The modification and discharge of planning obligations

Charles Banner ©

Introduction

1. In the current economic climate it is unsurprising that developers are showing a greater interest in looking at ways of minimising their liabilities under existing planning obligations. It is equally unsurprising that local authorities are concerned to ensure that developers who, when seeking planning permission, have committed to make contributions towards local infrastructure, are held to their word unless there is a sufficiently compelling and lawful justification for revisiting those obligations.

2. The modification and discharge of planning obligations is governed by s.106A of the Town and Country Planning Act 1990 (**"TCPA1990"**). As amended, it provides as follows:

> "**Modification and discharge of planning obligations.**
>
> (1) A planning obligation may not be modified or discharged except—
> (a) by agreement between the appropriate authority (see subsection (11)) and the person or persons against whom the obligation is enforceable; or
> (b) in accordance with this section and section 106B.
>
> (2) An agreement falling within subsection (1)(a) shall not be entered into except by an instrument executed as a deed.
>
> (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.
>
> (4) In subsection (3) "the relevant period" means —
> (a) such period as may be prescribed; or
> (b) if no period is prescribed, the period of five years beginning with the date on which the obligation is entered into.
>
> (5) An application under subsection (3) for the modification of a planning obligation may not specify a modification imposing an obligation on any other person against whom the obligation is enforceable.
>
> (6) Where an application is made to an authority under subsection (3), 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.

(7) The authority shall give notice of their determination to the applicant within such period as may be prescribed.

(8) Where an authority determine that a planning obligation shall have effect subject to modifications specified in the application, the obligation as modified shall be enforceable as if it had been entered into on the date on which notice of the determination was given to the applicant.

(9) Regulations may make provision with respect to—
(a) the form and content of applications under subsection (3);
(b) the publication of notices of such applications;
(c) the procedures for considering any representations made with respect to such applications; and
(d) the notices to be given to applicants of determinations under subsection (6).

(10) Section 84 of the Law of Property Act 1925 (power to discharge or modify restrictive covenants affecting land) does not apply to a planning obligation.

(11) In this section "the appropriate authority" means–
(a) the Mayor of London, in the case of any planning obligation enforceable by him;
(aa) the Secretary of State, in the case of any development consent obligation where the application in connection with which the obligation was entered into was (or is to be) decided by the Secretary of State;
(ab) the Infrastructure Planning Commission, in the case of any other development consent obligation;
(b) in the case of any other planning obligation, the local planning authority by whom it is enforceable.

(12) The Mayor of London must consult the local planning authority before exercising any function under this section."

3. This gives rise to the following key questions:-

(1) When can a developer apply to modify or discharge a planning obligation?

(2) What is the procedure to be followed?

(3) What principles should be applied in considering whether a planning obligation *"no longer serves a useful purpose"* or *"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"*?

Timing

4. An application to discharge or modify a planning obligation under s.106A may only be made after the "relevant period": see s.106A(3).

5. The "relevant period" is defined by s.106A(4) as either (i) such period as may be prescribed in regulations or (ii) in the absence of such regulations, five years beginning with the date on which the obligation was entered into.

6. No regulations have been passed to provide for a period other than the default of five years. Paragraph A18 of Annex A to Circular 05/05 *Planning Obligations* explains why:

> "The Secretary of State has decided not to prescribe a relevant period. It would not be reasonable to allow an obligation to be reviewed very soon after it had been entered into. This would give no certainty to a local planning authority which had granted planning permission on the understanding that a developer would meet certain requirements. Other affected parties might also be disadvantaged by allowing obligations to be swiftly brought to an end. On the other hand, where over a period of time the overall planning circumstances of an area have altered it may not be reasonable for a landowner to be bound by an obligation indefinitely. Allowing the five year period to stand appropriately reconciles these various considerations."

7. Accordingly, the right to invoke the s.106A procedure and the right of appeal under s.106B (discussed further below) applies only where the planning obligation is at least five years old.

8. However, in ***R (Batchelor Enterprises Ltd.) v. North Dorset DC*** [2004] J.P.L. 1222, Sullivan J indicated that a local planning authority nonetheless has <u>discretion</u> to entertain an application to modify or discharge prior to the expiry of the five year period, and that an irrational failure to do so would be amenable to judicial review. At paras. 27-30 he held:

> "27. It is clear from the terms of section 106A(1)(a) that the local planning authority has a discretion to consider a request or an application that it should agree to a modification of an obligation notwithstanding the fact that the five-year period has not elapsed. It is common ground that there is a distinction to be drawn between an application made within the five-year period under sub-section 106A(1)(a) and an application made after the expiration of the five-year period under section 106A(3) . In the latter case the local planning authority is bound to determine the application within a prescribed time, and if it fails to do so or if it refuses the application, an appeal may be made on the merits to the Secretary of State who may substitute his

view for that of the local planning authority. In the former case, the local planning authority has a discretion.

28. On behalf of the defendant, Mr Harrison rightly conceded that this discretion is not unfettered. It must be exercised to further the aims of the statutory scheme, that is to say for planning purposes, and must not be exercised in a manner that is Wednesbury unreasonable. Thus, for example, it would be unreasonable for a local planning authority to refuse even to consider a request made under section 106A(1)(a) simply because it had been made within the five-year period.

29. It is accepted that the question to be considered by the local planning authority in each case is the same: does the obligation still serve a useful planning purpose? Since the court in judicial review proceedings may not substitute its own answer to that question for that of the local planning authority, the question in relation to an application for judicial review in respect of a local authority's decision under section 106A(1)(a) is whether a reasonable local planning authority could have concluded that the obligation still served a useful planning purpose."

9. The same approach was followed by the High Court and Court of Appeal in ***R (Millgate Developments Ltd) v. Wokingham BC*** [2011] EWCA Civ 1062**.**

10. As Sullivan J made clear in the passage quoted above, where a local planning authority refuses an application to modify or discharge a planning obligation prior to the expiry of the five year period, there is no right of appeal to the Secretary of State under s.106B. The only remedy is judicial review on public law grounds. The scope for challenges of this nature has been discussed by Guy Williams in his earlier presentation.

Procedure

11. The procedure for the making and determination of applications under s.106A is governed by SI 1992/2832 The Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992 (**"the 1992 Regulations")**.

12. The key elements of this procedure to note are:-

(1) The application must be submitted on a form provided by the local planning authority which shall require the information specified by Regulation 3 of the 1992 Regulations, including a statement of the applicant's reasons for applying for the modification of discharge. The application form must be accompanied by a map identifying the land to which the obligation relates.

(2) The applicant is required to give notice of the application to any other person against whom, on the day 21 days before the date of application, the planning obligation(s) in question is enforceable: see Regulation 4 of the 1992 Regulations.

(3) The local planning authority is required to publicise the application: see Regulation 5 of the 1992 Regulations.

(4) The application must be determined within 8 weeks from the date on which the application is received, failing which the Applicant has a right of appeal against non-determination: see Regulation 6(2) of the 1992 Regulations.

13. It is clear from the terms of s.106A(3)(a) & 6(c) that, where the applicant seeks the modification (as opposed to discharge) of a planning obligation, the proposed modifications must be specified in the application. The application and any appeal will be determined by reference to those specified modifications; there is no duty on the local authority (or the Secretary of State) on the appeal to consider hypothetical alternative modifications other than those set out in the application. Moreover, as Richards J observed in ***R (Garden & Leisure Group Ltd.) v. North Somerset Council*** [2004] 1 P. & C.R. 39:

> "…the question whether the statutory test is met must be decided by reference to the entirety of the modifications specified in the application. It is an all or nothing decision. It is not open to the authority to decide that the obligation shall have effect subject to only some of the proposed modifications. If the authority considers that some of the proposed modifications are acceptable but others are unacceptable, it can of course invite the applicant to submit an amended application or a new application containing only the acceptable modifications; but in the absence of an amended or new application it must determine that the obligation shall continue to have effect without modification."[1]

14. It is therefore essential that applicants give very careful thought to the proposed modifications (and the arguments underpinning them) **before** submitting a s.106A application.

15. A decision by a local planning authority to allow an application to discharge or modify a planning obligation will be amenable to judicial review on standard

[1] See also paras. 49 & 51.

public law grounds (subject to the normal rules on standing and promptness, etc).

16. In the event that an application to discharge or modify a planning obligation is refused, or the local planning authority fails to determine it within the prescribed period of 8 weeks, the applicant has a right of appeal under s.106B. This provides, in relevant part:

> "**106B.— Appeals.**
> (1) Where an authority (other than the Secretary of State or the Infrastructure Planning Commission) **-**
> (a) fail to give notice as mentioned in section 106A(7); or
> (b) determine that a planning obligation shall continue to have effect without modification, the applicant may appeal to the Secretary of State.
> (2) For the purposes of an appeal under subsection (1)(a), it shall be assumed that the authority have determined that the planning obligation shall continue to have effect without modification.
> (3) An appeal under this section shall be made by notice served within such period and in such manner as may be prescribed.
> (4) Subsections (6) to (9) of section 106A apply in relation to appeals to the Secretary of State under this section as they apply in relation to applications to authorities under that section.
> (5) Before determining the appeal the Secretary of State shall, if either the applicant or the authority so wish, give each of them an opportunity of appearing before and being heard by a person appointed by the Secretary of State for the purpose.
> (6) The determination of an appeal by the Secretary of State under this section shall be final."

17. Regulation 7 of the 1992 Regulations provides that an appeal under s.106B must be made within 6 months of the date of the refusal notice or, in the case of non-determination, the date on which the right of appeal against non-determination arose (i.e. 8 weeks from the date on which the application was received). The information which must be submitted with an appeal is set out by Regulation 7(2).

18. Notably, s.106B(5) provides that either party may request to be heard before an Inspector. The Planning Inspectorate has discretion in such circumstances as to whether to proceed by way of an informal hearing or a public inquiry, but (unlike

in s.78 planning appeals) the appeal cannot proceed on the basis of written representations without the consent of both parties.[2]

19. Recent experience suggests that, in practice, the Planning Inspectorate will proceed by way of a public inquiry in cases involving any significant dispute as to the relevant legal principles to be applied (as to which see below).

20. Although s.106B(6) provides that the Secretary of State's decision will be *"final"*, it is well established that such provisions do not oust the judicial review jurisdiction of the High Court.[3] Accordingly, a decision to allow or dismiss an appeal under s.106B will be amenable to judicial review on ordinary public law grounds.[4]

The principles to be applied

21. 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"*.

22. 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"*.

23. In ***Batchelor Enterprises***, Sullivan J held that *"useful purpose"* in this context meant *"useful planning purpose"*. In reaching this conclusion, Sullivan J relied in part on (now repealed) policy guidance in para. C6 of DoE Circular 1/97 *Planning Obligation*, which stated:

> "The department considers that the expression 'no longer serves any useful purpose' should be understood in land use planning terms Thus, if an obligation's only remaining purpose is to meet some non-planning objective it will generally be reasonable to discharge it."

[2] The provisions of TCPA1990 s.319A regarding the determination of procedure for planning appeals do not apply to appeals under s.106B.
[3] See eg. ***Anisminic Ltd. v. Foreign Compensation Commission*** [1969] 2 A.C. 147.
[4] The provisions for bringing a statutory challenge to the High Court (instead of judicial review) under TCPA1990 ss.284-292 do not apply to s.106B appeal decisions: see s.284.

24. The current guidance in ODPM Circular 05/05 *Planning Obligations* states at para. A20 of Annex A:

> "The Secretary of State considers that the expression "no longer serves any useful purpose" should be understood in land use planning terms."

25. In ***R (Renaissance Habitat Ltd.) v. West Berkshire DC*** [2011] J.P.L. 1209 Ouseley J, whilst noting that the parties were agreed that the test under s.106A was whether the agreement served a useful "planning" purpose, sounded the following note of caution:

> "I am prepared for present purposes to accept that point, but I note that "planning", the word implied, very broad though it is, may lead to a debate about what constitutes a planning consideration for these purposes as opposed to some other useful public purpose which could be pigeonholed under some other head, or even a private purpose such as the protection of private views, which may show the implied restriction to be unjustified. Sullivan J also relied on Ministerial guidance which in fact contradicts this interpolation since it said that an agreement should *"normally"*, rather than *"always"*, be discharged when there is no planning purpose to be served by its continuance. The learned editors of the Planning Encyclopaedia, without explanation, and both before and after *Batchelor*, have said that no planning purpose was necessary."

26. Accordingly, there remains some scope for argument as to whether or not the *"useful purpose"* needs to be a *"useful planning purpose"*, although the better view is probably that it does, since it would mirror the requirement that a s.106 obligation may only be entered into in the first place by a local planning authority if it is for a planning purpose: see ***Tesco Stores Ltd v. Secretary of State for the Environment*** [1995] 1 W.L.R. 759, per Lord Hoffmann at p.779C-D.

27. But even this begs the question: what is meant by a *"useful planning purpose"*?

28. What about the situation where a s.106 obligation, entered into at the time when planning permission was granted for new residential development, commits the developer to pay a specified sum of money towards the improvement of local infrastructure, only for the developer to discover some time later with the benefit of hindsight that the development would have been acceptable with a lower financial contribution or no contribution at all (for example because the formula in the local planning authority's SPD, by reference

to which the original contribution was calculated, has since been demonstrated to be inaccurate)?

29. That was broadly the situation in ***Renaissance***, where the developer argued (inter alia) that, although it had signed up to a planning obligation in 2007 in connection with a planning permission for residential development, which provided for financial contributions to meet the impact of the development on the local infrastructure (in particular education, highways and public open space), it had subsequently become clear that lower contributions (and no contribution at all in relation to education) would have been sufficient to make the development acceptable. The developer argued that there was no lawful purpose for which the Council could require payment of the 'surplus' elements of the contributions which went beyond what was necessary to make the development acceptable.

30. Ouseley J rejected this argument in the following terms (emphasis added):

> "32. First, the useful planning purpose does not have to be related to the development in connection with which the s106 agreement was entered into. The decision in *Pye* is quite clear, and I accept Mr Jefferies' submissions, set out above, as to its effect. Since there is no need for a connection between the agreement and the permission, in the first place, in order for the agreement to be lawful and enforceable, it is quite impossible to imply into s106A (6)(b) and (c) on variation or discharge, a requirement that the "useful planning purpose" must be one related to the permission itself. Since there is no need for the agreement to have any connection at all to a permission or a particular development, the variation or discharge power cannot be constrained in a way in which the power to enter the agreement in the first place is not. There is nothing in the Act which requires variation or discharge for want of useful planning purpose to be judged by reference to the development to which the agreement was related. There is nothing unlawful about enforcing an agreement in circumstances which would not warrant its variation or discharge.
>
> 33. There is therefore, second, 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; the statutory provisions do not contain such a limitation, and it is not there by necessary implication. Richards J took a similar view in *R v (The Garden and Leisure Group Ltd) v North Somerset Council* [2003] EWHC 1605 (Admin) para. 46. There is nothing of course, to stop the parties agreeing to provisions which cover changes in circumstances, if they wish.
>
> 34. Since there is no requirement that the useful planning purpose relate to the development itself at all, there can be no requirement either that it relate to an impact of the development at all, or to the same impact for which it was originally sought.

35. There is no unlawfulness if the "surplus" contributions are applied for a useful planning purpose to the benefit of the area where the new residents will live, and from which they can benefit, even if they are not spent on the particular aspect of the development's effects for which they were originally sought. In so saying, I am not holding that to be a necessary test of lawfulness, merely that it cannot be unlawful to do so.

36. Third, on the facts here Mr Harwood's own case is unsustainable. Each of the useful planning purposes on which the Council is proposing to spend the "surplus" contributions is related to the development in at least this sense, that the people living in the development will benefit from the useful planning purposes to which the contributions will be put. That is sufficient, even on Mr Harwood's approach to the scope of s106. But the Council's case is stronger than that.

37. The Council proposes to spend the "surplus" open space contribution on improving open space provision locally in Thatcham. It is impossible to contend that that is not a useful planning purpose and one related to the development. It does not cease to be a useful planning purpose simply because the basis upon which the agreed sum was calculated was found to be unfair or unreasonable by an Inspector. (It seems, though it is not for me to decide whether this precludes a defence to the claim, that this proposed expenditure falls within the unvaried terms of the obligation anyway.). The educational provision on which the "surplus" is to be spent is undoubtedly a useful planning purpose related to the development; it is not for me to judge whether it falls outside the contractual provision so as to afford a defence to the claim as a matter of contract."

31. A similar situation arose in ***Millgate***, in which the developer sought judicial review of the local planning authority's refusal to discharge certain planning obligations under s.106A (within the first five year period – hence JR was their only remedy as there was no right of appeal under s.106B). The obligations were contained in a unilateral undertaking that the developer had entered into in support of an appeal to the Secretary of State against the authority's refusal to grant planning permission for a residential development. The Inspector who determined the appeal on behalf of the Secretary of State allowed the appeal and granted planning permission for the development. In his decision letter, he expressed the opinion that *"the contributions to the provision of infrastructure are unnecessary and* [I] *afford the unilateral undertakings little weight"*. The developer submitted that, in light of this conclusion by the Inspector, the obligations should be discharged on the basis that they no longer served a useful planning purpose.

32. Dismissing the claim, Pill LJ (with whom Rimer and Munby LJJ agreed) held that *"it does not in my view follow* [from the Inspector's conclusion] *that the*

undertaking did not have and did not continue to have a legitimate planning purpose" (para. 27); *"a relevant planning purpose is served and is not defeated by concessions or detailed arguments about quantum"* (para. 33).

33. It can be concluded from ***Renaissance*** and ***Millgate*** that a developer seeking to discharge or modify a planning obligation under s.106A needs to do more than simply establish that the obligation was not necessary to make the development acceptable. An obligation can be strictly unnecessary, but still serve a useful planning purpose.

34. It follows that Circular 05/05 is unlikely to be of significant assistance in making or determining s.106A applications.[5] Intriguingly, whilst Circular 05/05 is almost exclusively directed at the creation of <u>new</u> planning obligations, the final paragraph at B59 states as follows (emphasis added):

> "**Appeals against refusals to Modify or Discharge a Planning Obligation**
>
> Planning obligations can only be modified or discharged by agreement between the applicant and the local planning authority or following an application to the local planning authority five years after the obligation has been entered into. Where an application is made for modification or discharge and the authority decides that the planning obligation shall continue to have effect without modification (or fails to determine an application), the applicant has the right of appeal to the Secretary of State within 6 months. (See Annex A to this Circular for further details.) <u>The Secretary of State will have regard to the policies explained in this Circular when determining such appeals.</u>"

35. Precisely what is meant by "having regard to" the policies in Circular 05/05 is open to debate, but if an Inspector were to rely on para. B59 as a basis for allowing an appeal under s.106B and modifying or discharging a planning obligation on the grounds that it no longer meets the requirements of Circular 05/05, then he/she would be directly at odds with the judgments in ***Millgate*** and ***Renaissance***. A judicial review challenge could be expected to succeed.

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[5] Paragraph B5 of Annex B to Circular 05/05 states that the Secretary of State's policy is that a planning obligation should only be sought if it is:

(i) Relevant to planning;
(ii) Necessary to make the proposed development acceptable in planning terms;
(iii) Directly related to the proposed development;
(iv) Fairly and reasonably related in scale and kind to the proposed development; <u>and</u>
(v) Reasonable in all other respects.

[Criteria (ii), (iii) and (iv) have now been put on a statutory footing by Regulation 122 of the Community Infrastructure Regulations 2010]

36. If non-compliance with Circular 05/05 is not enough to demonstrate that a planning obligation *"no longer serves a useful (planning) purpose"* or *"continues to serve a useful (planning) purpose but would serve that purpose equally well if it had effect subject to the modifications specified in the application"*, what is?

37. The answer remains to some extent unclear, but the signs from ***Millgate*** and ***Renaissance*** is that only in very rare circumstances will it be possible to establish that an obligation no longer serves any useful planning purpose at all (bearing in mind Ouseley J's observation in ***Renaissance*** that the useful planning purpose today does not need be the same as the one that existed at the time when the agreement was entered into). Moreover, in circumstances where it is accepted that the obligation serves a useful planning purpose (eg. improvements to the local highway infrastructure), it will be difficult to establish that a lesser contribution can serve that purpose *"equally well"* – ordinarily, more money means greater improvements.

38. An example of the kind of extreme situation required can be seen from the facts of ***Batchelor Enterprises***. In that case, the developer had entered into a s.106 agreement in connection with a planning application providing that part of the site be maintained as a grassed open area. Permission was granted but the development did not proceed to completion because owing to the belated discovery of a public highway on the site. Subsequently, a second planning application was submitted for a revised scheme, with a realignment of the public highway, the construction of which would result in limited encroachment onto the area specified in the s.106 agreement (80% of which would remain untouched). Permission for this revised scheme was granted on appeal by the Secretary of State, who agreed with the Inspector's conclusion that the encroachment onto the grassland would not materially harm the character and appearance of the area. In these relatively unusual circumstances, Sullivan J held that the Council had acted irrationally in refusing to modify the s.106 agreement when requested to do so by the developer following the Secretary of State's decision.

39. At least one s.106A planning inquiry is already scheduled for early 2012 and the Inspector's decision in that case (together with the outcome of any subsequent High Court challenge) may provide further illustration of what is required in order to meet the seemingly high threshold for modification or discharge.

40. Some other issues which may arise in future include:-

    (1) As Ouseley J pointed out at para. 11 of ***Renaissance***, curiously there is no express obligation to discharge or modify if the criteria in s.106A(6)(b)-(c) are satisfied – s.106A(6) provides that in such circumstances the local planning authority *"may determine"* to discharge or modify. Does this mean that in some circumstances the authority retains a discretion to refuse to do so even if the criteria are made out?

    (2) What is the position where a developer applies for modification or discharge of an obligation to pay a financial contribution <u>after</u> the trigger date for payment of that contribution has passed (i.e. at a time when the payment should already have been made and the obligation should already have been satisfied?). Can such an application ever succeed? If so, in what circumstances?

    (3) Consistency in decision-making: it is well established that, in determining planning applications, like cases should be determined alike unless there are good reasons to the contrary: see eg. ***Oxford City Council v. SSCLG*** [2007] EWHC 769 (Admin) and the caselaw referred to therein. The same principle ought logically to apply to the determination of s.106A applications. This is of significance because many planning obligations are in a standard format used by the local planning authority in respect of many developments in its area. Therefore, if a local planning authority allows the modification or discharge of one such obligation owing to a change in circumstances, it may place itself a risk of other developers subject to the same or similar obligations relying on the principle of consistency to secure modification or discharge of their own liabilities.

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