

Landmark  
CHAMBERS

## SECTION 106 AND CIL

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## Overview

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- This talk will cover the following topics:
- Modification and discharge under s.106A TCPA 1990
- The difference in approach to affordable housing (“AH”) obligations under s.106 BA TCPA 1990
- The relationship between CIL and section 106 post-April 2015.

## Amendments to Planning Obligations – SECTION 106A

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- (1) A planning obligation may not be modified or discharged except—
  - (a) by agreement between [the appropriate authority (see subsection (11))] 2 and the person or persons against whom the obligation is enforceable; or
  - (b) in accordance with
    - (i) this section and section 106B
    - (ii) sections 106BA and 106BC.
- (3) A person against whom a planning obligation is enforceable may, at any time after the expiry of the relevant period, apply to the appropriate authority for the obligation—
  - (a) to have effect subject to such modifications as may be specified in the application; or
  - (b) to be discharged.

## Amendments to Planning Obligations - General

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- A planning obligation can be re-negotiated at any time – s.106A(1) and Batchelor [2003] EWHC 3006 (Admin)
- An application to discharge or modify a planning obligation under s. 106A may only be made after the “relevant period” has elapsed: s.106A(3)

## Amendments to Planning Obligations - General

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- The “relevant period” is defined by s. 106A as either (i) such period as may be prescribed by regulations or (ii), in the absence of such regulations, five years.
- Since 28 Feb 2013, regulations have removed this limit (in England) for obligations entered into on or before April 6, 2010.

## Amendments to Planning Obligations - General

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- A local planning authority has a discretion to entertain an application prior to the expiry of the “relevant period” (see ***Batchelor***).
- A decision to refuse to renegotiate a planning obligation/consider an application to modify or discharge is amenable to judicial review challenge.

## Amendments to Planning Obligations - General

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- If an application is made, the authority may determine:
  - (a) that the planning obligation shall continue to have effect without modification;
  - (b) if the obligation no longer serves a useful purpose, that it shall be discharged; or
  - (c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications.

## Amendments to Planning Obligations - General

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- A decision to refuse an application under s. 106A(3) (i.e. a decision that a planning obligation “shall continue to have effect without modification”) may be appealed to the Secretary of State.
- Conversely, a decision to allow an application to discharge or modify a planning obligation will be amenable to judicial review.
- An appeal also exists for non-determination after eight weeks: reg. 6 of the 1992 Regulations.

## Amendments to Planning Obligations - General

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- Where the applicant seeks the discharge of a planning obligation, the test under s. 106A(6)(b) is whether the obligation *“no longer serves a useful purpose”*?
- Where modification is sought, the test under s. 106A(6)(c) is whether the obligation: *“continues to serve a useful purpose but would serve that purpose equally well if it had effect subject to the modifications specified in the application.”*

## Amendments to Planning Obligations - General

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- Therefore, the key questions are these:
  - What is the current obligation?
  - What purpose does it fulfil?
  - Is it a useful purpose?
  - And if so would the obligation serve the purpose equally well if had effect subject to the modifications
- Garden and Leisure Group [2003] EWHC 1605, at [28]

## Amendments to Planning Obligations - General

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- What is a “useful purpose” is very broad
- Per Sullivan J in Batchelor, it is a useful “planning” purpose. See also guidance in Circular 05/05 at para. A20 of Annex A.
- Per Ouseley J in Renaissance Habitat [2011] JPL 1209, doubts the need to imply “planning” into the phrase “useful purpose”. Therefore, scope for argument.

## Amendments to Planning Obligations - General

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- The useful purpose does not have to be related to the development in question (see **Renaissance** at para. 32)
- There is no reason why the useful planning purpose still being served should not be a different one from that which led to the agreement in the first place (see **Renaissance** at para. 33)
- If an inspector considers undertakings in a unilateral undertaking to be so unnecessary and so afforded little weight, the obligation may still serve a useful purpose and so be upheld: **Millgate** [2011] EWCA Civ 1062.

## Amendments to Planning Obligations - General

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- Successful Judicial review challenges to a refusal to discharge a planning obligation are therefore rare. **Batchelor** is an example.
- Refusal to discharge relied upon the same objection that was overturned by the Secretary of State in a previous appeal. Held that it was irrational for the LPA to refuse to modify the s. 106 agreement in those circumstances.

## Amendments to Planning Obligations - Overview

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- Overall:
- Time restriction on making an application has been significantly shortened (in England)
- The test on an application to modify/discharge remains the same: it is a high threshold to demonstrate that a planning obligation does not serve a useful purpose

## Amendments to AH obligations

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- An “AH requirement” is defined as a requirement:
- “relating to the provision of housing that is or is to be made available for people whose needs are not adequately served by the commercial housing market (and it is immaterial for this purpose where or by whom the housing is or is to be provided).”

## Amendments to AH obligations

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- Section 106BA inserted into the TCPA 1990 by the Growth and Infrastructure Act.
- Section 106BA distinguishes between a first application and a second application:
- On a first application, the authority must discharge or modify the AH requirement if the requirement means that the development is not economically viable s.106 BA(3)
- On a second application, the authority may discharge or modify the AH requirement or determine that is to have effect without modification s.106BA(4)

## Amendments to AH obligations

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- Section 106BC provides a right of appeal to the Secretary of State.
- If allowed, the outcome of a successful appeal would be a revised AH requirement in the s. 106 agreement for three years, starting on the date when the appellant is notified of the appeal decision.

## Amendments to AH obligations

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- In making a determination under s.106BA, the authority must have regard to the Secretary of State's guidance and representation made by the Mayor of London in applications to which s.106BB applies
- Secretary of State's guidance published in April 2013: Section 106 affordable housing requirements

## Amendments to AH obligations

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- Guidance:
  - - to encourage development to come forward, the aim is to remove the obstacle of “unrealistic Section 106 agreements.”
  - Applications should contained a revised affordable housing obligation (presumptive modification and not discharge) and should not be supported by relevant viability evidence
    - “does not prescribe a methodology for viability assessment, but reflects the differing approaches used in the industry.”

## Amendments to AH obligations

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- At paragraph 10: “the test for viability is that the evidence indicates that the current cost of building out the entire site (at today’s prices) is at a level that would enable the developer to sell all the market units on the site (in today’s market) at a rate of build out evidenced by the developer, and make a competitive return to a willing developer and a willing landowner.
- It is for the developer to demonstrate that the AH requirement makes the scheme unviable (para. 11)

## Amendments to AH obligations

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- Revised viability appraisals should use the methodology as close as reasonably possible to that provided in relation to the application for planning permission (para 17).
- It should make the same policy assumptions and assume that all other obligations remain the same (para. 18)
- Guidance is provided in annex A as to a number of relevant key variables – the list is not exhaustive, will vary significantly between schemes and locations.

## Amendments to AH obligations

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- Potential key variables set out in Annex A include and value (particularly if there has been an intervening onward sale), site preparation costs, abnormal construction costs (for example decontamination) and GDV (gross development value)
- In respect of GDV, sales prices should be those current at the time of the appraisal and assumed to remain static through all phases of the development programme.

## Amendments to AH obligations

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- On a successful appeal, modification is valid for only 3 years. If the development is not completed in that time, the original affordable housing obligation will apply to those parts of the scheme which have not been commenced.
- A revised AH requirement cannot be made to more onerous than the original requirement.

## CIL - RECAP

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- A mechanism for developer contributions.
- Purpose: to contribute towards the infrastructure needed to support the development of the area.
- Imposed as a charge per square metre of floorspace.
- Applies to planning permission granted for development that involves net increase in floorspace, subject to a number of exceptions.
- Not mandatory – although n.b. changes post April 2015.

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## Relationship between CIL and s. 106 post-April 2015



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- This is dealt with in regulation 123 – applies after April 2015 or once a local authority has adopted a charging schedule.
  - 1. Restriction on pooling planning obligations.
  - 2. Local authorities must produce a list of infrastructure which will be funded by CIL. Any infrastructure on that list cannot be funded through section 106. If no list is provided, once CIL has been adopted, no infrastructure can be funded through section 106.

## Pooling

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- A planning obligation cannot fund an infrastructure project, or type, if there are already five or more obligations funding this infrastructure or type.
- N.b:
  - Doesn't apply to affordable housing.
  - Applies when a planning obligation "entered into"
  - Obligations not agreements.
- Effect – indiscriminate tariff schemes unlikely to be lawful.

## ***Pooling – unlimited infrastructure projects?***

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- Is there a restriction on the number of infrastructure projects?
- How do you define an infrastructure project?

## ***Regulation 123 list***

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- Regulation 123(2) provides (in relation to post 6th April 2010 obligations):
  - *(2) A planning obligation may not constitute a reason for granting planning permission for the development to the extent that the obligation provides for the funding or provision of relevant infrastructure.*
- Regulation 123(4) defines "relevant infrastructure" as (a) the charging authority's website published list of projects or types of infrastructure it "intends will be, or may be" CIL funded, or (b) absent that list "any infrastructure".

## ***Regulation 123 – best approach***

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- Further way of preventing contributions to infrastructure being collected both by way of CIL and by way of a s. 106 agreement.
- Where the regulation 123 list includes a generic item (such as education or transport), section 106 contributions should not normally be sought on any specific projects in that category.
- Benefit in adopting a carefully focused and concise reg. 123 list

## *Golden Rules*

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- Strategic infrastructure – CIL; site specific mitigation – s. 106.
- Avoid double dipping.
- Transparency

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