc.

As above, ensure specialist advice is sought early on in the design process to ensure spatial layouts take acoustic considerations into account. It is also necessary to ensure that the design proposals take into consideration internal fit out requirements, such as box-in-box construction. This will have an impact on space requirement for the venue. Also consider the other neighbours – for example, is there a cinema proposed within the same development, a gym with potential noisy classes etc. Ensure that appropriate controls are specified for these operations too.

Basement theatres

Basement theatres are becoming more common in larger-scale redevelopment schemes – whether replacement theatres, such as at the Arts Theatre in Westminster, or the inclusion of culture within a development – such as at Skipton House in Southwark. While it is always hoped that the inclusion is due to the developer's realisation of the benefit of arts projects to new developments, such as seen at the New Diorama, there is concern that the inclusion of cultural space is sometimes sought as an offset against affordable housing and that little consideration has been given to the requirement of the venue.

With basement venues there are additional implications with regard theatre operation – from the scheme giving the venue adequate street presence and visibility, through to ensuring a viable get-in for ongoing theatre operation, ensuring an appropriate and fully developed fire escape strategy (including the provision of evacuation lifts), and making operators fully aware of ongoing maintenance issues – for example running costs for mechanical ventilation (heating and cooling), any size restrictions for replacement plant, smoke ventilation requirements, lift maintenance, possibility of pumped drainage etc.

While the following points are specifically related to theatres, they are equally as applicable for any cultural venue.

Theatres Trust and the Association of British Theatre Technicians (ABTT) are currently compiling guidance on basement theatres for operators, designers, and developers. In the meantime please do consult with Theatres Trust and the ABTT.

It is also highly recommended that building control / fire officer advice is sought at planning stage.

Developer contribution

Beyond the provision of the space it must be made clear how the developer will be contributing to the project. Developers may fund the entire fit out or just provide shell and core services with a contribution towards the fit out costs. If the Section 106 is a replacement for an existing theatre then a full fit out should be the expectation. Theatre fit outs are large capital projects that are very difficult for theatre organisations to fundraise for. Inadequate funding from the developer may require theatres to go into significant debt and have an impact on the viability of the theatre.

Councils are understandably reluctant to support theatres that may require ongoing subsidy. Some developers opt to provide a revenue subsidy to a theatre company for the first years of operation. This form of guaranteed income can allow theatre companies to develop an audience over the first years in the confidence that they have time before they need to be financially self-sufficient. This is particularly important with new theatres, which can take three to five years to raise their profile enough to attract favourable terms from productions and build an audience.

It is worth remembering that culture is community infrastructure so, in the absence of a Section 106, can potentially receive funding from the Community Infrastructure Levy towards the provision, improvement, replacement, operation or maintenance of theatres.

The role of the Theatres Trust

Theatres Trust, is the national advisory public body for theatres, established through the Theatres Trust Act 1976 'to promote the better protection of theatres' and provide statutory planning advice on theatre buildings and theatre use. The Act requires the Trust to be consulted by local authorities on planning applications that include 'development involving any land on which there is a theatre'.

We are also involved in the preparation of Local Plans and the development of planning legislation, policy and guidance, and provide an advice service, which covers planning, design and theatre operation. We encourage all councils to contact us to discuss any theatre related project queries at any stage of works – from early viability studies and pre-applications through to works on site, queries relating to theatre operation through to ways of helping sustain your local theatres.

While our main objective is to safeguard and promote theatre use, or the potential for such use, we also seek to provide impartial expert advice to establish the most viable and effective solutions for proposed, existing and former theatre buildings at the earliest possible stages of development.

Please contact us at planning@theatrust.org.uk for any planning related issues.

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