Interpretation of the Changes to CIL and Section 106 Legislation and Applying Practical Solutions to Speed up the Process and Improve Outcomes

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Introduction

The background for this paper is the evolving position in relation to section 106 obligations and the Community Infrastructure Levy ("CIL"). For practitioners, both in private practice and within local planning authorities ("LPAs"), changes over recent years in these areas (in legislation and in policy) have presented considerable difficulties, even in keeping up to date with the changes, let alone understanding wider implications for clients. Guiding clients and their other advisors in s.106 and CIL matters has never been more challenging.

Before I turn to some practical ways of producing better outcomes, it is worth bearing in mind some of the basics.

In theory at least, and with the arguable exception of affordable housing, the reason we negotiate s.106 obligations is to deliver mitigation measures which, if they were not ensured, would result in the relevant planning application being rejected as unacceptable. This is not the case with CIL. Beyond the liability calculation under CIL reg.40, there is no direct connection between the payment and the delivery of the development.

The other key difference between the two is that CIL (or at least the payment of it) is not negotiable. You pay what the CIL Regulations require you to pay. Section 106 obligations, on the other hand, and as we all know too well, are negotiable. It is this element of negotiation which so often builds in delay and frustration to the process of planning applications, particularly those applications for large or complex developments.

The other point to note at the outset is something I don't propose to deal with in any detail. This is the use of conditions as an alternative to s.106 obligations. In my experience, conditions are under-used, and s.106 obligations over-used. Often this happens because of a belief (in my view mistaken) that s.106 obligations give local authorities more control or greater powers of enforcement. So there is the potential in the future for s.106 obligations to be replaced in good measure by conditions. But I will make the assumption for this paper that s.106 obligations will continue to have a significant part to play in the determination of planning applications.

CIL

CIL has few friends, although over 100 local authorities have adopted the levy, and about the same number are going through the process. What was supposed to be a simple and fair way to raise monies for local infrastructure has underperformed. A review was first suggested some time ago and began in autumn 2015.

The terms of reference of the CIL review[1] were set within the context of the "overarching question of whether CIL is meeting its objectives of providing a faster, fairer, more certain and transparent means of funding infrastructure through developer contributions".

[1] (1) The relationship between CIL and s.106 in the delivery of infrastructure, including the role of the reg.123 list and the restriction on pooling planning obligations; (2) the impact of CIL on development viability, including any disproportionate impact on particular types or scales of development;

What we know from recent announcements is that the review is being approached with an open mind and with "all options on the table". The panel's initial aim was to have their final report with Government by mid May 2016 though, speaking in April, Liz Peace (head of the review) suggested the date of publication was uncertain, citing the EU referendum as a "purdah" period. The review remains unpublished at the time of writing, and the recent change of Prime Minister and Secretary of State for Communities and Local Government may lead to further uncertainty as the government considers its priorities for planning and housing.

Further, with affordable housing not within the potential scope of CIL,[2] this important component can often be squeezed in the overall planning gain package. It is often reduced for viability reasons, and will not benefit from CIL. In addition, Vacant Building Credit has been reintroduced following the Court of Appeal decision in *Secretary of State for Communities and Local Government v West Berkshire DC and Reading BC*.[3] This will have a further effect on affordable housing.

So assuming we continue to have CIL at least for some time, what are the issues which crop up in practice?

Phasing

The CIL Regulations provide for phased planning permissions. A phased planning permission is defined as "planning permission which expressly provides for development to be carried out in phases".[4] Outline, full and hybrid permissions can be "phased" for the purposes of CIL and the effect of that is that each phase is a separate chargeable development.[5]

Each chargeable development will then have its own CIL liability and its own payment timetable in accordance with the CIL regulations and any relevant instalment policy. Also, a relief application (e.g. for exceptional circumstances) or an exemption (e.g. for charities) can be made per phase which may increase the availability of reliefs and exemptions.

It is possible to create a phased permission with both horizontal and vertical phases. So if that gives rise to a benefit it might be worth looking at. The example I have in mind had two levels of underground phases enabling substantial work to be carried out without triggering commencement of phases which would generate a CIL payment.

The vertical phases allowed for a number of separate relief applications because, for example, social housing relief could be sought for the blocks where the affordable was to be provided, leaving freedom to use exceptional circumstances relief on other phases.[6] The purpose of partitioning the site in this way was to allow an early start on site whilst an exceptional circumstance application was made for the first vertical phase. The plan was to make subsequent relief applications. In the event, the state aid rules got in the way.

At the very least, CIL phasing can benefit cashflow.

Floorspace set offs and the application of Regulation 40

CIL reg.40 is one of the most difficult pieces of legislation we have to deal with. This is particularly the case when it comes to setting off floorspace against CIL liability. We have experience in practice of setting up a "CIL bank" to capture demolished floorspace from an early phase, which can be drawn down across

(3) the exemptions and reliefs from CIL; (4) the administrative arrangements and governance associated with charging, collecting and spending CIL; (5) the ability of CIL to fund and deliver infrastructure in a timely and transparent way; (6) the impact of the neighbourhood portion on local communities' receptiveness to development; (7) and the geographical scale at which CIL is collected and charged.

[2] Although affordable housing is within the Planning Act 2008 definition of infrastructure, that was disapplied by the CIL Regulations.

[3] [2016] EWCA Civ 441.

[4] See CIL regs 2(1) and 8(3A).

[5] See CIL reg.9(4).

[6] These reliefs cannot be combined in the same chargeable development.

subsequent phases as they come forward. CIL Phase 1 could be part of a wider outline scheme with an application made for landscaping and roads.

Although this has cost saving advantages, attention must be paid to ensure that in the calculation of CIL for any given phase, reference is always made to relevant values in the "previously commenced phase".[7]

This can lead to a draining of the bank where nil rate parcels intervene. Also, complications can arise where the expected sequencing is disrupted so that commencements happen out of sequence. For large sites, this can mean updating the paperwork as you go.

Delivery of the necessary infrastructure

This is one of the (many) frustrations with CIL, that although making the payment is a straightforward process, ensuring delivery of the necessary infrastructure may not be. Developers are often concerned that a payment into CIL will not deliver a piece of infrastructure needed for their development in the time needed.[8]

FAQs in the context of property transactions

Some basic points still arise in property transactions, e.g. concerns that reserved matters applications might trigger CIL even where the outline predated adoption of CIL in the area (which they will not), and the stage at which CIL becomes payable.

This latter point depends on the relevant chargeable development so that a phased development could have a series of phased commencements as the separate chargeable developments come forward.[9]

Appendix 3 considers further issues.

Section 106 agreements: Back to basics

Statutory purposes

As will be appreciated, the types of obligations[10] to which s.106 applies are:

(i) Restricting the development or use of the land[11] in any specified way;
(ii) Requiring specified operations or activities to be carried out in, on, under or over the land;
(iii) Requiring the land to be used in any specified way; or
(iv) Requiring a sum or sums to be paid to the authority[12] … on a specified date or dates or periodically.

The importance of falling within the statutory purposes in s.106(1) was made apparent in *Westminster CC v Secretary of State for Communities and Local Government*.[13] Here a unilateral obligation to not apply for an on street parking permit was found to not meet any of the objectives of s.106(1). This was the outcome in similar circumstances in *R. (on the application of Khodari) v Kensington and Chelsea RLBC*.[14]

[7] See CIL reg.40(8).
[8] See at Appendix 3 the Law Society/City of London Law Society Planning and Environmental Law Committee's response to the CIL Review for a more detailed consideration of these issues.
[9] CIL is payable in full 60 days from commencement on the relevant chargeable development subject to any applicable instalment policy.
[10] Section 106(1)(a)–(d).
[11] i.e. the land in which the covenantor is interested.
[12] i.e. the LPA in whose area the land is.
[13] [2013] EWHC 690 (Admin).
[14] [2015] EWHC 4084 (Admin).

The consequence of not meeting one or more of these objectives is that the covenant is personal only and will not run with the land. Alternative powers can be used (e.g. s.111 of the Local Government Act 1972), but these will not solve the running with the land point.[15]

In my view it must be for the decision maker to decide what weight if any should be placed on a purely personal covenant and much will depend on the nature of the covenant and the identity of the covenanting party. In the case of *Scottish Widows v Cherwell DC*,[16] the local planning authority placed reliance on the public assurance given by Marks & Spencer that it would remain in the town centre of Banbury for a period of five years and also on a letter from one of the interested parties, a local employer, that it would relocate its business locally. In a challenge, the Court found that "the Committee was entitled to place reliance on such assurances".

There are many examples in practice of obligations which might struggle to fall within the four objectives. For example:

- an obligation to submit a scheme for approval;
- an obligation to include particular terms in a lease or other disposal document; or
- an obligation to set up a Community Trust.

To some extent at least it is likely to be possible to draft the obligation in such a way as to fit it within one of the four objectives, typically by creating a negatively worded obligation preventing commencement or occupation, etc. But this is not always done and not always straightforwardly achieved even where the point is noted and the draftsman is consciously looking for a solution. Leaving aside the risk of challenge, the issue will generally be one for the local planning authority in terms of enforcement and risk.

In the case of *R. (on the application of Lady Hart of Chilton) v Babergh DC*[17] it fell to the Court to consider whether the Council had fallen into error by relying on the planning agreement delivering sufficient public benefit (in this case by way of the retention and creation of jobs) to justify the harm to heritage assets. The issue came down to a consideration of the obligation to use reasonable endeavours to maintain existing staffing levels and whether a more rigorous obligation should have been required. No point was taken as to whether this satisfied the s.106(1) test but in any event, the Court decided it was reasonable for the Council to conclude that the public benefits would be delivered.

In *R. (on the application of Tesco Stores) v Forest of Dean DC*,[18] committee members had accepted an obligation to provide a shuttle bus service to the local town centre as sufficient mitigation for a new Asda supermarket. Officers had advised that there was no way of telling what level of mitigation the shuttle bus would deliver. The Court of Appeal held that the question of whether the mitigation was too speculative to be a material consideration was a matter of planning judgement. The challenge by Tesco against the grant of planning permission was not successful.

Can you "contract out"?

We often include in s.106 agreements a provision stating that certain persons are not liable or not liable for certain provisions, typically home owner/occupiers and sometimes small commercial occupiers. Clients will often insist these provisions are included, although it is not always accepted by LPAs in the case of restrictions on occupation. But how does this sit with the provisions of the section itself?

Section 106(3) in terms provides that subject to subs.(4)[19] a planning obligation is enforceable by the relevant authority:

[15] But note that in London the power under section16 Greater London Council (General Powers) Act 1974 can be used. This is much broader than s.106 in any event as well as enabling enforcement against successors.
[16] [2013] EWHC 3968 (Admin).
[17] [2014] EWHC 3261 (Admin).
[18] [2015] EWCA Civ 800.
[19] Emphasis added.

- against the person entering into the obligation; and
- against any person deriving title from that person.

This is the mechanism through which planning obligations "run with the land" i.e. they can be enforced against those who derive title from the original covenanting party.

Section 106(4) then goes on to provide that, "the instrument by which the planning obligation is entered into may provide that a person shall no longer be bound by the obligation in respect of any period during which he no longer has an interest in the land". This appears to be the only exception to what is provided for in s.106(3) (rather than being an example of what the document may provide in this regard).

The starting position on the ability to vary or discharge planning obligations is contained in s.106A(1). In essence, a planning obligation may not be modified or discharged except by agreement between those persons against whom and by whom the obligation is enforceable, or in accordance with s.106A and the sections which follow.

All of this suggests that Parliament intended persons deriving title to be bound subject only to the provisions of s.106(4) and the statutory modification sections.

Absent any specific provision in the "code", we should assume that s.106(3) is effective notwithstanding terms to the contrary in the deed itself. This suggests that it is not effective to identify persons or categories of person who will bear no liability.

How to approach the issue in drafting?

The same effect can be achieved by defining the land to which the obligation relates — so using a combination of the effect of s.106(1) and s.106(9). The deed could identify any number of "lands" and allocate obligations to each. Equally, land can be taken out of liability, e.g. at the point at which it is acquired by a person whose interests are sought to be protected. So rather than, say, homeowners being stated to be not liable, the homes they purchase could be released at the point of purchase. Those homes would no longer be land to which the relevant obligations relate. This may or may not be in relation to all of the obligations in the agreement.

The question of joint and several liability is specifically dealt with elsewhere in this note, but it is worth reminding ourselves here that the burden of succeeding to planning obligations may affect how purchasers and investors approach opportunities, and how they seek to protect their interests. If the deed itself can manage liability by allocating it appropriately within the document, then these issues can be mitigated.

"Partitioning" or "splitting" obligations across a site is not new, but it is often overlooked as a way of better reflecting the actual likely division of responsibility across a site (and therefore improving accountability) and speeding up legal negotiations by reducing the need for cross covenants and other security. Across a large site, this can assist delivery and protect value.

The partitioned approach can also aid understanding of the terms of the agreement by making clear which parts of the site are bound by which obligations. Future variations are made easier because only those interested in the relevant "land bound" are required to join in (although inadvertently leaving parties in liability who were intended to be protected can have the opposite effect).

Case studies

These case studies show examples of where an alternative approach to the section 106 agreement (and conditions) can bring about benefits.

CB1, Cambridge

This mixed use urban regeneration site, approved in outline in April 2010, adjacent to the railway station in Cambridge was, for the purposes of the s.106 agreement, "split" according to use type across the site into five coloured phases.[20] Colours were used here in place of numbers to avoid any assumptions on sequencing. The environmental impact assessment ("EIA") parameter plans and the list of necessary infrastructure elements were used to inform the phases.

Each coloured phase was burdened with its own relevant obligations — sometimes identical in form to those imposed on other phases, but with each phase taking a named element of the overall infrastructure burden.

This meant that only the residential Blue and Pink Phases carried affordable housing and education contribution obligations, and the liability on Blue was separate to the liability on Pink. The Yellow Phase (expected to be first to commence) took liability for the new transport interchange, the Green Phase took liability for the Station Square, the Red Phase carried liability for works to a nearby junction and Blue and Pink had their respective local park requirements. Each coloured phase has its own separate liability for public art and public realm.

The same phased approach using the same coloured phases informed the estate management strategy so that tenants in particular coloured phases can see the relevance of their charges as set against the relevant public realm and public art provision within the phase.

Some phases were split further so that individual blocks or pairs of blocks were burdened with their relevant pro rated financial contribution. So, for example, within the Green Phase and separately the Red Phase, the financial contributions for transport were allocated to specific blocks or pairs of blocks.

Agreeing this approach was not without its challenges and the LPA required specific advice from their lawyers on risk. Our client was quite determined to secure the partitioning because he was confident it would make the site more attractive in the market.

In addition, Network Rail ("NR") was a freeholder, and unwilling to give planning obligations save for some high level negative obligations, and some positive obligations (e.g. in relation to works on the station itself) on the NR retained land. This gave rise to a significant delay in the process.

We came to a position that different obligations should be imposed on the NR land with "not to commence" covenants preventing a start until the next owner has delivered an agreed form of planning obligation deed. This postponed the full set of planning obligations (including financial obligations) until a new owner was in place. That new set of obligations reflects the coloured Phases in which the relevant parcel sits.

As specific market opportunities have come along, some further "splitting" of obligations has taken place. For example, where a financial burden was placed on a pair of blocks in the Red Phase, this has been divided between the two blocks so that the disponee and tenants would only acquire subject to the proportionate burden on the relevant block. Because the original burden was placed on the pair of blocks only (and not the remainder of the CB1 site) a variation could be effected by the owners only of those two blocks. A similar outcome is in the offing for a single floor in one of the blocks.

Feedback from the client has been that this allocation of liability has been very helpful in marketing the opportunities on the CB1 site and has speeded up transactions and delivery. The client would look to replicate this on other comparable sites.

Benefits:

- limited and relevant liability by phase/block has been attractive to the market;
- deeds of variation easier to achieve; and
- viability issues more direct and relevant.

[20] See Appendix 1 from OS HMSO (not reproduced here).

Radio Station Rugby and Alconbury Weald

The urban extension to Rugby was approved in outline in May 2014 some four months after the committee resolution. The outline permission grants approval for up to 6,200 homes with employment development, schools and other relevant infrastructure.

The Alconbury Weald permission was granted in October 2014 and permits 5,000 new homes with schools and other relevant infrastructure plus 3,000,000ft^2 of business space in an enterprise zone.

Each of these permissions has a flexible phasing scheme with key phases being brought forward at the developer's discretion but within the scope of the outline. These key phases are used as the staging point for reviews (viability, transport measures and education) and set the framework for reserved matters applications.

This approach avoided the need to produce and agree a lot of detail, e.g. on the trigger points for some open spaces and their specification because these matters can come forward across the life of the development with key phases and be approved in a relevant and current context.

At Alconbury Weald, for example, we use a "monitor and manage" approach to setting transport mitigations with the actual measures to come forward and be agreed with each key phase across the life of the development. This avoided unnecessary and time consuming work trying to settle all the transport mitigations at the outset when there were so many variables, not least the bringing forward of the A14 improvements north of Cambridge.

In both of these developments, we settled a tabular style of presentation for the obligations and used the points raised earlier in this note to allocate liability to relevant parts of the site, and also to release parts of the site on specific "release events". A couple of extracts are at Appendix 2.

Although the main release event for housebuilders in each of the sites is different (generally at Alconbury Weald, parcels are released on start on site, whereas at Rugby the release is generally (but not always) postponed until all market dwellings on the relevant parcel are occupied[21]) the style and mechanism used are the same.

For example, in the case of affordable housing, the burden of delivery across a key phase is placed on the key phase as a whole but with releases for reserved matters parcels when they start.[22] Residential parcels are burdened with their own separate liability for their own affordable housing delivery in accordance with key phase expectations.[23] This puts the burden of delivery on each housebuilder separately in accordance with their own approved scheme. Joint and several liability as between housebuilders for key phase affordable housing delivery is thus avoided.

Obligation 29 in Appendix 2 is an example of an obligation which relies on an approval at the key phase framework stage for the trigger event. The key phase brings forward its own trigger events in this case, relevant to delivery of the key phase. These triggers then have effect to draw down an obligation.

As well as the benefit of management of liability, the tabular format better aids understanding of what the obligation involves and how it applies across the site. The ability also to refer to obligations by single number, rather than the usual "Schedule X, paragraph Y, sub paragraph Y(ii)(b)" style is also helpful.

This tabular format also lends itself to regular reporting and monitoring.

Benefits:

- limited and relevant liability;
- deeds of variation easier to achieve;
- more straightforward presentation;
- easier reporting and monitoring; and

[21] Reflecting different approach to risk in each case.
[22] See Obligation 14 in Appendix 2.
[23] See Obligation 23 in Appendix 2.

- details postponed until relevant in the development programme and at a stage when stakeholder engagement will be more meaningful.

New Lubbesthorpe, Leicestershire

Planning permission was granted for this residential-led scheme of 4,250 homes in January 2014.

Here we acted for the LPA, who wanted to embed flexibility into the planning permission and the section 106 agreement so that it would remain "current" for longer. We achieved this by providing for strategies to come forward (secured by negative obligations) which will contain within them relevant triggers and provision. So the detail is postponed until a later date, when circumstances are current and engagement more relevant.

The s.106 agreement contains obligations which link to the trigger events to be agreed further down the line.

This approach meant that many details were postponed until relevant in the development programme and at a stage when stakeholder engagement will be more meaningful. This saved much time in the negotiation.

Dealing with the LPA as landowner

We still see examples of LPAs entering into section 106 agreements with themselves as landowner. This surely does not work as a matter of simple law. The LPA council is a single legal person, even if it wears a range of hats.

Nevertheless, if the idea is to embed mitigation measures into a scheme, the need for an agreement of that kind probably misses the point. What is important is that the level of confidence the LPA has in delivery of the mitigation measures is not unreasonably held.

Confidence in delivery may arise in different ways, e.g. the LPA may have a development agreement with the developer selected to deliver and those contractual arrangements with the due diligence around developer selection are likely to be sufficient in most cases.

Other ways of dealing with the issue include an agreement between the LPA and the "other" authority in a two tier area and a negatively worded "Arsenal" condition (subject to satisfying the requirements of the NPPG).

Relationship with CIL

When CIL reg.122 first came in, there was much commentary about this being a new opportunity to challenge the grant of planning permissions. That expectation turned out to be not well founded and CIL reg.122 cases have tended to fail on the basis that the judgement as to whether the tests are met is one for the LPA as the decision maker.

CIL reg.123 is a different story of course because the question of whether its requirements have been breached is largely a matter of arithmetic. Further, whereas the prospect of the pooling limit had its attractions for developers, the reality is that no one wants to be delayed in securing planning permission for want of agreement on appropriate mitigations (which contributions into a pool might have resolved). Decision makers (and local highway and education authorities), have found ways of getting around the restriction and often this is with full collaboration with the applicant.[24] Among these are:

[24] I do not vouch for CIL reg.122 compliance in all cases.

- An agreed approach as to how many obligations can be grouped together as a single obligation (typically where what would have been a single obligation has been split into several in order to partition liability).
- The creation of new mini pools are not uncommon. These could identify local works for which local developments could make contributions;.
- Specific items, e.g. highway work not previously discussed.
- Splitting infrastructure items into parts and having a pool for each part. In a challenge context, the salami slicing of a project to circumvent the restriction on pooling is unlikely to be justified. However, if as a matter of fact and degree, different projects can be identified, then it is possible for five obligations to be pooled for each project. Whilst not without risk, it may be that the delivery of a road, for example, forms different projects (some roads schemes are delivered through different projects eg. a southern and northern link road, each of which is funded and delivered through a separate source/project).
- Using "scheme" conditions: Grampian conditions which require a scheme to deliver particular outcomes which themselves will probably need to bring forward section 106 obligations in due course. These may have some attraction but note that under the CIL Regulations a "planning obligation" includes a proposed planning obligation so it would be open to argument whether or not the scheme was sufficient to bring into account a "proposed planning obligation" at the time of the grant of permission. In addition, this may in turn lead to issues when seeking to enforce the conditions. For example, rather than at the outset having the certainty of the infrastructure delivery in a planning obligation, the scheme will be settled at a date post grant of planning permission and could potentially be settled at appeal if the LPA and applicant are unable to agree the contents of the scheme through the discharge of conditions process. It is for this reason that the use of scheme conditions is not generally a preferred route.
- Obligations requiring highways agreements to be entered into do not fall within the reg.123(3) requirement and therefore could be used as a vehicle to deliver or fund highways infrastructure where appropriate. Whilst this route circumvents the requirements of reg.123(3), it is important to note that the reg.122 tests still apply.
- One route that is sometimes mentioned is for a Grampian condition to be imposed on a permission to restrict development until infrastructure is provided and for the delivery of infrastructure to be secured through a separate contractual arrangement between the LPA and landowners. The contractual agreement could be entered into pursuant to s.111 of the Local Government Act 1972 (or a similar suitable power). In order for the agreement to bind successors in title to the land, a deed of covenant would be required to ensure that on disposing of its interest in the land, the successor in title to the landowner enters into a direct covenant with the LPA. This is likely to be cumbersome and may be impractical.

It seems clear from the wording of CIL reg.123(3) that you can have up to five obligations for a particular infrastructure project, and also up to five for a general type of infrastructure (but subject to the particular not having benefitted from the general).

It is now regular practice in appeals for inspectors to require information from LPAs regarding the number of obligations already entered into in relation to the matters proposed as obligations in the appeal.

One interesting appeal decision we have come across in Warfield, Bracknell[25] raised a risk of the pooling limit being exceeded in the future. The appeal proposal was for 10 dwellings on land within the Warfield development area which had been designated in the core strategy for a large scale mixed use development

[25] APP/R0335/W/15/3131136, Old Farmhouse Row, Abbey Place, Warfield.

including 2,200 dwellings. The appellant offered a unilateral undertaking committing to contributions to a range of infrastructure elements. The inspector confirmed there was no reason to conclude that any of these obligations would fail the CIL reg.122 tests.

However, the LPA raised a concern that because the wider policy area was in multiple ownerships, they could be faced with the policy site being developed via a series of smaller permissions. If each took the same approach as this appellant and offered a proportionate contribution to infrastructure, the pooling limit could be reached well short of full provision across the policy site.

The inspector regarded that concern as a material consideration in the appeal, even though in relation to the appeal itself, there was no suggestion of a breach of CIL reg.123. He took the view that there was a realistic probability of compromising the comprehensive approach to development required by policy.

Implications of the Housing and Planning Act 2016

There are some elements in the Act which impact on s.106 agreements. I will not go into these in detail because James Fennell is presenting a separate paper on the Act, and a good deal is dependent on the content of regulations. But there are a few provisions which will have an impact on the negotiation of section 106 agreements:

- Dispute resolution:[26] It is proposed that this new system will provide a binding report setting out what terms are deemed appropriate in relation to the issues under dispute. Although a size limit which applications must meet in order to qualify for the procedure may be set in Regulations, the consultation undertaken in February 2016[27] suggested no criteria would be set at this stage.
- Potentially, this procedure will be in play across the full range of applications including for large scale and complex schemes. I assume the expectation is that the disputes will largely revolve around specific obligations e.g. is a highway contribution of £X justified in this case, what should be the level of affordable housing? But there is no reason why other issues should fall within its scope, e.g. whether the forms of section 106 agreement mentioned earlier are appropriate. If they do, then the track record of comparable forms of agreement could well be relevant to the debate.
- Regulations to restrict the enforceability of affordable housing obligations. There was nothing on this in the consultation and it is quite an extensive power. But much depends on regulations.
- Opportunity is already being taken to renegotiate some section 106 agreements in order to allow for starter homes.
- Provision for processing of applications by alternative providers. Although it seems clear that this will extend (initially by pilot) only to the processing of applications and not to their determination, presumably the process will include the consideration of s.106 obligations.

Extending the scope of section 106 obligations

It is well accepted that the planning system can restrict the occupancy of homes, e.g. for agricultural workers and in relation to holiday accommodation. However, there appears to be an emerging appetite for further restrictions on the occupancy of residential dwellings, presumably in response to the increasing difficulties faced by many in relation to the availability and affordability of suitable housing, and the resulting pressure being put on local authorities to do something about it.

[26] Clause 157 and Sch.13.
[27] Technical consultation on implementation of planning changes.

Ultimately the extent to which it falls to councils, as planning authorities, to solve "the housing crisis" is questionable. But certain ideas are being brought forward in different areas of the country in response to problems where the public perception is that the government is not doing enough at the national level.

Principal residence housing

Although not the first[28] to adopt a policy on the "reservation" of new housing for persons occupying as their principal home, the St Ives Neighbourhood Development Plan has made the headlines this year.

- Reported in the national media as Cornwall's crackdown on second homes and holiday homes, a new Full-time Principal Residence Housing policy seeks to "safeguard the sustainability of the settlements in the area whose communities are being eroded through the amount of properties that are not occupied on a permanent basis".
- This restriction relates to new open market houses, which will only be supported subject to a condition or obligation requiring that they are occupied as the primary residence of those persons entitled to occupy them.
- Occupiers of homes subject to such conditions/obligations will be required to keep proof of compliance and be obliged to provide this at the LPA's request. The policy suggests that such proof might comprise evidence of the residents being registered on the local electoral register and being registered for and attending local services, e.g. healthcare, schools etc.
- Such a policy clearly poses questions in relation to monitoring and enforceability. The consultation process identified significant human rights concerns, in particular in relation to Article 8. At the time of writing, the legality of the local referendum approving the policy is being challenged by a local developer.

Preventing wasted housing supply

Islington BC last year produced a supplementary planning document ("SPD")[29] designed to tackle the related issue of "buy-to-leave", i.e. the purchase of new residential property with the intention of it never being occupied to achieve maximum capital growth as an investment.

- The SPD states that for developments of 20 dwellings or more, the LPA will require a section 106 agreement to be entered into by the owner which requires the owners of individual dwellings within the development to use and occupy the property as a dwelling house or to ensure such use and occupation (i.e. arranging for a tenant).
- The owner of the development will be required to include such an obligation in the leases of individual dwellings and provide the LPA with reasonable evidence of compliance. Further, the owner/developer will be required to publicise the details of the obligation in their sales materials and ensure that prospective purchasers are aware of it.
- The policy then sets out indicative heads of terms for the required s.106 obligations. Of particular interest are the following precedent clauses:

  (v) Dwellings shall not be left unoccupied or unused as a dwelling house for any continuous period of three consecutive months or more; and

[28] A neighbourhood plan for Lynton and Lynmouth in the Exmoor National Park Authority places similar restrictions on new dwellings by planning condition and has been operational since 2013. So far no enforcement action has been brought in relation to the policy.

[29] Question whether an SPD is the appropriate place for such a policy. Regulation 5(1)(a)(iii) of the Town and Country Planning (Local Planning) (England) Regulations 2012 sets out what may be included in an SPD, namely statements regarding any environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land mentioned in para.(i). Regulation 5(1)(a)(i) describes statements regarding the development and use of land which the local planning authority wish to encourage during any specific period, though such statements must be included in a Local Plan, not an SPD (reg.6).

(vi) In any period of three consecutive months the dwelling shall be occupied for at least 14 days.

Adding to the suggested evidence of the St Ives policy above, the SPD lists further details of evidence that might be required to satisfy the LPA that the policy is being complied with, such as:

(vii) Evidence of the consumption of power consistent with the required level of occupation (e.g. utility bills etc); and

(viii) Records kept by the owner(s), e.g. records kept by the concierge of deliveries to and collections from the dwelling.

As with the St Ives policy, there are clearly monitoring and enforceability issues. It is not clear how, in practice, this sort of policy is likely to be effective.

Interestingly a proposal for a similar policy is currently being discussed in Kensington and Chelsea, though there is a suggestion that it is unlikely that an equivalent policy will emerge. Of particular concern in that borough is the difficulty in distinguishing between second homes infrequently occupied (not identified as a major issue) and empty housing stock which is never occupied (something they'd like to explore). Ultimately, it may be that they decide the planning system is not the right area to be addressing these issues.

"First Dibs for Londoners"

Sadiq Khan has pledged to give "first dibs" on housing to Londoners and has said he would expect developers to market new homes to Londoners first, to prevent wealthy international investors buying properties and using them as "asset lockers". There are clear similarities here with the above and many of the same problems and questions apply. As Matthew White remarked in The Planner magazine earlier this year,[30] it is very difficult to regulate a purchaser's intentions when they buy a home: "controlling who is entitled to buy and sell homes is an issue that goes far deeper than a catchy campaign slogan, and is almost certainly beyond the Mayor of London's powers to change." We shall await with interest to see what exactly the new London Mayor has in mind.

On a similar theme, but not specifically in relation to obligations secured through section 106 agreements, the much discussed and much favoured (at least by Brandon Lewis) starter homes initiative points to a further step in the direction of centrally led intervention of housing occupancy. It is thought that starter homes might well end up taking the place of affordable housing as we know it, but the crucial difference is that the restrictions on occupancy of affordable housing derive from locally assessed needs, not from statute. The Housing and Planning Act 2016 has already set out restrictions for the purchase of starter homes in relation to age and has suggested that further regulations will follow to make further restrictions for example in relation to nationality.

A final point to make in this section, or perhaps a question to leave you with, is where will the buck stop? Much of the above tests our understanding of the boundaries of the planning system. The St Ives and Islington policies go further than the current restrictions seen in relation to agricultural workers for instance. Who is to say further "types of occupancy" won't find their way on to the shopping lists of local policy makers? Much has been made of the so called "bedroom blockers", those individuals or couples continuing to live in large detached family homes whose children have since flown the nest. Is a hypothetical policy to ensure the occupation of bedrooms within a property really that much of a leap from a policy to ensure that properties are occupied as main residences or occupied at all?

[30] *http://theplanner.co.uk/opinion/legal-view-first-dibs-for-londoners*.

Specific issues

Security.

Quite often a request will be made for bonds and/or other forms of security to be provided. Although these come in for some criticism on account of the additional cost burden they impose on sites with already challenging viability, what I want to look at briefly is how these are framed in drafting terms.

Often these are drafted as positive obligations to deliver bonds at certain stages. But without negatively worded supplemental obligations to restrict development or occupation until bonds are delivered, it is difficult to see how these positive obligations add any value or fit comfortably within section 106.

Joint and several liability.

In my recent experience this is becoming more of an issue. Traditionally, s.106 agreements are drafted such that the whole site is burdened across the board with all of the obligations, and persons interested are liable on a joint and several basis. This raises difficult issues for non-developing landowners who remain in ownership of part of the site, following commencement. Equally, for developers with control of only part of the site, the prospect of being on the hook jointly and severally with others outside of their control can be unattractive. The issue is made worse if the site in question carries the burden of significant infrastructure e.g. a secondary school.

A partitioned approach may be helpful in reducing risks to parties in this position.

Conclusion

Clearly the direction of travel for us all is more change, particularly in CIL and the emerging regulations under the Housing and Planning Act 2016. But there is still an onus on us to look to the legislation as it stands and utilise this to inform our negotiation and drafting of s.106 agreements. These are here to stay, at least for now!

We should also be mindful of the emerging trend towards intervention in the context of the occupation of dwellings.

What I have sought to do is to persuade you that the drafting and negotiating of section 106 agreements (and planning conditions) does not have to follow the traditional path. For complex or large scale planning applications in particular, an approach which seeks to make the development more market facing, more flexible and which can avoid the need to settle every term at the outset, can only be good for delivery.

But bear in mind the need to stay within the confines of s.106 itself, and that the traditional way of excluding specified persons or persons of specified descriptions may not be effective.

Appendix 1

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Appendix 2

Part 1B: Affordable Housing Delivery: Key Phase

This Part 1B applies only and separately to each Subsequent Key Phase which contains Dwellings save for any Final Key Phase.

Obligation 18 applies only and separately to any Subsequent Key Phase in relation to which the Review Process has resulted in an agreement under para.9 of Annex C that an Offsite Affordable Housing Contribution should be paid.

Ref	Obligation	Land Bound	Event	Land Released	Release Event
1	Not to submit any Reserved Matters Application for any Residential Reserved Matters Area on the relevant Subsequent Key Phase unless and until for that Subsequent Key Phase: (i) the Review Process has been undertaken with agreed or Determined Outcomes: and (ii) following agreement or Determination of the said Outcomes the Key Phase Affordable Housing Delivery Plan has been submitted to and Approved by the District Council	The relevant Subsequent Key Phase	Identification of the relevant Subsequent Key Phase	The relevant Subsequent Key Phase	Agreement to or Determination of the Outcomes and Approval of the Key Phase Affordable Housing Delivery Plan in relation to the relevant Subsequent Key Phase
				Each Reserved Matters Area (other than a Residential Reserved Matters Area)	The Reserved Matters Start Date for the relevant Reserved Matters Area
2	To Provide Affordable Housing on the relevant Subsequent Key Phase in accordance with the relevant Approved Key Phase Affordable Housing Delivery Plan	The relevant Subsequent Key Phase	Identification of the relevant Subsequent Key Phase	The relevant Subsequent Key Phase	Provision of all of the Affordable Housing Dwellings on the relevant Subsequent Key Phase as required by the relevant Approved Key Phase Affordable Housing Delivery Plan
				Each Reserved Matters Area (but without prejudice to the application of Obligation 23)	The Reserved Matters Start Date for the relevant Reserved Matters Area
				Each Dwelling	The first date when that Dwelling is acquired by a Beneficial Occupier

Part 2: Affordable Housing Delivery: Residential Reserved Matters Areas

This Part 2 applies only and separately to any Residential Reserved Matters Area in relation to which material approved under Planning Condition 18(i) demonstrates that Affordable Housing is proposed for the Residential Reserved Matters Area.

Ref	Obligation	Land Bound	Event	Land Released	Release Event
	Not to Commence the construction of any Dwelling on the relevant Residential Reserved Matters Area until the Residential Reserved Matters Area Affordable Housing Scheme for the said area has been submitted to and Approved by the District Council	Separately each Residential Reserved Matters Area to which this Part 2 applies	The Reserved Matters Start Date for the relevant Residential Reserved Matters Area	Each Residential Reserved Matters Area to which this Part 2 applies	Approval of the relevant Residential Reserved Matters Area Affordable Housing Scheme
				Each Exempt Unit	The first date on which that Exempt Unit is acquired by a Beneficial Occupier
3	To Provide Affordable Housing on the relevant Residential Reserved Matters Area in accordance with the relevant Approved Residential Reserved Matters Area Affordable Housing Scheme	Separately each Residential Reserved Matters Area to which this Part 2 applies	The Reserved Matters Start Date for the relevant Residential Reserved Matters Area	Each Residential Reserved Matters Area to which this Part 2 applies	Approval of the relevant Residential Reserved Matters Area Affordable Housing Scheme
				Each Exempt Unit	The first date on which that Exempt Unit is acquired by a Beneficial Occupier
4	Where in the relevant Residential Reserved Matters Area Affordable Housing Scheme there has been Approved a Prescribed Number and a corresponding Trigger Event not to Occupy more Market Dwellings than the relevant Trigger Number until the relevant Prescribed Number of Affordable Housing	Separately each Residential Reserved Matters Area to which this Part 2 and this Obligation 24 apply	The Reserved Matters Start Date for the relevant Residential Reserved Matters Area	Each Residential Reserved Matters Area to which this Part 2 and this Obligation 24 applies	Provision of the relevant Prescribed Number of Affordable Housing Dwellings in accordance with the relevant Approved Residential Reserved Matters Area Affordable Housing Scheme

Part 2: Non Strategic Open Space: Provision

This Part 2 applies only and separately to any Key Phase where in relation to the Key Phase the material approved under Planning Condition 10 proposes one or more areas of Open Space within the Key Phase and the material approved under Planning Condition 10(g)(iii) or (iv) contains a Trigger Event corresponding to one of the said areas of Open Space and references to Key Phase and to Open Space shall be construed accordingly.

Ref	Obligation	Land Bound	Event	Land Released	Release Event
29	To Provide the area of Open Space no later than the relevant Trigger Event	Separately each relevant Key Phase	Identification of the relevant Key Phase	The relevant Key Phase	Provision of the relevant area of Open Space
				Each Reserved Matters Area	The Reserved Matters Start Date for

Ref	Obligation	Land Bound	Event	Land Released	Release Event
					the relevant Reserved Matters Area
				Each Dwelling	The first date on which that Dwelling is acquired by a Beneficial Owner
				Each area of Temporary Open Space	Expiry of the period for which the relevant Temporary Open Space was to be made available pursuant to the relevant approval under Planning Condition 10(g)(iv)
30	Where in relation to the relevant area of Open Space the relevant Trigger Event is expressed as a period of time from Commencement of the Key Phase not to First Occupy any Dwelling after that relevant Trigger Event until the Open Space has been Provided	Separately each relevant Key Phase	Identification of the relevant Key Phase	The relevant Key Phase	Provision of the relevant area of Open Space
				Each Reserved Matters Area (other than a Residential Reserved Matters Area)	The Reserved Matters Start Date for the relevant Reserved Matters Area
				Each Residential Reserved Matters Area	The first date on which all of the Dwellings within the relevant Residential Reserved Matters Area shall have been Occupied

Appendix 3

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