A Beginners Guide to S106 Planning Obligations

11th April 2024

Geldards LLP

Outline

- Types of obligations
- Formalities
- Limitations
- Other powers
- Policy position – PPW/TAN
- Parties / 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
- A 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

- s111 Local Government Act 1972
  - Is this calculated to facilitate, or conducive or incidental to, discharge of a function?
- s24 Local Government and Elections (Wales) Act 2021
  - 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 s111, LGA 1972 or s1, LA 2011 (equivalent to s24, LGEWA 2021)
- *R (Khodari)* v Royal Borough of *Kensington and Chelsea (2017)*
  - Parking permit free flats = personal obligation
  - Original party bound as contractual obligation

Planning Policy Wales

- PPW and NDF only include examples of areas where s106 obligations may be useful:
  - Biodiversity
  - Public transport
  - Active travel networks
  - Remediation

Circular 13/97

- Principal policy - obligations only sought if:
  - Necessary
  - Relevant to planning
  - Directly related to the proposed development
  - Fairly and reasonably related in scale and kind to the proposed development
  - Reasonable in all other respects
- Conditions preferred over planning obligations

Circular 13/97 (cont…)

- Planning obligations can remedy genuine planning problems and enhance the quality of development
- Local plan policies will provide the basis for justifying s106 obligations
- Policies must make clear LPA will take account of site specific circumstances

Competing policy demands

- R *(Working Title Films Ltd) v Westminster City Council (2016)*

  - Provision of community hall compensated for under-provision 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

- s106(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
- Does the LPA's land need to be bound?
- 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

- HMRC 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 s106(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

- s106A:
  - By agreement (executed as a deed)
  - On application to LPA (after 5 years)
- s106B – appeals re s106A applications
- Commonly used for s.73 applications

Enforcement

- Joint and several liability
- Exemptions?
- If releasing a party from liability ensure remains 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*

geldards

Charles Felgate
Partner

+44 (0) 29 2039 1858
charles.felgate@geldards.com

Gareth Aubrey
Associate

+44 (0) 29 2039 1763
gareth.aubrey@geldards.com

Tomos Phillips
Senior Associate

+44 (0) 29 2039 1787
tomos.phillips@geldards.com

geldards

Thank You

www.geldards.com
info@geldards.com