Landmark Chambers

Charles Banner Q.C.

Viability in Planning: Coping with COVID-19

Adapting Existing Consents

ISSUE 1: CIL

- MHCLG guidance 13 May 2020: *"the government will introduce amendments to the CIL Regs 2010 to enable charging authorities to defer payments, to temporarily disapply late payment interest and to provide a discretion to return interest already charged where they consider it appropriate to do so for developers that have an annual turnover of less than £45 million."*
- In the meantime the guidance encourages LPAs:
  - to consider policies for payment by instalments (Reg 69B);
  - to consider exercising their discretion not to stop developments until outstanding CIL has been paid & not to impose surcharges for late payment.
- But: this is all about deferring, not reducing, liabilities.
- It won't be available to companies with a turnover of more than £45m.
- In HWGPNFY Episode 4 Simon Gallagher, MHCLG Director of Planning, discussed this (see 37:14 ff) and said it was about "*helping small businesses*" and that the £45m figure was an attempt "*to mirror the eligibility criteria for some of the more general Treasury schemes*"

ISSUE 2 – SECTION 106 OBLIGATIONS

Landmark Chambers

Section 106A

Landmark Chambers

"(1) A planning obligation may not be modified or discharged except—

(a) by agreement between the authority by whom the obligation is enforceable and the person or persons against whom the obligation is enforceable

(b) in accordance with this section and s.106B"

Route (b) – the s.106A procedure with the right of appeal under s.106B – can only be invoked after 5 years from the date on which the obligation was entered into. (In 2013 this was shortened for pre April 2010 obligations in England).

Route (a) – seeking to persuade the LPA to agree to modify – can be invoked at any time – remedy is JR, not appeal: see ***R (Batchelor Enterprises Ltd.) v. North Dorset DC*** **[2004] JPL 1222**

Section 106A: procedure

- Town and Country Planning (Modification and Discharge of Planning Obligations) Regulations 1992 as amended.
- Applications to modify need to specify the proposed modifications in the application
  - The application will be determined by reference to the entirety of the modifications specified: *"it is an all or nothing decision"* ***R (Garden & Leisure Group) v. North Somerset Council*** [2004] JPL 232 (Richards J)
- S106B: appeal against LPA refusal of S106A application
  - 6 month time limit
  - Appeal against non-determination after 8 weeks
  - Right to a hearing/inquiry
  - JR of SoS's decision

The S106A test

Landmark Chambers

- Discharge if obligation *“no longer serves a useful purpose”*
- Modification if 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*”
- Useful purpose = useful planning purpose (*Renaissance Habitat*)

Case-law on the s.106A test

Landmark Chambers

- **R (*Renaissance Habitat Ltd) v. West Berkshire DC*** [2011] JPL 1209 (Ouseley J):
  - The useful planning purpose does not have to be related to the development in connection with which the planning obligation was entered into
  - Therefore no requirement that it relates to any impact of the development
- ***R (Millgate Developments Ltd v. Wokingham BC*** [2011] EWCA Civ 1062 (Court of Appeal):
  - It does not follow from an Inspector's conclusion that planning obligations were "unnecessary" that the obligations do not serve a useful planning purpose
- So will financial contributions always serve a useful planning purpose which wouldn't be served equally well if they are reduced? (More money = more useful?)
  - What if, without variation, they would render the development unviable? (assuming no downwards review mechanism already built into the s.106 agreement/undertaking)

MHCLG 13 May guidance

Landmark Chambers

"Where the delivery of a planning obligation, such as a financial contribution, is triggered during this period, local authorities are encouraged to consider whether it would be appropriate to allow the developer to defer delivery.

Deferral periods could be time-limited, or linked to the government's wider legislative approach and the lifting of CIL easements (although in this case we would encourage the use of a back-stop date). Deeds of variation can be used to agree these changes. Local authorities should take a pragmatic and proportionate approach to the enforcement of section 106 planning obligations during this period. This should help remove barriers for developers and minimise the stalling of sites."

- **Potental for JR if LPA fails to take guidance this into account or unreasonably departs from it?**
- **No hint yet of a return of s.106BA**

ISSUE 3: ADAPTING PLANNING PERMISSIONS

Landmark Chambers

- The principal options include a fresh application for planning permission under s.70 TCPA 1990 or an application under s.73 for planning permission without compliance with conditions previously attached to an existing permission.
- S.73(5): can't be used to extend lifetime of permission (note Simon Gallagher's comments about this in HWGPNFY Episode 4 at 39:35).
- A new permission may be a way of revisiting s.106 obligations associated with an existing consent where reliance on s.106A isn't an option (eg because under 5 years or the demanding s.106A test can't be met)
- Or alternatively of re-engineering the development to be more profitable so as to create the value to service the existing s.106 obligations

Landmark Chambers

Thank you for listening

London
180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham
4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us
clerks@landmarkchambers.co.uk
www.landmarkchambers.co.uk

Follow us
@Landmark_LC
Landmark Chambers