

A photograph of three business professionals (two men and one woman) sitting around a table in a modern office or meeting room at night. They are engaged in a discussion, with laptops open in front of them. The room has large windows overlooking a city at night, with lights visible outside. The scene is dimly lit, primarily by the laptop screens and ambient office lighting.

geldards

# Fundamentals of Section 106 Agreements

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17 May 2024

Public Sector England

# Outline

- Types of obligations
- Formalities
- Limitations
- Other powers
- Policy position – NPPF / PPG
- TParties / Title issues
- Costs
- Practical issues
- Modification / discharge of obligations
- Enforcement

# What is a Planning Obligation?

- Enforceable against the person entering into the obligation and any person deriving title from that person (s106(3))
- Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation..." (s.106(1) TCPA 1990)
- Types of obligations:
  - a) Restrict development or use of land
  - b) Require specified operations or activities to be carried out on land
  - c) Require land to be used in specified way
  - d) Require sum(s) to be paid to LPA
- Most common – affordable housing, education, transport, healthcare, POS, SUDS...
- No requirement for planning application

# Nature of obligations

- Section 106(2):
  - a) Conditional or unconditional
  - b) Impose restrictions/requirements indefinitely or for specified period
  - c) (i) Payment of specified amount or amount determined according to s.106 instrument  
(ii) if periodical sums, require payment indefinitely or for specified period

# Formalities

- “...by agreement or otherwise...” = Agreement or UU
- Deed which:
  - a) states it is a planning obligation
  - b) identifies land in which person is interested
  - c) identifies person entering into the obligation and states their interest
  - d) identifies LPA by whom obligation is enforceable
- Local land charge

# Limitations

- Cannot require:
  - transfer of land
  - payments to public bodies other than LPA
- Consider ‘Grampian style’ drafting - *R(Crest Homes plc) v South Northamptonshire DC (1994)*
  - “No development shall be commenced until...”



# Other powers

- S.111 Local Government Act 1972
  - Is this calculated to facilitate, or conducive or incidental to, discharge of a function?
- S.1 Localism Act 2011
  - Are there any limitations on this?
  - If local authority acting for a commercial purpose must use a company

# Other powers: case law

- *R (Savage) v Mansfield DC (2015)*
  - Obligation not to seek compensation if PP modified/revoked
  - Could be enforceable if entered into under s.111, LGA 1972 or s.1, LA 2011
- *R (Khodari) v Royal Borough of Kensington and Chelsea (2017)*
  - Parking permit free flats = personal obligation
  - Original party bound as contractual obligation



# Regulation 122(2)

- ...a planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—
  - a) necessary to make the development acceptable in planning terms;
  - b) directly related to the development; and
  - c) fairly and reasonably related in scale and kind to the development.

# National Planning Policy Framework

- Consider whether otherwise unacceptable development can be made acceptable by conditions/s.106 obligations
- Conditions preferred over planning obligations
- Only sought if they comply with Reg 122(2)
- Up to applicant to demonstrate need for viability assessment at application stage
- Affordable housing only for 'major development' (10+ homes / 0.5ha or lower in rural areas)

# Planning Practice Guidance

- Planning obligations assist in mitigating impact of unacceptable development
- Reiterates the application of Reg 122(2) of the CIL regs
- S.106 policies set out in local plan and neighbourhood plan
- Policy must make clear LPA will take account of site-specific circumstances
- LPA's encouraged to use and publish templates
- Agreements should state how and when funds will be used and allow return of unused funds

# Competing policy demands

- R (*Working Title Films Ltd*) v *Westminster City Council* (2016)
  - Provision of community hall compensated for underprovision of affordable housing
  - *“Matters of weight and of planning judgement are for the decision maker, and the officer and his Council were perfectly entitled to think that the gain in one area made up for the loss in another.”*

# Parties

- S.106(1) - “*Any person interested in land...*”
- No requirement to bind all land - *R(McLaren) v Woking BC (2021)*
- Cannot bind superior estate
- Third party interests – Option Agreement / Contract / Mortgagee
- Trustees may seek to limit their liability

# Local Authority owned land

- LPA cannot enter into an obligation with itself
- In two-tier areas obligation could be given to another authority
- Some options available as LPA is in control:
  - Restriction on development and supplemental agreement
  - Conditioning requirement for a s106
  - Condition of sale contract



# Costs

- No statutory right to recover costs
- Most developers will agree to pay reasonable costs – keep breakdown/records
- Solicitor's undertaking or money on account (with costs payable regardless)
- Monitoring fees

# VAT

- HMCE published article setting out its position in 2003 (JPEL)
- VAT should not be added to costs of work by LPA legal team for the LPA
- VAT can be charged if LPA legal team provides services to developer
- If external lawyers' fees payable by developer, LPA can recover VAT

# Practical issues (1)

- Heads of Terms
  - base on committee report
  - set parameters for drafting
  - balance of certainty and flexibility
- Ensure delegated powers in place
  - *Andrews v New Forest DC (2017)*

# Practical issues (2)

- Check all requirements of s.106(9) complied with
- Think carefully about triggers
- Precise drafting – what does the clause actually require / permit?
- Severance clause
  - *Jelson Ltd v Derby CC (2000)*

# Completion

- Ensure bind all interests as at date of completion
  - Up to date official copies
  - Certificate of title/warranty?
- Counterparts?

# Modification and Discharge

- S.106A:
  - By agreement (executed as a deed)
  - Application to LPA (after 5 years)
- S.106B – appeals re s.106A applications



# Enforcement

- Joint and several liability
- Exemptions?
- If releasing a party from liability, ensure they remain liable for prior breaches
- Enforcement options:
  - Pursue unpaid money as a debt
  - Injunction (if proportionate)
  - Enter land and carry out operations
- Need for more immediate step-in rights?

# Enforcement – Case law (1)

- *Newham LBC v Ali and Others (2014) & (2018)*
  - UU requiring removal works to place of worship
  - Planning obligation is enforceable as a contract
  - Injunction usually granted for substantial breach of planning obligation
  - Court has power to suspend an injunction
  - Hardship did not amount to circumstances that gave Court power to suspend injunction

# Enforcement – Case law (2)

*Hampshire CC v Beazer Homes* [2010] EWHC 3095

- Clawbacks are common in agreements
- Wednesbury Reasonableness applies to decisions to spend



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# Thank You

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