

WHAT STEPS CAN YOU TAKE TO CUT THE TIME IT TAKES TO SIGN AND IMPLEMENT A SECTION 106 AGREEMENT?

IS THERE A LEGAL BASIS FOR LPAs ALTERING ITS CONDITIONS ONCE PLANNING PERMISSION IN PRINCIPLE IS AGREED?

ANDREW PARKINSON

Structure of the talk

- Two parts: section 106 and permission in principle.
- Section 106:
 - Avoiding need for s. 106 obligations at all
 - Early engagement
 - Dealing with delays, inc. new dispute resolution mechanism
 - Dealing with the drafting
 - Looking ahead
- Permission in principle.

REDUCING THE TIME TO SIGN A S. 106

1. Are s.106 obligations are needed at all?

- Can the proposed obligation be addressed by planning condition or unilateral undertaking?
- Planning Practice Guidance (“PPG”):
- *“It may be possible to overcome a planning objection to a development proposal equally well by imposing a condition on the planning permission or by entering into a planning obligation under section 106 of the Town and Country Planning Act 1990. In such cases the local planning authority should use a condition rather than seeking to deal with the matter by means of a planning obligation.”*

2. Early engagement

- Start discussions before the application is submitted.
- PPG: *“Discussions about planning obligations should take place as early as possible in the planning process, including at the pre-application stage. This will prevent delays in finalising those planning applications which are granted subject to the completion of planning obligation agreements.”*
- Information gathering: (i) local policies; (ii) completed s. 106 agreements.
- Other stakeholders? Competing interests between stakeholders.

3. Dealing with delays

- Planning performance agreements: DMPO, art 34(2) – *“such extended period as may be agreed in writing between the applicant and the local planning authority”*.
- Formal dispute resolution mechanism proposed in section 158 and schedule 13 of the Housing and Planning Act 2016:
 - When mechanism triggered, Secretary of State required to appoint someone to resolve issues holding up the completion of planning obligations.

Dispute resolution (1)

- In overview:
 - Duty to appoint arises where a local planning authority is likely to grant planning permission for an extant application if satisfactory planning obligations are entered into.
 - The dispute resolution procedure must normally be requested either by the local planning authority or the applicant. The regulations may set out other people who can make the request.
 - The proposed regulations may also allow the dispute resolution procedure to be triggered regardless of whether there is a request, if outstanding issues have not been resolved within set timeframes.

Dispute Resolution (2)

- The appointed person must produce a report that sets out:
 - the unresolved issues and the steps taken to resolve them; and
 - the terms agreed, or where the terms have not been agreed, recommendations as to what terms would be appropriate.
- Where planning obligations are entered into in line with the report, then the local planning authority must not refuse permission for reasons relating to the appropriateness of the planning obligations.
- The parties may agree different terms, but they will only have a limited period to do so, which will be set out in regulations.
- Where no obligations are entered into within a set period, the application must be refused.

4. Dealing with the drafting

- Start work on the drafting before the resolution to grant.
- Ask the local authority for their template agreement. In the absence of a template, there is the Law Society's model form of section 106 agreement.
- Triggers – check definitions of implementation/commencement in particular.
- Flexibility – avoid need for a formal deed of variation, “or...as the Council approves”.

5. Looking ahead

- The Mayor's Affordable Housing and Viability SPD (August 2017)
- Autumn Budget 2017 – Response to the independent review of the Community Infrastructure Levy which concluded: “*We recommend that small developments (10 units or less) should pay only the LIT and no other obligation, unless exceptional circumstances apply.*”
- Current consultation: “Planning for the right homes in the right places” – viability to be resolved at plan stage. Update to PPG to make viability assessments “*simpler, quicker and more transparent*”.

Can conditions on a Planning Permission in Principle be varied?

Overview: Two Stages

- The first stage (or permission in principle (“PIP”) stage) establishes whether a site is suitable in-principle for residential development (i.e. development in which the residential use occupies the majority of the floorspace): s. 59A TCPA.
- PIP can be granted by development order. The only order currently in force is the Town and Country Planning (Permission in Principle) Order 2017. Article 4 grants permission for suitable sites in Part 2 of LPAs brownfield land registers (see also s. 59A(3) TCPA).
- Once the necessary secondary legislation has been introduced, it will also be possible to obtain permission in principle through the local plan site allocation process or by an application for non-major development.
- The second (‘technical details consent’) stage is when the detailed development proposals are assessed. It is described at s. 70(2ZZB) as “*an application for planning permission*” and the effect of technical details consent is the grant of planning permission.

Conditions

- It is not possible for conditions to be attached to a permission in principle. Its terms may only include the site location, the type of development and amount of development: see s. 70(1A) TCPA.
- Local planning authorities can however inform applicants about what they expect to see at the technical details consent stage.
- It is possible for the local planning authority to attach planning conditions (and planning obligations) to a technical details consent providing they meet existing requirements around the use of conditions.
- PIP normally ceases to have effect on the expiration of 5 years or 3 years from when it takes effect (5 years from when the land in question is added to the register/allocated and 3 years if granted by the LPA on an application): s. 59A(7) TCPA.
- It does not cease if the land is removed from Part 2 of the Brownfield Register.

Answer

1. It is not possible to impose conditions on a PIP.
2. However, conditions can be imposed on the technical details consent.
3. Those conditions can arguably be subsequently be removed or varied.
4. S. 73 TCPA applies to “*applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted*”. The effect is the grant of a new planning permission: see s. 73(2).
5. As an application for technical details consent is described as an application for planning permission, and the effect is the grant of a planning permission – then the s. 73 procedure can arguably be used.
6. However, not at all clear cut – and no consequential amendments to s. 73 to make this clear. Application need to be made while PIP extant?
7. If s. 73 cannot be used, then to change conditions on a technical approval consent the only way to do is to submit a fresh technical approvals application within the life of a PIP or to appeal the consent.

aparkinson@landmarkchambers.co.uk