

SECTION 106 OBLIGATIONS

CHALLENGES IN THE HIGH COURT¹

1. This talk addresses two separate issues:
 - a. challenges to planning permissions on the basis of the content and form of s.106 obligations; and
 - b. challenges to decisions to enforce planning obligations or to refuse to discharge/modify them.
2. Both issues have been the subject of significant recent case law arising, in part, from the economic downturn and a determined effort by developers to reduce their liabilities.
3. In respect of (a) above, this talk considers:
 - (1) The statutory requirements and formal validity;
 - (2) The requirement for s.106 obligations and conditions to reflect up to date policy *at the date of the grant*;
 - (3) The requirement for s.106 obligations to be drafted in such a way as to secure the delivery of that which they promise – and the scope for challenges based on inadequate contractual drafting;
 - (4) The otherwise broad discretion as to the content and form of s.106s.
4. In respect of (b) above, this talk considers:
 - (1) The scope for implication of contractual terms so as to limit the obligations under the S.106 and demonstrates that there is very limited such scope;
 - (2) The ability to force a council to modify or discharge a s.106 (during the initial five year period); and
 - (3) The factors which a Council is and is not required to take into account in deciding to enforce existing s.106 obligations.
5. It will be demonstrated that, following recent case law, the ability to imply terms, to force a council to discharge/modify and to challenge a decision to enforce are very limited.
6. It is appropriate to start by briefly referring to s.106 itself and s.106A.

Section 106

7. Section 106 of the Town and Country Planning Act 1990 provides, so far as relevant:

“(1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation enforceable to the extent mentioned in subsection (3)

¹ In writing this seminar, I have drawn, in parts, on previous seminars given by Tom Jeffries, Guy Williams and Charles Banner (all of Landmark) whose (much more detailed) talks are available on the Landmark website.

- (a) restricting the development or use of land in any specified way;
- (b) requiring specified operations to or activities to be carried out in, on, under or over the land;
- (c) requiring the land to be used in any specified way; or
- (d) requiring a sum or sums to be paid to the authority,... on a specified date or dates or periodically.

(2) A planning obligation may:

- (a) be unconditional or subject to conditions;
- (b) impose any restriction of requirement... indefinitely or for such period ... as may be specified;
- (c) if it requires a sum or sums to be paid, require the payment of a specified amount or any amount determined in accordance with the instrument by which the obligation is entered into....

8. Each provision of a s.106 obligation must fall within s.106(1)(a) – (d). If it is not, then it is not within s.106. Note s.106(2)(c) - which allows a sum to be set at the outset; or for it to be determined in accordance with the terms of the agreement. This distinction can be important in terms of the enforcement options available – see below.
9. S.106(3) provides that the obligation is enforceable by the LPA named in it. S.106(5) provides that it is enforceable by injunction. S.106(6) gives the LPA the power to enter the land in default to carry out the required operations and to recover the expenses “reasonably incurred”.
10. S106A provides mechanisms for the modification or discharge of obligations entered into under s.106 (on applications made more than 5 years after the s.106 is entered into) namely: (1) by agreement with the LPA; or (2) through an appeal under s.106B. If the obligation no longer “serves a useful purpose” then it shall be discharged. Case law demonstrates that the LPA may agree to discharge/modify before the 5 years has expired although there is no right of appeal within those 5 years.
11. S.106 agreements may be made by agreement “or otherwise” (unilateral obligations) but, however they are made, they are enforceable by the LPA and are only capable of being modified as set out above.

A: Challenging Planning Permissions – unlawful section 106 obligations or unlawful consideration of s.106 obligations

12. *Historically*, to the extent that they were “reasonably related” to the development (*Tesco v. SSE [1995] 1 WLR 759 at 779*) and, *now*, to the extent that they are necessary to make the development acceptable in planning terms (reg 122 of the Community Infrastructure Levy Regulations 2010), s106 obligations may be a relevant consideration in determining whether to grant permission. They are part of the package including the Permission. As we shall see if they are unlawful, the permission may be quashed.

The Statutory Requirements

13. Reg 122 now imposes the following legal requirements before a s.106 obligation can “constitute a reason for granting planning permission”². The obligation must be:
- (1) necessary to make the development acceptable in planning terms – the necessity test³;
 - (2) directly related to the development; and
 - (3) fairly and reasonably related in scale and kind to the development.
14. LPAs are required to give reasons for granting permission (and the report to committee or delegated report will set out in more detail what motivated the grant). If an LPA wishes to rely on a s.106 obligation as a reason for granting permission, the LPA must apply the above tests. If they adopt the former less stringent approach (in e.g. Tesco) and do not apply the necessity test, then they will have misdirected themselves in law and the consequent permission would be vulnerable to challenge.
15. Lesson: Councils must ensure they approach s.106 obligations and decision making fully aware of reg 122; and developers should ensure that s.106 obligations are only relied on by LPAs to the extent they are necessary. It may thus be necessary to distinguish between those parts of an obligation which meet the “necessity test” and those which do not.
16. However, it is not clear to what extent a failure to apply the necessity test will result in the permission being quashed on a claim by a third party because if the s.106 is not necessary in the reg 122(a) sense, then the Permission could/should have been granted without it. Consequently, the s.106 may be capable of being “severed” from the permission and the permission would survive.

Making sure the s.106 obligation reflects the position at the date of the permission

17. It is often many months or even years from:
- a. the resolution to grant to the actual completion of the s.106 and the grant of permission; or
 - b. the inquiry before an inspector and the ultimate grant of permission by the SoS.
18. It is essential that the s.106 (and conditions) reflects planning policy and the factual circumstances at the time of the grant and not at the time of the resolution or the inquiry.
19. Thus its terms must take into account material changes in circumstances in the intervening period.
20. A recent example of the problems which can arise from long delay between the decision in principle to grant and the final grant is *Hertfordshire County Council and North Herts DC v. Secretary of State for Communities and Local Government* [2011] EWHC 1572 (Admin) (“the HCC case”). There the gap was 5 years.

² This provision does not prevent developers offering and councils accepting s.106 obligations which are not necessary – what it prevents is any weight being given to such obligations in deciding to grant permission.

³ The necessity test in reg 122 gives statutory force to long standing SoS policy.

21. The SoS had held an inquiry into a major urban extension west of Stevenage in 2004/5. A hugely complex s.106 unilateral obligation had been submitted at the end of the inquiry and had gone through numerous changes over the following years in response to criticisms of its content and enforceability.
22. During that period, changes to planning policy both in the East of England Plan (“the RS”) and in local development plan documents had occurred which:
 - (1) introduced a wholly new requirement for on-site renewable energy generation - policy ENG1; and
 - (2) substantially increased the affordable housing requirements from major sites.
23. The S.106 unilateral (and conditions) did not reflect the up to date policy position.
24. The Councils challenged the permission (partly) on that basis – no reasons had been given by the SoS for not requiring compliance with ENG1 and inadequate reasons given one for not increasing the AH requirement to current policy compliant levels.
25. The claim relating to ENG1 succeeded. Having carefully reviewed the facts, the Court concluded that the SoS had simply failed to recognise the change in policy. ENG1 was a new policy which the SoS had to either give effect to through the s.106 and conditions or which he had to give reasons for not applying on the facts. The permission for 3600 homes was quashed on that basis⁴ (even though no party had mentioned ENG1 in any of the discussions about the s.106 and conditions and even though it was, on any view, a relatively minor issue in the overall scheme of the s.106 and conditions).
26. Lessons:
 - (1) delays between resolution and grant (and failure to address properly material changes of circumstance in that period) remain a fertile area for challenges;
 - (2) in the context of s.106 obligations (and conditions) it is necessary to review them against up to date planning policy and up to date circumstances *immediately prior to the grant*;
 - (3) it is not sufficient simply to address MCCs raised by the objectors or the Council. The s38(6) duty applies whether or not new policies are expressly brought to the attention of the decision maker;
 - (4) substantial changes in policy or the factual matrix should be expressly provided for in reformulated obligations and/or clear and compelling reasons for not doing so set out⁵; and

⁴ In respect of affordable housing, the change in policy had not been ignored and the reasons were (just) adequate to explain why the change in policy had not required changes to the AH provision.

⁵ Note that in the HCC case the fact that the formulation of the s.106 had been massively complex and time consuming did not mean that the Court could overlook the clear flaw in the overall package against current development plan policies.

(5) for those wishing to challenge a permission, testing the s.106 against current policies and circumstances lead to identification of strong grounds for challenge.

S.106 - Fit for purpose

27. Headline: A section 106 must, in fact, achieve that which the LPA/SoS thought it would achieve in deciding to grant permission on the basis of it. If the drafting does not achieve the purpose for which the obligation was required, then that may constitute a legal flaw in any decision to grant permission based on it.
28. The *HCC case* provides an example of this. In that case, the SoS had decided that it was necessary, in order to make the development of 3600 homes acceptable, that schools be provided on site, such schools being delivered in phases as dwellings were completed. As part of the schools strategy, temporary schools were to be provided in the early years. The developers put forward complex unilateral obligations which purported to secure the delivery of the temporary schools (“the Temporary Schools Accommodation Strategy” or “TSAS”). The TSAS went through various permutations over the five years when the S.106 obligations were being worked up following a minded to grant letter. Each time changes were required to make sure the obligations were enforceable and that they delivered.
29. The SoS finally granted permission on the basis that the social and community infrastructure including temporary schools would be delivered and that, despite HCC’s objections and concerns, the TSAS was fit for purpose.
30. Applying a standard approach to contractual construction (understanding the words used in their factual context – now with the added “commercial commonsense” approach from the very recent Supreme Court decision in *Rainy Sky SA v. Kookmin Bank* The Times 18th November 2011), the High Court held that the TSAS did not secure that which the SoS had assumed it would and which had motivated him to grant permission.
31. In short, the TSAS was so complex that *HCC* was able to point to plausible factual scenarios in which the TSAS would not bite and the obligation to provide temporary schools would fall away. If the SoS had taken into account those flaws in the drafting he would have had to have considered whether the S.106 was nonetheless fit for purpose. He had not done so. The permission was quashed on that basis.
32. Lesson: a robust testing of (especially unilateral) obligations to ensure that they deliver that which they promise is essential. Complex drafting (more normally associated with unilateral obligations) is a recipe for gaps being subsequently identified which undermine the fit for purpose credentials of the S.106 and the Courts, applying standard contractual principles to construction, will not be adverse to considering the detail of such gaps if the SoS has failed to do so.

S.106 – Unilateral versus Agreement

33. If possible, agreements are strongly to be preferred. They tend to be far less complex and less likely to be the subject of challenge than unilateral obligations. The error in respect of TSAS in HCC arose because of the complexity of the drafting which was in turn driven by the lack of an agreement.
34. Further, unilateral obligations cannot impose obligations on the LPA actually to provide the schools or other social infrastructure. This is where additional difficulties potentially arise. The way round this difficulty is for developers to deliver the social infrastructure themselves and then to offer it to the LPA or to offer (through the s.106) a fixed sum to deliver X, Y or Z (which the LPA is free to accept or reject on a take it or leave it basis. Historically, the SoS has been prepared to accept such unilateral arrangements on the basis that, as a matter of planning judgment, they are likely to deliver appropriate social infrastructure.
35. The *HCC* case demonstrates how reluctant the Courts are to dictate any particular form of s.106 obligation.
36. In that case, HCC and NHDC said they were willing to negotiate an agreement on the basis of parameters set out in the SoS's minded to grant letter. The developer contended that negotiations had failed. The public authorities claimed that this was because of basic flaws in the demands and approach of the developer. The SoS concluded that in such circumstances he was reluctantly willing to accept a unilateral obligation – agreement could not be reached. He was not prepared to apportion blame.
37. The unilateral obligation as drafted had the effect that the developer gave itself the option as to whether: (1) to deliver the infrastructure itself; or (2) to give HCC/NHDC specific pre-determined sums to allow them to deliver the infrastructure. Because of the detailed dispute resolution procedures and the lack of specifications in the s.106 itself, the result was that risk was transferred to HCC/NHDC. If the developer thought that the infrastructure would cost more than the pre-determined sums then the developer could unilaterally, in effect, force HCC to provide that infrastructure with it (HCC/NHDC) meeting any shortfall.
38. Further, HCC was, in effect, forced to accept the specification, location and design of e.g. schools offered to it by the developer or to submit to a third party dispute resolution procedure. It was given a “take it or leave it” choice (at the behest of the developer) which HCC claimed was inconsistent with its statutory duties and with the basic structure and purpose of s.106. It would never normally allow third parties to dictate to it what its schools would be like.
39. HCC thus challenged on the basis that where it was intended that social and community infrastructure be transferred to the public authority then it was necessarily the case that the delivery of that infrastructure had to be via a s.106 *agreement* not a unilateral. Further it was not legally possible for the developer to retain an option which passed risk to the LPA.
40. The Court did not agree. There were no words in s.106 itself suggesting such limitation and no reason to imply such a limitation on the availability of the unilateral route. On the Court's

approach, the SoS was entitled to conclude that the package (albeit with the potential for a “take it or leave it” ultimatum from the developer and the transfer of risk) was fit for purpose⁶ as a matter of planning judgment. Such a conclusion would only be capable of being challenged on *Wednesbury* grounds.

41. Lesson: whether to accept a unilateral obligation is likely to be a matter of planning judgment and there is no “in principle” extra limitation on the range of matters which can be provided through a unilateral obligation compared to an agreement⁷.

B: Enforcing S.106 Agreements – public law considerations

42. S.106A provides a mechanism for varying s.106 obligations (by agreement or through an appeal to the SoS) if the obligation no longer serves a useful purpose. The statutory right of appeal against the refusal of the LPA to discharge or modify only applies from 5 years after the date of the s.106. This talk does not concentrate on the issues which arise on such s.106A modification appeals but rather on: (1) the position of developers who claim material changes in circumstances requiring modification or discharge before the 5 years has expired; and/or (2) decisions of Councils to enforce unmodified s.106 obligations when circumstances may have changed.

43. It is necessary to consider first the legal nature of s.106 obligations.

The Legal Nature of s.106 Obligations

44. Fundamentally, once lawfully entered into, a section 106 agreement is a contract between the parties which falls to be construed according to ordinary principles of contractual construction: *Stroude v. Beazer Homes* [2006] 2 EGLR 115 at [38]⁸; *R (Millgate Developments Limited) v. Wokingham BC* [2011] EWCA Civ 1062 at [17], [22e], [22i] and [30].

45. This fundamental point naturally and inevitably substantially curtails the role of public law in enforcement and in discretionary (pre-5 years) decision as to whether to discharge or modify as demonstrated by recent case law.

46. If a s.106 obligation is lawful at the outset, it will be very difficult to pursue public law remedies to prevent its enforcement or to force its discharge.

Enforcement Options available to the LPA

⁶ It is to be noted that HCC would have taken this point higher if the Permission had not been quashed on other grounds and it remains to be seen whether the decision will be applied in the future in similar situations.

⁷ Although of course a unilateral cannot impose a positive obligation on a public authority to do a particular act or to accept a particular piece of infrastructure. The unilateral can though give the LPA the take it or leave it option if as a matter of planning judgement on the facts that it is acceptable.

⁸ The fact that the section 106 agreement is made in the context of the statutory provisions is, no doubt, part of the factual matrix against which it has to be construed, and so it should be construed so as far as possible in a way which allows the statutory provisions to operate but there are no special canons of construction for s.106 agreements. Further, by statute. Unilateral obligations are enforceable by LPAs as if they were a party to them.

47. By virtue of s.106(3) - (6), it is enforceable by the LPA.
48. By virtue of s.106(6) the LPA is empowered in the case of breach of a s.106 obligation to enter the land and to carry out the requisite works itself and then to recover the expenses “reasonably incurred”. Given the obvious scope for dispute and uncertainty as to whether expenses were reasonably incurred, LPAs are justifiably reluctant to use this self-help remedy: *London Borough of Waltham Forest v. Oakmesh Limited* [2009] EWHC 1688 Ch.
49. Alternatively, if the obligation is to pay a defined sum of money, a debt claim can be brought.
50. Where there is a breach of a restrictive covenant or a *Grampian* style obligation the normal remedy would be an injunction (*Avon County Council v. Millard* [1986] JPL 21).
51. Where there is a breach of a positive obligation, however, an LPA may have significant difficulties proving the requisite damage to it⁹. This is why it is appropriate always for there to be positive and negative obligations in respect of the same item: namely the developer will provide X (the positive obligation); the developer will not complete more than Y houses, until X is complete (the negative or *Grampian* style obligation). That allows the LPA to obtain an injunction for breach of the negative obligation¹⁰.
52. The position with which we are concerned is where a s.106 obligation requires X to be delivered; or £Y to be paid and that requirement has not been complied with. The LPA decides to enforce against the failure. Are there any contractual or public law defences to such enforcement or grounds for judicial review of the decision to enforce? This has been the subject of significant litigation in the recent past.

S.106 Legal Formalities complied with

53. The validity of a planning obligation requires only that the formalities are met, that it is for a planning purpose (including now meeting reg 122) and is not *Wednesbury* unreasonable: *Good v. Epping Forest DC* [1994] 1 WLR 376. Any challenge to it should be at the outset. A developer can hardly carry out development pursuant to the permission and then challenge the S.106 on the basis that the agreement it has entered into and which was necessary for the grant of permission was unlawful.
54. However, the first possible defence to enforcement of a s.106 is that on its face it is not in fact a s.106.
55. An obligation will only be within s.106 if it complies with all the formalities provided for in that section (entered into by person interested in the land, by deed, stating it is a s.106

⁹ The normal position under building contracts is that the damages are the costs of the claimant completing the works where the claimant intends to do the works (*Alfred McAlpine Construction v. Panatown Ltd* [2001] 1 AC 518) but statute already provides a remedy for council’s who wish to do the work (s.106(6)) and to entitle them to damages for breach of a positive obligation would appear to cut across that statutory formulation.

¹⁰ For full consideration of causes of action see Thomas Jeffries paper “Enforcement and Defences” Sept 2011

obligation, identifying the relevant land, the person interested and the LPA by whom it is enforceable). If these requirements are not met the obligation will not fall under s.106 and the remedies provided for in s.106 will not be available to the enforcing Council.

Changing Circumstances – relevance to enforcement

56. Many of the cases concern situations where things have moved on since the grant of permission and the developer considers that if a new application were to be pursued a less onerous s.106 obligation would be required (e.g. changing viability reduces need for AH).
57. Such is the case currently for many major developments where viability considerations have changed substantially since permission was granted. The Government has emphasised the need for flexibility in such circumstances – encouraging LPAs to renegotiate S106s to reflect current economic circumstances so as to assist in delivery. Modification and discharge applications under s.106A can be pursued to reflect the changed circumstances.
58. However as demonstrated below: (1) it is clear that there is no legal obligation for the LPA to modify or discharge s.106 obligations previously agreed if they continue to serve a useful purpose¹¹; and (2) unless and until modified or discharged the original s.106 obligation constitutes an enforceable contract.
59. Further there is no right to apply for a discharge or modification of an extant planning obligation for five years from the date of the obligation and a developer may find itself in a position where things have moved on (circumstances and economics have changed) but five years has not elapsed and the LPA is unwilling to re-negotiate - what then?

Implied Terms

60. Absent any provision within the s.106 itself to require/allow changes to the obligations if circumstances change¹², developers have sought to imply terms into the s.106 obligations to create some additional limitation on their exposure as circumstances change.
61. There are two main situations.
62. The first is where the obligation is to pay a given sum of money for X (e.g. highway improvements, education, public open space). Is the obligation to pay £Y, subject to an implied term that it only arises if the Council's expenditure on X is "reasonably" and "properly incurred"?
63. The second is where the obligation requires the Council to do X and the developer will pay it the costs incurred in doing so (e.g. manage a contract, deliver a highway scheme itself).

¹¹ For a full discussion of this issue see Charles Banner's talk on "The Modification and Discharge of Planning Obligations Oct 2011

¹² which are in any event highly unusual and almost impossible to draft in all but the most straightforward of cases

64. In the first situation, the recent case law is clear. There is no implied term: *Hampshire County Council v. Beazer* [2010] EWHC 3095 QB. In that case the developer was under various obligations to pay fixed sums for given categories of expenditure at given triggers.
65. Part of the obligation was to fund part of the Fleet Inner Relief Road. The s.106 contemplated the possibility that the Council may decide not to build that road but to carry out alternative highway related schemes. In the event the Council pursued alternative schemes.
66. Subsequently, the developer sought repayment of the fixed sums on the basis that the expenditure incurred by the Council was unreasonable or not properly incurred in that, for example, the internal fees and administrative costs on the alternative schemes had been too high.
67. The Council said that as long as it had spent the contributions for the purposes specified in the s.106 agreement and had complied with its public law duties (acted rationally, acted bona fide etc.), there was no basis for repayment. There was no implied term to the effect that the sums actually spent were reasonably and properly spent and repayment could only be ordered if the Council's had been irrational in the *Wednesbury* sense in incurring the costs – a much higher standard than a “reasonably incurred” test.
68. The Court found for the Council. The Court will interfere with a local authority's exercise of its statutory discretion in expending monies only to the extent that it may have acted unreasonably (in a public law sense) or in bad faith or for an improper purpose. The public authority was bound only by its public law duties as to how to spend the fixed sums paid to it under a s.106.
69. The Lesson: if a developer wants to have control as to how its contributions are spent then mechanisms must be drafted into the agreement at the outset. It is highly unlikely that a council will be found to have acted unlawfully in a public law sense in choosing how to spend the contributions once paid.
70. In the second situation (as yet untested in the Courts) it is considered that terms will be implied. Take a situation where the s.106 agreement obliges the Council to procure and build a highway and for the developer to reimburse the costs incurred. That is a contract for services – the council providing services to the developer. It is considered likely that in such circumstances, either the common law or s.12(1) of the Supply of Goods and Services Act 1982¹³ will imply a term that the services be provided with reasonable care and skill. If they are not, then it is difficult to see why the developer should be liable to pay them. Thus if the Council does not deliver a reasonable standard of service then it may find itself unable to sue for the full costs actually incurred by it. This proposition remains to be tested.

¹³ A local authority is specifically included in the definition of “in the course of a business”: s.18.

71. The Lesson: councils will want to try to exclude the operation of the 1982 Act (as they are empowered to do under s.16). Whether this is likely to be acceptable to the developer is doubtful. Absent such exclusion, the Council will prefer to have a defined sum in the s.106 not tied to any particular standard of provision or to require the developer to procure the infrastructure itself.
72. Subject to any implication of terms, the only route for developers to prevent enforcement of the full terms of a s.106 obligation is through a public law challenge to the decision to enforce or a public law defence to the enforcement.

A Public Law Decision¹⁴

73. In order for a public law challenge to be raised there must be a justiciable public law decision.
74. There are two possible public law decisions:
- a. A decision within the five years not to accept an application to modify or discharge a s.106 obligation is a public law decision: *R (Batchelor) v. North Devon DC* [2003] EWHC 3006 Admin;
 - b. The decision to enforce may itself be a public law decision (*R (Renaissance) v. West Berkshire DC* [2011] EWHC 242 Admin).
75. In order to generate a public law decision, a developer wishing to re-negotiate s.106 obligations and/or to avoid enforcement under a s.106 (but who does not have the s.106A option) would be well advised to:
- a. check all formalities;
 - b. check whether obligation has taken effect – if not a new permission with less onerous s.106 obligations can be sought;
 - c. set out a detailed critique in current circumstances of the existing obligation and submit to LPA with a request for a reasoned decision as to whether they will revise the s.106 voluntarily (even though not bound to under s.106A - because for example the 5 years has not expired; or the agreement still serves a useful purpose even if not the purpose for which it was entered into);
 - d. test the response from the LPA against normal public law principles;
 - e. LPAs should treat such applications for reasoned justification with caution.

Refusal to consider modification/discharge

76. A refusal to consider discharge/modification when there is no statutory obligation to do so and when the obligation continues to serve a useful purpose¹⁵ (even if very different from and a less useful purpose than that which subsisted at the time of the obligation) will be very difficult to challenge.

¹⁴ For a more detailed consideration of these issues please see the seminar paper by Guy Williams - "Public Law challenges to Planning Obligations" Oct 2011 on which I have drawn in preparing this paper.

¹⁵ Which case law shows is a very low test.

77. The question is not whether the Court thinks that the Council should have considered modifying or discharging the obligation but whether the Council has acted irrationally in not agreeing to modify or discharge: *R (Batchelor) v. North Devon DC* [2003] EWHC 3006 Admin at [29].
78. *Batchelor* was an extreme case where that high hurdle was met – it is the exception not the norm. Unless a developer can point to a straight forward public law error it is highly unlikely that the Court will intervene.
79. In that case there was a clear public law irrationality.
80. On an earlier related planning permission, a s.106 safeguarded some land as open space. That development could not be built out because of a misunderstanding as to the extent of highway land available and required for the development. The developer therefore applied for a new permission to build over some of the safeguarded open space. Permission was granted by the SoS on the basis that the loss of open space would not cause harm. The developer therefore applied to the LPA less than 5 years after the s.106 had been entered into to discharge that part of the s.106 obligation re: open space to allow the development to be built out. The Council refused on the express basis that the requirement for open space still served a useful purpose because it made a significant contribution to the character and appearance of the area. This conclusion was directly contrary to the SoS's conclusions. Sullivan J held that this conclusion was irrational. That same issue had been addressed by the SoS and the Council could not simply stick to its original view (note the close parallels with *Powergen*).
81. Lesson: challenges to refusals to modify/discharge will face formidable hurdles if the obligation continues to serve a useful purpose. As shown below, that is a very low threshold.

Continue to serve a useful purpose – does that purpose have to be connected to any particular effect of the development?

82. A key question for the Council will be what useful purpose the contribution continues to serve. If the current purpose is not connected with a particular effect of the development in respect of which the S.106 was entered into, can the useful purpose test still be met? The answer is clearly yes: *R (Renaissance Habitat) v. West Berkshire DC* [2011] EWHC 242 Admin.
83. In that case, planning permission was granted for residential development and a s.106 was entered into to mitigate the impacts. The fixed sum contributions were calculated by reference to supplementary planning guidance (“SPG”) in force at that time.
84. That SPG was subsequently heavily criticised in other cases and extensively rewritten. The result that the requirements for various contributions were significantly reduced from those in force at the time of the entering into the s.106 obligation. The developer refused to pay the sums due under the s.106 and the Council sued. The developer sought to rely on the changes to the SPG in a judicial review of the decision of the Council to sue for the outstanding contributions (an unusual and rather surprising approach). Its argument was

(basically) that the Council could not lawfully demand the full amount given the subsequent changes in the SPG which showed what was the current extent of the “purpose”.

85. The developer was given short shrift by Ouseley J. The Council was simply seeking to enforce an agreement which was lawful when made. The developer had not contested the merits of the obligations at the application stage. If the developer had considered the LPA’s demand at application stage to be excessive or unlawful it could/should have refused to offer the requisite obligations and instead have appealed and challenged the SPG at that stage. It could not carry out the development pursuant to the permission and then complain of the s.106 which was intrinsic to the permission.
86. The wording of the s.106 was clear and the parties had not made provision for what would happen if the SPG or other circumstances changed. “It would be very strange indeed if enforcing the agreement was unlawful in those circumstances”.
87. More importantly for present purposes, the lawfulness of enforcement did not depend on the lawfulness of the calculations or methodology in the SPG or in deciding the figures in the s.106. The final agreement simply contained the sum which was to be paid. The sums were lawfully demanded because the developer had agreed in a contractually binding document to pay them.
88. The fact that the SPG was subsequently changed because of errors in it did not make the agreed contributions unlawful.
89. As a matter of straightforward contractual law, the s.106 properly construed required contributions to be paid even if/when circumstances changed. Thus on the facts, even though the sums claimed were in respect of particular educational provision, and even though the circumstances re: education had changed significantly such that the development did not itself trigger any need for educational investment by reason of changed circumstances, that did not mean the education contribution was not payable. The Council was entitled to hold the developer to the agreement.
90. This case is a very strong re-affirmation of the contractual force of s.106 obligations and illustrative of the very limited way in which public law intrudes into this area. An obligation can still serve a useful purpose even if the purpose which originally motivated the obligation does not subsist and even if the link with the development has, by reason of changes in circumstances, ceased.
91. Lesson: any developer wanting to ensure that the sums are tied to specific projects and only in so far as the need for those projects continues to arise only from the development, needs to so provide in the s.106 itself. No terms will be implied to that effect and public law will offer no substantive protection either.

Decisions to enforce/ refusal to modify discharge – obligation to revisit planning merits?

92. Closely linked to the logic of *Renaissance* is the question as to whether there is an obligation on the Council to revisit the planning merits (or the policy tests in 05/05 or the development plan) in deciding whether to enforce or discharge a planning obligation.
93. The answer is that there is no such obligation: *R (Millgate Development) v. Wokingham BC* [2011] EWCA Civ 1062.
94. The essential facts are as follows. The Council refused permission on design grounds and lack of s.106 contributions. On appeal, the developer provided all the required s.106 obligations. Permission was granted by the SoS but the inspector noted that the Council had not satisfied the 05/05 tests and had not produced any evidence as to why the contributions were necessary. The result was that the contributions were unnecessary and the Inspector therefore accorded the s.106 limited weight. Naturally, the developer asked for the s.106 to be discharged. The Council refused. All the relevant departments had confirmed that the contributions remained “necessary”.
95. The Court of Appeal held that the obligation became enforceable on its own terms on implementation of the planning permission. At that point it was a binding enforceable contract.
96. The Inspector’s approach on lack of evidence of necessity did not demonstrate that the s.106 was unlawful. It clearly was not – all the statutory requirements were met. It was entered into for a legitimate purpose. The fact the Council had not demonstrated that it was necessary did not make it unlawful. There is nothing to prevent developers offering and councils accepting unnecessary s.106 obligations (although of course it would now be unlawful to rely on an unnecessary s.106 as a reason for granting permission (reg 122)).
97. The Council was entitled to enforce without analysis by them at the enforcement stage of the planning merits of the obligation. The decision to enforce was simply a decision to enforce a contractual undertaking. The enforceability of the undertaking could not now be challenged on the basis that when it was made there was insufficient nexus with the proposed development. The conclusion that the obligation still served a useful purpose was not irrational.
98. Further, there was no requirement to apply s.38(6) of the 2004 Act to the decision to enforce and there was not need to revisit development plan policies. Public law did not therefore impinge to any significant extent on the enforcement decision.
99. Lesson:
- a. Developers who offer s.106 to an inspector but want to protect against s.106 obligations being found by the inspector to be unnecessary should insert conditional clauses in the s.106 obligations – “if and to the extent that the SoS considers such obligations to be necessary as expressed in his decision on the appeal, clause X will be operative upon implementation of the Permission”.

- b. More fundamentally, the threshold for challenges is very high. It has to be shown that the Council could not rationally form the view that the obligation continued to serve a useful purpose. Given that that purpose is not limited to the original purpose or to the specific issue arising from the development which made the s.106 necessary in the first place, the scope for such challenges is very limited;
- c. Once there is a refusal to discharge, the issue of enforcement does not trigger a requirement to go through the planning decision making process (s.38(6)) again.

Conclusion

- 100. It can thus be seen that the scope for public law challenges to: (1) a refusal to discharge or modify the s.106 within the 5 years; or (2) a decision to enforce will only succeed in the most extreme cases.
- 101. An LPA simply has to identify a useful purpose which is subsisting and is entitled to rely on its contractual rights even if circumstances have fundamentally changed.
- 102. If one considers, s106 obligations as first and foremost contractually binding obligations, then the result reached should come as no surprise.

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