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INTRODUCTION TO SECTION 106 AGREEMENTS

1 INTRODUCTION

- 1.1 A planning obligation is a legal instrument and a negotiating tool available to a local planning authority (**LPA**) and a developer who is seeking planning permission in circumstances where planning conditions are not appropriate. Planning obligations can be either in the form of an agreement between the developer and the LPA or in the form of a unilateral undertaking given by the developer normally in the context of a planning of an appeal.
- 1.2 The current law governing planning obligations is set out in ss.106-106C of the Town and Country Planning Act 1990 (**TCPA**) and came into force on 25 October 1991 and affects only obligations entered into on or after that date. Prior to this date, a different set of legal requirements applied under the old style s.106 of the TCPA.

2 WHAT CAN A PLANNING OBLIGATION DO?

- 2.1 Section 106 (1) states that any person interested in land in the area of a LPA may by agreement or otherwise enter into a planning obligation which:
- 2.1.1 restricts the development or use of land in a specified way;
 - 2.1.2 may require specified operations or activities to be carried out in, on, over and under land; or
 - 2.1.3 require the land to be used in any specified way; or
 - 2.1.4 require sum/s of money to be paid to the LPA (or the GLA).
- 2.2 The following points should be noted:
- 2.2.1 'Any person interested'- this means a person with a legal interest in land. This would include a freeholder, leaseholder and a mortgagee. All persons with an interest in the land subject of the obligation must be a party to it otherwise they are not bound by its terms. In addition, it cannot bind a superior title so a tenant entering into the obligation cannot bind the landlord but will bind all subsequent sub tenants. If the lease comes to an end then the obligation will only bind the original covenantor.
 - 2.2.2 An obligation cannot bind parties who have existing rights in the land at the time the obligation is entered into unless they consent to be bound by it. If there is a mortgage on the property then the mortgagee must either be a party to the obligation or agree to be bound by it otherwise the mortgagee will be able to exercise its power of sale free of any covenants in the obligation.
 - 2.2.3 A planning obligation can impose restrictive covenants e.g. restricting the development or use of land and positive covenants e.g. requiring works to be done or money to be paid.

3 FORMALITIES

- 3.1 There are a number of formalities which planning obligations must comply with¹:
- 3.1.1 A planning obligation must be in the form of a deed;
 - 3.1.2 The deed must state it is a planning obligation for the purposes of section 106;
 - 3.1.3 It must identify the land subject to the obligation;
 - 3.1.4 It must identify the parties to the obligation and state their interests;
 - 3.1.5 It must identify the LPA by whom it is enforceable.
- 3.2 In addition:
- 3.2.1 A copy of the planning obligation must be given to the LPA²; and
 - 3.2.2 It is registrable by the LPA as a local land charge³.

4 GOVERNMENT POLICY

- 4.1 In 2010, the Government introduced the **community infrastructure levy (CIL)** under part 11 of the Planning Act 2008. The Community Infrastructure Levy Regulations 2010 (as amended)⁴ (**CIL Regulations**) came into force on 6 April 2010.
- 4.2 The CIL Regulations for the first time, set out in law, the tests that a planning obligation must comply with in order to be considered a material consideration. Regulation 122 of the CIL Regulations (Limitation on use of planning obligations) states that:
- 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.*
- 4.3 Government policy on planning obligations was previously set out in Circular 5/2005⁵.. This was cancelled, together with a number of other circulars and planning policy guidance notes, in 2012 with the publication of the national planning policy framework (**NPPF**) and its associated guidance in 2014, the national planning policy guidance (**NPPG**).
- 4.4 The NPPG states that:

¹ S.106(9)

² S.106(10)

³ S.106(11)

⁴ SI 2010/948

⁵ ODPM Circular 5/2005: Planning obligations

Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition.

Planning obligations should only be sought where they meet all of the following tests:

- *necessary to make the development acceptable in planning terms;*
- *directly related to the development; and*
- *fairly and reasonably related in scale and kind to the development.*⁶

4.5 The related guidance in the NPPG states that:

Obligations should meet the tests that they are necessary to make the development acceptable in planning terms, directly related to the development, and fairly and reasonably related in scale and kind. These tests are set out as statutory tests in the Community Infrastructure Levy Regulations 2010 and as policy tests in the National Planning Policy Framework.

4.6 The NPPG further states that planning obligations:

4.6.1 should not be sought where they are not necessary to make a development acceptable in planning terms, e.g. for public art⁷.

4.6.2 must be fully justified and evidenced.

4.7 On 28 November 2014, the Minister of State for DCLG announced that the Government was making the following changes to national policy on planning obligations:

4.7.1 affordable housing and tariff style contributions should not be sought for sites of 10-units or less, and which have a maximum combined gross floor space of 1,000 square metres. This will also apply to all residential annexes and extensions.

4.7.2 for designated rural areas⁸ (includes national parks and areas of outstanding natural beauty) LPAs may choose to implement a lower threshold of 5-units or less, beneath which affordable housing and tariff style contributions should not be sought. This will also apply to all residential annexes and extensions. If the 5-unit threshold is implemented then payment of affordable housing and tariff style contributions on developments of between six to ten units should also be sought as a cash payment only and be commuted until after completion of units within the development.

4.8 The announcement stated that these changes will not apply to rural exception sites which, *'subject to the local area demonstrating sufficient need, remain available to support the delivery of affordable homes for local people. However, affordable housing and tariff style contributions should not be sought in relation to residential annexes and extensions'*.

⁶ National Planning Policy Framework, paragraphs 203 and 204

⁷ NPPG, paragraph 4

⁸ under s.157 of the Housing Act 1985

- 4.9 The Government hopes these measures will help increase housing supply and estimates that the policy will save, on average, £15,000 in s.106 housing contributions per new dwelling in England.
- 4.10 The guidance in the NPPG has been amended to reflect the above announcement⁹.

5 PLANNING OBLIGATIONS AND CIL

- 5.1 Where CIL is not adopted by an LPA, section 106 agreements will continue to be used, although an LPA's ability to use more than five separate planning obligations to pool contributions towards a common piece of infrastructure will be phased out by April 2015 (unless this date is changed).
- 5.2 Where an LPA decides to charge CIL or from 6 April 2015 regardless of whether it has introduced CIL, the LPA will only be able to enter into a planning obligation alongside the CIL where, in addition to meeting the tests set out at paragraph 4.4 above, it:
- 5.2.1 Makes provision for affordable housing and/or the payment of contributions for affordable housing, subject to the recent changes at paragraph 4.7 above.
- 5.2.2 Will only be able to enter into a planning obligation which provides for the funding or provision of an infrastructure project or type of infrastructure subject to a maximum of five separate planning obligations made on or after 6 April 2010 which provide for the funding or provision of that project or type of infrastructure. This limit on pooling of contributions does not apply to obligations that relate to, or are connected with, the funding of Crossrail and in respect of infrastructure that is not capable of being funded by CIL e.g. affordable housing.

6 COMMON PROVISIONS

- 6.1 There are no 'standard' clauses for planning obligations, but since 1992, a number of provisions have become generally accepted. Set out below are some common examples.
- 6.2 Clauses required by the LPA
- 6.2.1 In the Recitals: 'The Council considers it expedient in the interests of the proper planning of its area that the development of the property should be restricted or regulated in accordance with this Agreement'.
- 6.2.2 In the Agreement: (A) '*This Agreement is made in pursuance of section 106 of the Act and is a planning obligation for the purposes of that section and shall be enforceable by the Council in its capacity as local planning authority against the Owner and against any person deriving title to the Property from the Owner.*'
- 6.2.3 (B) '*This Agreement is without prejudice to and shall not be construed as derogating from any of the rights powers and duties of the Council pursuant to any of its statutory functions or in other capacity.*'

⁹ NPPG, paragraphs 12 to 23

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- 6.2.4 (C) *'The Owner agrees to pay to the Council on the signing of this Agreement its proper and reasonable legal and administrative costs and expenses incurred in preparing negotiating and settling this Agreement.'*
- 6.2.5 (D) *'The Owner hereby covenants to develop the Property in strict accordance with this Agreement and not to use the Property otherwise than as permanently subject to the restrictions and requirements set out in [Schedule 1].'*
- 6.2.6 (E) *'Any expenses incurred or to be incurred by the Council to which the Owner is or may become liable under this Agreement may be recovered by the Council as provided for in section 291 of the Public Health act 1936 and in particular such expenses and interest accrued thereon shall until recovered be a charge on the Property and on all estates and interest therein.'*
- 6.3 Clauses required by the developer:
- 6.3.1 (A) *'Where in this Agreement the approval consent agreement expression of satisfaction or confirmation of the Council or any of its officers is required then such approval consent agreement expression of satisfaction or confirmation shall not be unreasonably withheld or delayed.'*
- 6.3.2 (B) *'Save as may be expressly provided in this Agreement, nothing in this Agreement shall be construed as prohibiting or limiting any future right to develop any part of the Property in accordance with and to the extent permitted by any future planning permission.'*
- 6.3.3 (C) *'No party to this Agreement will be liable for any breach, non-performance or non-observance of the covenants, obligations and restrictions contained in this Agreement in respect of any period during which that party no longer has an interest in the Property or in the part in respect of which the breach, non-performance or non-observance occurs but without prejudice to liability for any subsisting breach, non-performance or non-observance prior to parting with such interest.'*
- 6.3.4 (D) *'It is hereby agreed and declared that in the event of the planning Permission being quashed as a result of legal proceedings or expiring before Implementation or being revoked or otherwise modified by any statutory procedure without the consent of the Developers then this Agreement shall cease to have effect and in that event the Council shall procure the removal of this Agreement from the Register of local land Charges.'*
- 6.3.5 (E) *'This Agreement is conditional upon and shall not take effect until the fulfilment of both of the following conditions precedent:*
- (a) the grant of the Planning Permission; and*
- (b) the Implementation of the Planning Permission.'*
- 6.3.6 (F) *'The Council hereby covenants on completion of this Agreement to issue the Decision Notice granting the Planning Permission (in the form of the draft annexed hereto) as soon as is reasonably practicable.'*

6.3.7 (G) *'In this Agreement any reference to Implementation of the Development shall be construed as meaning the undertaking by the Developer pursuant to the Planning Permission of any material operation (as defined in section 56(4) of the act) EXCEPT FOR any of the following operations or uses:*

(a) demolition and site clearance;

(b) soil tests or other investigations for the purpose of assessing the degree or extent of any contamination or of any remedial action in respect of any contamination

(c) archaeological investigations or excavations in accordance with Condition [] of the Planning Permission

(d) the erection of fences or other means of enclosure around the perimeter of the Property

(e) the display of advertisements.'

7 EXAMPLES OF SOME UNUSUAL PROVISIONS

7.1 No praying outside a mosque:

The Trustees herby covenant with the Council:

7.1.1. The Trustees will ensure that all religious activity by the Trustees and their visitors will take place within the confines of the Property and in particular there will be no overflow praying on the highway adjoining the Property.

7.2 Maintaining the Property in its current set up:

The Owner herby covenants with the Council:

7.2.1. The Owner shall ensure at all times that the Property is occupied used and managed solely as the Main Planning Unit comprising 15 self-contained bedsits and one self-contained flatlet.

7.2.2. The Owner shall ensure that the layout of the Property as shown on Plan B shall be retained and not altered in any way without the prior written consent of the Council.

7.2.3. The Owner shall ensure that (except with the prior written consent of the Council) no part of the Property shall be disposed of or alienated in any form (including by lease or licence) as a unit of occupation separate to the Main Planning except under an Assured Shorthold Tenancy granted under the Housing Act 1988 (as amended by the Housing Act 1996).

7.3 Personal planning permission:

The Owner herby covenants with the Council:

7.3.1. That the Planning Permission will be personal to Mildred Jane Rutter during her occupation of the Property and shall not ensure for the benefit of the Property.

7.3.2. That upon the said Mildred Jane Rutter vacating the Property its use shall revert to the lawful use of a residential dwelling house within Class C3 of the Town and Country Use Classes Order 1987.

7.4 Car free housing:

The Owner hereby covenants with the Council:

7.4.1. Not to apply or cause to be applied for and to ensure that prior to occupying any residential unit forming part of the Development every new resident is informed that they shall not be entitled (unless they are the holder of a disabled person's badge issued pursuant to section 21 of the Chronically Sick and Disabled Persons act 1970) to apply for a permit to park a vehicle in a Residents Parking Bay or to buy a contract to park in any carp park owned controlled or licensed by the Council.

7.5 Setting up a working group:

The Owner hereby covenants with the Council:

7.5.1. That until practical completion of the Development it shall:

(a) Use its reasonable endeavours to establish the Working Group.

(b) Invite two members of each of the Residents Associations and two officers of the Council's Environment Department to become members of the Working Group.

(c) Procure that its project manager (however styled) is a member of the Working Party).

(d) Procure that meetings of the Working group are arranged at least once in every three months (commencing with the Implementation Date) and shall provide at its own expense suitable venue for each such meeting and shall give no less than seven days notice to each member of each such meeting.

(e) Notwithstanding clause (d) any member of the Working Group shall be entitled by giving not less than fourteen days written notice to the other members of the Working Group (except in case of emergency when twenty four hours notice will suffice) to call an additional meeting of the Working Group for the purposes of discussing any matter specified in the notice.

(f) To ensure that a twenty four hour telephone complaint service is available to local residents PROVIDED THAT if the complaints service is used unreasonably by the residents then it may be discontinued after consultation and agreement with the Working Group.

(g) Use all reasonable endeavours to ensure that the Development is undertaken in accordance with the Council's Considerate Contractor Manual.

8 ISSUES

- 8.1 A planning obligation cannot contain a positive obligation to transfer land¹⁰ as this would fall foul of s.2 of the Law of Property (Miscellaneous Provisions) Act 1989. However, the effect of requiring a transfer of land can be achieved by way of a restriction pursuant to s.106(1)(a).
- 8.2 What happens where the developer is buying the freehold or some lesser interest, e.g. a long leasehold, from the local authority which also happens to be the LPA? A council cannot contract with itself, it can only make the obligations bite once the freehold has been acquired. Where the developer is acquiring, or already has a head leasehold interest from the council then the obligations will only bind that and any lower interest.

¹⁰ Wimpey Homes Holdings Ltd v Secretary of State for the Environment (1993) and Jelson Ltd v Derby City Council (2000)