

The Legal Issues of Renegotiating Planning Agreements

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Matters to be covered

- Current context
- Why renegotiate?
- S106 – the legal formalities
- Varying Section 106 – the different approvals
- Issues that might arise
- Some real examples

Current context

- Economic downturn
- Planning Policy Statement 3: Housing – Paragraph 29 – Targets should “Reflect an assessment of the likely economic viability of land for housing within the area, taking account of risks to delivery and drawing on informed assessments of the likely levels of finance available for affordable housing, including public subsidy and the level of developer contribution that can reasonably be secured
- Circular 05/2005 – Planning obligations should not be used purely as securing a share in the profits of a development
- Court of Appeal decision in *Blyth Valley* – Quashing affordable housing target based on housing need evidence alone with no robust credible evidence of viability
- Homes and Communities Agency – Investment and planning obligations: Responding to the downturn good practice note
- Atlas Guide – Planning obligations in the downturn

Responding to current market conditions

■ Adverse Issues

- Reduced Completed Development Values
 - Uncertainty from absence of market
- Deferral of values by extended sales periods
 - Few purchasers with funds
- Expectation of higher profits to reflect risk
 - Banks reluctance to lend
- RSLs reneging on shared ownership purchases

Why renegotiate?

- Unlock stalled schemes
- Affordable Housing NOW
 - Variation of percentages
 - De-pepperpotting
 - Tenure mixes
 - Assistance from HCA
- Cash flow
 - Delay payments/ public works
 - Delay affordable housing
- Overall viability
 - Financial appraisal
 - Index linked contributions/ AH

Why renegotiate?

- What will it achieve?
 - Earlier development
 - More profits when market resumes?

Part of a wider strategy:

- Granting permissions with lifetimes longer than 3 years
- Renewing existing consents
- Securing some affordable housing
- Part of package of measures with Homes and Communities Agency

Section 106 – The legal formalities

- May be by an agreement “or otherwise”
- Must be a deed and
 - State that it is a planning obligation
 - Identify the land in which the person has an interest
 - Identify the person and states his interest
 - Identify the local planning authority
- May release the party if it no longer has an interest in the land
- “Specified” means specified in the instrument by which the obligation is entered into
- May not be modified or discharged except
 - By agreement as a deed OR
 - By application under S106A (after 5 years.)

Statutory Powers

- Any person interested in land may enter into an obligation:-
 - Restricting the development or use of land
 - Requiring specified operations or activities to be carried out
 - Requiring land to be used in specified way
 - Requiring sums to be paid at specified times
- The agreement may be:-
 - Conditional or unconditional
 - Specify permanent, temporary or periodic
 - Specify fixed or calculable sums for payment
 - specified period or indefinite
- Enforceable against
 - Person entering into the obligation
 - Any person deriving title from that person

Varying Section 106 Agreements Statutory Provisions - Section 106A and Section 106B

- A planning obligation may not be modified or discharged except:-
 - By a DEED of agreement between the enforcing authority and ALL persons against whom it may be enforced: S106A (1)
- OR
 - By an application made by a person against whom it can be enforced: S106A (3)
 - Made not less than 5 years after the date of the obligation
 - In accordance with regulations governing
 - Form of application
 - Publicity
 - Procedures for determination
 - Subject to a right of a appeal to the Secretary of State

Regulations

- Regulations relate to S106A (3) applications only
- TCP (Modification and Discharge of Planning Obligations) Regulations S1 1992 No 2832
 - Application on prescribed form (not 1APP)
 - Location
 - Sufficient detail to identify obligation
 - Reasons for application
 - Other information required by LPA
 - Map
 - Other information provided by applicant
 - Notice to be served on any other known person against whom the obligation may be enforced
 - Certificate
- LPA must publicise like a planning application
- LPA must give notice within 8 weeks
- Applicant may Appeal to Secretary of State

Modifications Material considerations in S106A (3) applications

- Applicant may not propose any modification that has the effect of imposing any other person against whom the obligation is enforceable
 - Joint applications required
- LPA may decide
 - Obligation should not be modified
 - Obligation no longer serves a useful purpose and may be discharged
 - Obligation still has purpose but that purpose would equally well be served if modified in accordance with the application
- If modified deemed to have been made on the date that the notice was given to the applicant
 - New 5 year period begins?

Modification variation by agreement S106A (1)

- No formal application required – no right to make one
- No regulations apply
- No publicity requirement
- Only stipulation is that the agreement must be between the LPA and ‘person or persons’ against whom the obligation is enforceable
- Anomaly
 - applicant has a right under S106A (3)
 - formal transparent procedures
 - applicant has no right under S106A (1)
 - no procedures
 - no transparency, but consider GDPO 1995 Reg 25
 - human rights/natural justice

Modification by forbearance or informal agreement

- LPA agrees not to enforce S106
 - E.g. public open space delayed to allow land to be used as builders compound
- Cannot be binding if done informally
 - S106A (2) requires a deed
- Estoppel
- Aggrieved third parties
- Variation clauses in the S106:-
 - “Except with the written agreement of the LPA....”
 - No specific power in S106
 - Does not appear in model form
 - Appears in very many S106 agreements
 - No more than a statement of the obvious BUT
 - Can only be given legal effect under S106A

Variation of/by unilateral undertakings

- Unilateral undertakings cannot be used to release or vary existing planning obligations
 - General contract law
 - Does not comply with S106A
- Unilateral undertakings may be used to
 - Increase obligations
 - E.g. to add additional affordable houses to an existing scheme
 - Novate obligations
 - E.g. to support Section 73 applications
 - Extend obligations

Modification of Section 52 Agreements

- TCPA 1970 Section 52
 - Plus Section 106 agreements before 25 October 1991
- No provisions for modification
- Restrictive covenants may be varied:-
 - Application to the Lands Tribunal
 - Law of Property Act 1925 Section 84
 - NOT available for post 1991 obligations (S106(10))
 - Lands Tribunal to decide if still necessary
- Section 106A not applicable to vary Section 52 agreements
- Section 52 Agreements cannot be varied under Section 106
 - Entirely different beast
- Solution would appear to be revocation and substitution with a new Section 106

Subsequently fragmented site - Parties to a S106A deed of modification

- Meaning of
 - “planning obligation”
 - “person against whom it is enforceable”
 - The document OR
 - The specific obligation
- Wording of Section 106
 - (1) Any person..
 - May by agreement or otherwise
 - Enter into an obligation
 - (6) The *instrument* by which the planning obligation is entered into may provide...
 - (9) A planning obligation may not be entered into except by an *instrument*....
 - (10) A copy of any such *instrument*....
- Enforceable against “any person deriving title”

Example: Changing affordable housing obligations

- Planning Obligation (2007) for mixed site specifies
 - Mix/price/tenure/delivery programme/pepperpotting
- Developer wishes to sell the houses currently under construction to an RSL
 - Different mix/price and not pepperpotted
- Scenario 1
 - No open market sales
 - No third party interests in the land
 - Parties to deed of modification clear
 - Who should be consulted?
- Scenario 2
 - Various open market purchases
 - Who needs to be a party to the modification
 - Who should be consulted

Modification of affordable housing obligation

- Against whom is it enforceable?
- “Plots 34 to 45 shall not be used for any purpose other than affordable housing”
 - Could only be enforced against owners of those plots
- “No more than 20 open market dwellings shall be occupied until the affordable housing has been provided”
 - Can be enforced against whole development
 - May be enforceable against all buyers if 20 exceeded and the “offending 21st” cannot be identified
 - Consider effect of “This deed shall not be enforceable against any person purchasing an individual dwelling for his own occupation.”
- Who needs to be parties?
 - Controversial
 - Need to be decided by the courts

Other Issues

- Viability
 - Land values (historic/current?)
 - Level of profit – depends on risk
 - Willingness to be transparent
- Phased Developments
 - Relax first phase
 - Review subsequent phases later
- Claw-back/Overage
 - Is this appropriate?
 - How is it calculated/When is it payable?
 - How is it secured?
- Requiring development to commence

Some real examples

- Slough Borough Council
- Norwich City Council
- Ashford Borough Council
- Plymouth City Council

Slough Borough Council

- Cabinet decision – 19 January 2009
- In exceptional cases, renegotiation may be considered where:-
 - Schemes are half built and in administration
 - Lack of progress is hindering the generation
 - Lack of progress is causing an eye sore
- Otherwise Agreements to be left unchanged awaiting upturn or alternative proposals
- Open book appraisals essential
- Relaxation of provisions strictly time limited

Norwich City Council

- Executive Committee – 4 February 2009
- Criteria for determining priorities for competing funding requirements
- If all requirements cannot be met, independent open book appraisal required
- Costs and values to be based on current prices
- Developers profit 18 – 20% on market housing and 6% on affordable housing
- Reappraisal if a scheme does not commence within 1 year
- Overage clause if larger profits than anticipated

Ashford Borough Council

- Planning Committee – 10 February 2009
- Deferred payment of contributions if development not financially viable
- Combination of initial contributions, deferred contributions and a capped total contribution
- Increases based upon actual sale prices compared with base sale prices
- Payable in phases
- Borough Council to hold monies on behalf of County and other bodies

Plymouth City Council

- Market recovery action plan
- October 2008
- Relaxations considered on site by site basis
- Greater concessions for brownfield
- Time limited (2 year), and linked to commencement
- Overage
- Personal consents (?)