

**Welcome to Landmark Chambers’
‘The Variation and Enforcement of s.106
Obligations’ webinar**

The recording may be accessed [here](#).

Your speakers today are...



Graeme Keen QC (Chair)

Topic:
S.106B appeals
in relation to
modifications and
discharge
of planning
obligations



Kate Olley

Topic:
Variation of s106
obligations



Matthew Henderson

Topic:
Planning
obligations – the
relationship
between ss. 73
and 106 T CPA
1990



Nick Grant

Topic:
Enforcement of
planning
obligations

Variation of s106 obligations



Kate Olley

How to modify a s106 obligation

- S106A Town and Country Planning Act 1990
- *Not* s84 Law of Property Act 1925 (see s106A(10))
- Previously- ss106BA-C
- Agreement or application?
- Between the LPA/Secretary of State/Mayor of London and “the person or persons against whom the obligation is enforceable”

When can a s106 obligation be modified

- Agreement- at any time
- By Deed (s106A(2))
- But needs agreement of all parties against whom the obligation is enforceable
- Application- after the expiry of the 'relevant period' (s106A(3))
- 5 years (s106A(4)(b))
- Avoids requirement for *all* parties to sign
- But can't place additional obligations on another party (s106A(5))

Procedure

- Modification and Discharge Regulations (s106A(9))-
 - Form and content
 - Publication of notice of the application
 - Procedures for considering any representations about the application
 - Notice to the applicant of the determination
- Application- on form provided by the LPA
 - Applicant's name and address
 - Address/location of the land to which the application relates, and applicant's interest in it (and a map)
 - Information to identify the planning obligation to be modified/discharged
 - The reasons for applying
- Determination within 8 weeks unless a longer period is agreed

Applicable principles

- s106A(6)
- The authority may determine:
 - The planning obligation shall continue to have effect without modification
 - It no longer serves a useful purpose and should be discharged
 - It continues to serve a useful purpose, but would serve the purpose equally well if it had effect subject to the modification sought = it will have effect subject to those modifications
- *R (Mansfield DC) v SSHCLG* [2018] EWHC 1794- the correct approach in considering a s106A application (Garnham J)

(contd)

- *R (Garden and Leisure Group Ltd) v North Somerset Council* [2003] EWHC 1065
 - “there are four essential questions to be considered: what is the current obligation? what purpose does it fulfil? is it a useful purpose? and if so, would the obligation serve that purpose equally well if it had effect subject to the proposed modifications? [Counsel] lays stress on the words ‘equally well’ and describes them as ordinary English words importing a principle of equivalence...”
- A precise and specific statutory test
- Not the full range of planning considerations (like in an ordinary decision whether to grant PP)

Meaning of ‘*useful purpose*’?

- Characteristics of the purpose delimited by s106A?
- *R (Batchelor Enterprises Ltd) v North Dorset DC* [2003] EWHC 3003 (Sullivan J) and *R (Renaissance Habitat Ltd) v West Berkshire DC* [2011] EWHC 242 (Ouseley J)
 - Useful *planning* purpose or just a useful purpose?
- Garnham J’s 4 reasons:
 - 1) qualification in the statute itself?
 - 2) help from the Planning Encyclopaedia?
 - 3) Effect of reading-in the word ‘planning’
 - 4) Influence of the precise character of the useful purpose served by the obligation?
- LPA therefore needs to point to “a” subsisting purpose for the obligation

S.106B appeals in relation to modifications and discharge of planning obligations



Graeme Keen QC (Chair)

S.106B

- (1) Where an authority (other than the SoS) -
 - (a) fail to give notice as mentioned in s.106A(7); or
 - (b) determine under s.106A that a planning obligation shall continue to have effect without modification,the applicant may appeal to the SoS...

- (7) Sch 6 (determination of certain appeals by person appointed by the SoS) applies to appeals under this section.

- (8) In the application of Sch 6 to an appeal under this section in a case where the authority mentioned in ss.(1) is the Mayor of London, references in that Schedule to the LPA are references to the MoL.

Points to note

- The right to invoke the s.106A procedure and thus the right of appeal under s106B applies only where the planning obligation is at least 5yrs old.
- An appeal under s.106B is against a decision following an application made under s.106A.
- There is no appeal where the application under s.106A was to the SoS in respect of a development consent obligation.
- An appeal may be made under this section against the refusal of the LPA/Mayor to modify/discharge a planning obligation under the preceding section, or their failure to issue notice of their decision within the prescribed 8 wk period (or any agreed extension thereof).

Points to note: Non-determination

- If the appeal has been submitted on the grounds of non-determination, it will be assumed that the LPA has determined that the obligation will continue to have effect without modification (ss.2).
- Although not an option formally recognised by the Act, it would still be open for the LPA to resolve in committee that *if* the application had still been before it, some form of partial modification might have been acceptable (see Butterworths Planning Service at 1695).
- If so, it will be important for LPA to ensure that the SoS (via PINs) & the appellant are informed promptly. In such a situation, the appellant could submit another application with amended modification (but not withdraw the original appeal until the new application has been determined).

Points to note: Jurisdiction of SoS/Inspector

- The jurisdiction of the SoS/Inspector on an appeal is the same as that of the LPA under s.106A (ss.4) thus it can be determined:
 - (a) that the obligation shall continue to have effect without modification;
 - (b) that the obligation no longer serves a useful purpose and may therefore be discharged; or
 - (c) that the obligation does continue to serve a useful purpose but would still serve that purpose if it had effect subject to the modifications specified in the application and that it should therefore be modified in accordance with the application.

Points to note: Timings and mode

- Any appeal must be made within 6mths of the date of LPA's decision (or the expiry of the prescribed/agreed period), although the SoS has discretion to extend that period (Reg 7 of the TCP (Modification and Discharge of Planning Obligations) Regs 1992 (SI 1992/2832).)
- S.106B(5) provides that either party may request to be heard before an Insp. PINs has discretion in such circumstances as to whether to proceed by way of a Hearing/Inquiry.
- But (unlike in s.78 planning appeals) the appeal cannot proceed on the basis of WRs without the consent of both parties.
- In fact, WRs is a commonly agreed method of determination.

Points to note: Formalities

- Reg.7(2) requires that an appeal under this section must be made on a form obtained from the SoS (<https://www.gov.uk/government/publications/modify-or-discharge-a-planning-obligation-s106b>) and must include the information specified in the form.
- In addition, it must be accompanied by:
 - a copy of the application to the relevant authority;
 - the certificate accompanying that application;
 - the instrument by which the obligation was entered into;
 - any correspondence with the authority relating to the application, and the notice of decision (if any). Appellants are required to copy the completed notice of appeal to the authority when submitting it to the SoS (Reg.7(3)).

Points to Note: Miscellaneous

- None of the planning appeals rules and regulations apply to s.106B appeals but in practice such hearings and inquiries are conducted along similar lines, and some s.106B appeals are heard alongside other planning appeals.
- Jurisdiction to determine appeals under this section is transferred to Insp (Reg.8), but subject to the usual powers of the SoS to recover jurisdiction under para.3 of Sch.6 of the Act. An Insp has the same powers under this section as the SoS (Sch.6, para.2(1)(aa)).
- A decision made on an appeal under s.106B is amenable to JR: see e.g. ***R. (Mansfield DC) v SSHCLG*** [2019] P.T.S.R. 540.

Guidance & Costs

- There is only very limited PINs guidance on s.106B appeals:
<https://www.gov.uk/guidance/appeal-a-modification-or-discharge-of-planning-obligation-application-s106>
- As with other planning appeals costs may be awarded for unreasonable behavior, see e.g. APP/W0340/Q/11/2153060 - costs awarded against the appellant company who had pursued an appeal that was directly contrary to judicial authority on s.106A & B, and who had been a party to one of the leading cases, namely ***R (Renaissance Habitat Ltd) v West Berkshire DC*** [2011] EWHC 242 (Admin).

Appeal trends

- The most common appeal under s.106B appears to be in relation to s.106 obligations that restrict the occupancy of dwellings (e.g. for holiday lets, agricultural workers, staff accommodation, affordable housing, age restriction on retirement flats etc) or otherwise restrict the use of land.
- The appeals also contain many examples of developers seeking to argue that something they agreed to provide as part of obtaining pp is no longer necessary see e.g. APP/C/760/8/18/3216236 - releasing the developer of a 530 house scheme from an obligation to provide a junior sports pitch.
- Recovery of a s.106B is very rare, e.g. APP/R0660/W/16/31509608 - where the s.106B appeal was related to and parasitic on a s.78 appeal that had been recovered.
- The success rate appears to be no better than c.50% - perhaps unsurprising - given the difficulty of meeting the applicable test of not serving a useful purpose.

S.106B appeals at Inquiry (1)

- APP/M5450/Q/16/3160672: appeal seeking modification of an obligation so as to increase number of pupils on the roll of an independent school from 525 to 710: dismissed following a 4 day inquiry.
- APP/U/430/8/21/7315: appeal seeking to remove an area of land required to be maintained as a garden in a s.106 obligation, to allow the extension for nursing home business: dismissed following a 1 day inquiry.
- APP/Y3940/Q/2115524: appeal allowed following a 1 day inquiry & costs awarded to the App (the LPA withdrew its objection to a proposal to vary the terms of an obligation).
- APP/P0119/0/09/2109407: discharge sought of obligations relating to education in a 315-home scheme. The obligations contained an option for land for a school and if not exercised a financial contribution. Argued that any contribution would be used now not to meet need generated by development but to upgrade existing facilities: appeal dismissed following 1 day inquiry.

S.106B appeals at Inquiry (2)

- APP/M3645/Q/2050232/NWF: s.106B appeal linked to enforcement and planning appeals and seeking discharge/modification of a s.106 to allow the use of land for airport car parking: dismissed following 6 day inquiry.

s.106B - Judgments

- The fact that a sum has already been paid pursuant to a s.106 obligation does not mean that s.106A and an appeal under s.106B are necessarily excluded: ***Patel v Brent LBC*** (No.3) [2006] 1 P. & C.R. 7 [at 14].
- See also, by analogy, ***York City Council v Trinity One (Leeds) Ltd*** [2018] EWCA Civ 1883 dealing with s106BC appeals and whether this had retrospective effect, so although a developer was currently liable to pay a LPA a sum of money in lieu of providing affordable housing under a s.106 agreement, if the appeal against the refusal to modify the agreement by removing the affordable housing obligation was successful, that would extinguish its liability to the authority. (n.b. s.106BA to 106BC of the TCPA 1990 were repealed at the end April 2016).

Planning obligations – the relationship between ss. 73 and 106 TCPA 1990



Matthew Henderson

Topics

- 1) Building blocks:
 - a) s. 73 TCPA 1990
 - b) s. 106 TCPA 1990
- 2) Putting it together – relationship between ss. 73 and 106 TCPA 1990
- 3) Example – ***Norfolk Homes Limited v North Norfolk District Council*** [2020] EWHC 2256

(1)(a) Building blocks – s. 73 TCPA 1990

- Key characteristics:
 - Commonly referred to as applications to “amend” or “vary” – technically inaccurate
 - Result of s. 73 application is a new independent and freestanding permission – original permission is intact and unaltered – see *Pye v SSETR* [1999] PLC 28 at 44 (but NB *Lambeth v SSHCLG* [2019] UK33)
 - Therefore the applicant has a choice of permissions (but careful if one implemented, unless development is identical e.g. *R. (Robert Hitchins Limited v Worcestershire County Council* [2015] EWCA Civ 1060 at [37]).
 - May only consider the question of conditions – s. 73(2) and should be as at the time of the s. 73 determination.

(1)(b) Building blocks – s. 106 TCPA 1990

- Key characteristics:
 - Runs with the land.
 - Need not be linked to a planning permission – freestanding legal instrument – no part of the planning permission.
 - May be conditional – s. 106(2)(a) – e.g. on grant of permission, on commencement of development – triggers.

(2) Putting together - relationship

- Two freestanding instruments -
 - Relationship turns on drafting of obligation - essentially matter of interpretation.
 - Obligation may be revisited on determination of s. 73 application – NB s. 73(2) does not restrict.
 - Options for LPA: (1) broad wording of original obligation; or (2) new obligation.

- Common example – two planning permissions but only one s. 106 agreement – essential questions:
 - Which permission is being relied on?
 - Was obligation triggered by development under first permission?
 - If not triggered, does obligation/trigger encompass development under second permission?

(3) Norfolk Homes

- Background: 2012 permission (s. 70); obligation in 2012; 2013 permission (s. 73); 2015 permission (s. 73).
- Issue: obligation only applied to 2012 permission – two arguments (1) interpretation; (2) implication.
- Interpretation – rejected LPA’s argument that interpretation of planning obligation was unique; rather, consistent application of usual principles.
- Implication – rejected LPA’s argument that term should be applied to attach obligation to any subsequent obligation – no technical trap.

Enforcement of planning obligations



Nick Grant

Nature of an s. 106

- Nature of an s. 106 agreement: ***Newham LBC v Ali*** [2014] 1 WLR 2743 [16]
- Against whom enforceable (s. 106(3),(4)).
- Interpretation: ***R (Robert Hitchens Ltd) v Worcestershire CC*** [2016] J.P.L 373, [29]

Enforcement

- Only by the LPA (s. 106(3)), ***Milebush Properties Ltd v Tameside MBC, Hillingdon*** [2011] P.T.S.R. 1654
- Statutory methods
 - Injunctions (s. 106(5))
 - Entry on land (s. 106(6))
 - Charging orders (s. 106(12), but regulations not made)
- Contractual: ***Avon CC v Millard*** (1985) 50 P&CR 275, 279
- Do not have to exhaust planning enforcement remedies: ***Avon CC***

Injunctions

- ***Newham LBC v Ali:***
 - Interim injunction governed by ***American Cyanamid***
 - Damages rarely adequate, [17]
 - Injunction ought ordinarily to be granted, [20]
 - Matters to take into account, [20]-[23]
 - Ability to suspend (use sparingly!) [35]-[42]

- ***Waltham Forest v Oakmesh Ltd*** [2010] JPL 249
 - Obligations to build? [66]
 - What if planning permission denied? [67]-[68]
 - Obligation more expensive? [70]

Money Claims

- Damages?
- Debt? ***R (Renaissance Habitat Ltd) v West Berks DC*** [2011] J.P.L 1209
 - JR of decision by WB to commence debt claim against R
 - Argued that obligations in s. 106 unlawful as SPG varied
 - JR dismissed

- Expert determination – key points
 - Contractual process based on consent: ***Campbell v Edwards*** [1976] 1 WLR 403
 - Court often won't decide matters to go to ED: ***Milebush Properties Ltd v Tameside MBC, LB Hillingdon*** [2010] EWHC 1022 (Ch), [2011] PTSR 1654 (EWCA)
 - Sometimes final and binding: ***Jones v Murrell*** [2016] EWHC 3036 (QB)
 - Court's jurisdiction to review decision cannot be *totally* ousted: ***Barclays Bank plc v Nylon Capital LLP*** [2011] EWCA Civ 826 [21]-[35]
- Arbitration – Arbitration Act 1996

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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