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Section 106 Agreements - a note for anyone developing land

Inside

Introduction

When granting planning permission for development, local planning authorities often impose planning obligations on the party promoting the development. These obligations are usually contained in what are known as Section 106 Agreements or Planning Agreements – separate legal agreements that sit alongside the planning permission. Those agreements will, generally, bind the land to which the planning permission relates – so anyone who owns that land will be bound by the obligations. The negotiation of planning obligations, and the Section 106 Agreements in which they sit, can be a protracted and frustrating process for all concerned. We set out in this briefing some tips on achieving a more pain-free process.

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What is a Section 106 Agreement?

Section 106 of the Town & Country Planning Act 1990 provides that a local planning authority (LPA) may enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land. That, in a nutshell, is a Section 106 Agreement.

From a practical point of view, a Section 106 Agreement enables a developer to obtain planning permission. If the circumstances allow, without it the LPA could simply refuse to grant planning permission – on the basis that no mitigation is (or can be) provided to offset the downside of the proposed development (such as increased demand for school places in an area).

Any planning obligations must, however, relate to the proposed development. Frequently encountered obligations include:-

- the provision of affordable housing;
- a financial contribution towards social, education or recreational facilities;
- the construction of recreational facilities – such as a playground;
- the provision of car club facilities;
- a requirement to include renewable energy sources within the development;
- local employment and business initiatives;
- a requirement to develop and monitor a travel plan for the development.

Normally such obligations are included in a Section 106 Agreement which is negotiated and entered into between the developer and the LPA. An alternative sometimes used, however, is a unilateral undertaking. In these the developer, on its own, commits to the planning obligations – effectively in a series of one way promises to the LPA. Such undertakings are usually offered by a developer where they are appealing against a planning application refusal by the LPA. They enable the developer to deal with what they see as the LPA's valid objections to the development – but don't need the cooperation of the LPA to finalise.

Planning obligations should, in theory, only be used when it is not possible (or appropriate) to impose a condition on the same topic on the planning permission itself. In truth, Section 106 Agreements often contain matters which could have been dealt with by way of a planning condition.

One would usually expect anyone with a freehold or leasehold interest in the site (and all of their respective mortgagees) to be a party to the Section 106 Agreement relating to that site, to ensure all the relevant land interests are bound and the obligations can be enforced by the LPA – although this will depend on the precise circumstances of the case.

What the Government says

The use of Section 106 Agreements is now also regulated by the Community Infrastructure Levy Regulations 2010 as amended, which set out the legal tests to be applied by any LPA to determine if any planning obligations are lawfully required. The tests are that the obligations are:

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

This is supported by the same policy tests in the National Planning Policy Framework 2012 (NPPF). A requirement by a LPA which goes beyond these criteria may indicate that there are grounds for appeal - or might, in some cases, give rise to an argument that the planning permission granted as a result is not validly given. However, it would ultimately be a matter for the courts to decide whether an LPA has been unreasonable and sought to impose a planning obligation which is not proper.

Round the table

So, negotiation of Section 106 Agreements can be difficult. Many LPAs have adopted planning guidance which explains the cumulative impact of development in its area and how this will be dealt with by the use of planning obligations, and this

can provide a very useful introduction to the LPA 's potential requirements.

Early discussions between the developer and the LPA, together with any other stakeholders, are almost always beneficial in the long run. 'Early' means, if possible, before the planning application is even submitted - long before a draft Section 106 Agreement or draft heads of terms for it are produced. Early discussions mean that all parties are aware of the issues involved with a particular site – and what the key drivers are. The developer can start to see the LPA's bottom line – and work out how (and if) they can accommodate that into a viable project.

A common misapprehension is to assume that the LPA will always have a single coherent objective. As with any large organisation, local authorities are made up of many hard-pressed individuals with competing agendas. What is critical for those running the education function of the local authority will differ from the issues of concern to the highways department. Whilst it is the planners' job to coordinate these into a cogent and transparent planning policy, that may be achieved with different degrees of success. Again, as with many large organisations, internal communications are often difficult. Delays can be encountered simply because two departments within the local authority aren't liaising adequately with each other.

If possible, have a detailed 'round table' meeting with all relevant local authority officers in order to discuss the Section 106 Agreement. This can, at the outset:-

- establish the combined 'wish list' of the various officers;
- ensure that everyone within the local authority knows what everyone else within the authority wants;
- provide a route map of how to progress negotiations.

If you're acquiring a site but you do not yet have an interest in it, you should still be involved in the negotiation and final approval of any Section 106 Agreement. Once you buy the land, you will almost certainly be bound by the terms of the agreement.

Flexibility

Try to negotiate into any Section 106 Agreement as much future flexibility as possible. Whilst there are rules about how far you can change a planning permission and/or Section 106 Agreement without following a formal planning application process, some small changes may be possible. For example, if you are to provide 2 car parking spaces to a car club in a specific location, always seek to add the words 'or in such other location as the Council approves'. It doesn't give you carte blanche to change the position - because you would still need to get the LPA's approval to a change. What it does mean is that if things change and the LPA recognises that, there will probably be no need to formally vary the original Section 106 Agreement – the change can be documented by correspondence. This can save time, money and hassle in the long term when dealing with minor changes.

If you do need a formal variation of an existing Section 106 Agreement, then (as that original Section 106 Agreement will have been entered into as a deed) this should be done by deed also (that is, by a document which follows specific legal formalities). Section 106 makes provision for existing Section 106 Agreements to be amended or discharged following a formal application by the developer or landowner. This relates to obligations which are over 5 years old. Amendments in 2013 relaxed this provision in England and applications to modify or discharge can now be made in respect of pre 6 April 2010 obligations, even if they are not yet 5 years old. You may need to obtain tax advice as to whether entering into a deed of variation would affect your financial or tax position in general terms.

A bit of detail

Some early questions to consider:

- What is the likely level of affordable housing requirement?
- Would a payment in lieu of on-site affordable housing be possible?
- What payments will be required and when?
- Are there tariffs in place?
- What on-site or off-site 'physical' obligations are likely?
- When will they be required to be completed – and what is the sanction if they are not?

Before looking at a draft Section 106 Agreement in detail, the developer should obtain a copy of any LPA planning committee meeting minutes (usually available online) which contain the resolution to grant planning permission, subject to a Section 106 Agreement being completed. The developer can then check that the resolution reflects what is expected and ascertain what the members are expecting the Section 106 Agreement to say. Also, check any stipulated time period within which the Section 106 Agreement must be completed. If the planning resolution is wrong or uncertain, then the developer should obtain agreement as soon as possible with the LPA as to the position. Be aware that if the terms of the resolution need amending then the matter may have to be referred back to the committee members.

Affordable housing

A topic in itself, here are a few points worth noting.

In terms of Government policy, this is provided nationally by the NPPF. It says, for example, that LPAs should set local policies for meeting this need on site (NPPF paragraph 50). Developers will want to ensure that any required level of affordable housing doesn't jeopardise the scheme's viability.

Check, also, the viability-impact of a requirement that only a specific percentage of any market/ private housing on the site can be constructed or occupied before the affordable housing is constructed and transferred.

Get a registered affordable housing provider (of the proposed affordable housing on the site) involved in negotiations. They should consider the affordable housing requirements and specifically the acceptability of the tenure mix and the mortgagee and tenant

exclusion provisions in the draft Section 106 Agreement. There will be certain issues around the way the affordable housing obligations are phrased that will be key to them. If you get those wrong now, you may not be able to proceed until the issues are fixed by a formal deed of variation to the Section 106 Agreement.

Financial contributions

If financial contributions are payable, then you should ask for the Section 106 Agreement to record that the LPA should expend the contributions within a specific period (for example, five years). If the money is not spent in accordance with the Section 106 Agreement by then, then it should be returned to the person who paid the money (usually the developer), with interest. The LPA should also be obliged to expend the contributions for specific purposes. Remember, these contributions should usually relate to works or services in the vicinity of the development (such as junction improvements). Whether or not they are carried out will often impact on the sustainability of the specific development.

Consider whether contribution payments can be delayed until a later stage or phase of the development – it is almost always beneficial to the developer to negotiate as late a payment trigger as possible. On larger schemes you will need to factor in the possibility that not all of the development will be undertaken (either at the same time or at all). It may be appropriate, therefore, to phase the payments.

The LPA will often require any financial contributions to be index-linked (to account for payments not being made at the date of the Section 106 Agreement). Ideally, index-linking should only take effect after the implementation of the planning permission to which the agreement relates.

Timing of obligations

If, in fact, there are obligations to be complied with prior to certain stages (for example, on commencement of works on site or on occupation of the units on site) then the developer should check that these will not cause a problem.

Check which obligations take effect from the date of the s106 Agreement (such as payment of the LPA's legal fees) and those which should be expressed to take effect only at a later date: for example, on implementation of the planning permission.

Any definition of "implementation" or "commencement" or carrying out of a "material operation", should exclude all necessary preliminary works and activities which the developer would want to carry out on the site without triggering any obligations under the Section 106 Agreement.

Where obligations are to be triggered part way through a development, it is important to ensure that they are not forgotten. It is not unheard of for everyone (including the LPA) to forget about an obligation. The issue often surfaces when a buyer is undertaking its due diligence – sorting out late compliance can delay the sale or even scupper it. Developers should put in place suitable diary reminder systems.

Planning permission

The developer should obtain a copy of the draft planning permission that is proposed to be issued on completion of the Section 106 Agreement, and the developer's planning solicitors and consultants should check the draft planning permission and any conditions attached to it. Whilst we all concentrate on the finer details of the Section 106 Agreement, planning conditions are equally important and, if they are unclear or unduly onerous, they may make the development unviable.

Costs

LPAs will normally require their costs associated with the Section 106 Agreement to be paid by the developer on completion of the Agreement. These will be their legal costs and perhaps monitoring and/or administration costs. The exact amounts of these costs should be stipulated in the Section 106 Agreement so that the developer has certainty as to what it will be required to pay.

Binding effect

The developer will want to ensure that the terms of the Section 106 Agreement do not continue to bind it after it has disposed of its interest (in whole or, as appropriate, in part) in the site to a successor, and drafting should be included to cover that point.

Breach

When entering into a Section 106 Agreement, developers should be aware that LPAs have a variety of enforcement mechanisms open to them if development is carried out in a way which breaches the Section 106 obligations. Structures might have to be demolished in extreme cases.

Community Infrastructure Levy (CIL)

It is beyond the scope of this briefing, but we should mention CIL. CIL, as we have seen already, is relevant to the position of Section 106 Agreements. It is a new charge which local authorities can choose to levy on most new developments in their area, in order to secure funding for local and sub-regional infrastructure. An LPA does not have to introduce CIL to fund infrastructure. If it does (and it is expected that most will) then there will be restrictions on the pooling of Section 106 obligation funds for off-site infrastructure, although it will be possible to continue to use Section 106 Agreements for wholly site specific mitigation. If it decides not to introduce CIL then, although an LPA will still be able to use Section 106 Agreements, from Spring 2015 there will be the same restriction on the use of pooled contributions for off-site infrastructure improvements.

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