DEVELOPMENT LAND: ACQUISITION AND DEVELOPMENT – OPPORTUNITIES AND PITFALLS

Section 106 agreement / option / conditional contract / promotion agreements / planning clawback and overage & practical experience of dispute resolution in these contexts

By Wilson Horne
Key aspects of Section 106

• The unilateral undertaking; overcomes logjam in planning appeals.
• It is a prospective regime; old agreement still enforceable.
• The most common use of planning obligation is the grant of planning permission.
• The planning obligation can overcome planning objection and is a material consideration for section 70 (2).
• However, it must meet the test set out in regulation 22 of the CIL Regulations 2010, (a) necessary to make the development acceptable (b) directly related, (c) fairly related in scale and kind.
Key aspects of Section 106

• Capacity of the covenantor; looks as if settled; covenantor must have a proprietary interest in land Southampton CC v Halyard Ltd [2009]
• If the covenantor only has an option or interest under contract?
• The obligation only binds his limited estate and of no value in enforcement terms until he acquires the legal interest.
• A covenantor cannot bind a superior interest (e.g. tenant).
• Third parties rights existing prior to the planning obligation probably unaffected.
Key aspects of Section 106

• The terms of the section are broad though not without clear limits.

• However, not generally appropriate for imposition of an off-site obligation, save for monetary obligations.

• Potentially side stepped if tied as a negative condition to some obligation that can lawfully be imposed (e.g. Travel Plan for invitees) or a displacement arrangement.

• An obligation to transfer land can be done, however beware compliance with section 2 of LP (MP) Act 1989: Jelson Ltd v Derby CC [2000]: but Contracts (Rights of Third Parties) Act 1999.
Key aspects of Section 106

• A planning obligation may be conditional.
• Grampian style conditions may be imposed.
• Condition also where the planning obligation only applies insofar as the covenantor has an interest.
• Formalities: deed, identify covenantor’s interest.
• Registrable as a local land charge.
• Despite its statutory nature, still contractual so terms may be implied and invalid provisions may be severed using the blue pencil test.
Key aspects of Section 106

• The statute overrides the privity of contract, by allowing enforcement against a subsequent owner.
• The question still is whether the obligation falls within the section 106 scheme.
• Only the identified authority may enforce it, and it must relate to land in its area.
• Enforcement is a matter for the discretion of the authority: Milebush Properties Limited v Tameside MBC [2011].
• Injunction normally granted in the absence of circumstances where it would be denied applying equitable principles.
• Entry and recovery of costs.
Interpretation of a section 106 agreement

• The approach to the interpretation of a section 106 agreement.

• *Robert Hitchins Limited v Worcestershire County Council [2015]* Court of Appeal.

• *Arnold v Britton* applied.

• Obvious background to the section 106 is the draft Planning Permission attached thereto.

• Upon the execution of the agreement, the Planning Permission is granted.
Option Agreements

• Consider call option used in relation to proposed residential development land (i.e. cleared or greenfield site).
• Trigger event, a grant of a Satisfactory Planning Permission.
• The Price probably a % of the Market Value at the Valuation Date or a multiplier of the Net Developable Area.
• The fixing of the price does not necessarily result in the exercise of the Option.
• The determination of the Market Value under a Promotion Agreement will be similar.
Trigger

• The grant of a Satisfactory Planning Permission.
• Usually it is what is satisfactory from the Developer’s perspective.
• Developer invariably constrained by the requirement of reasonableness.
• However, what effect does a limitation of the Developer having regard to its own commercial interests have?
• Normally, the Developer will serve notice triggering the price fixing machinery following the grant of the SPP.
• A challenge by the Owner on whether SPP granted.
Net Developable Area

• A contractually defined term.
• Any land within the Property capable and authorised by the SPP of being developed (say) for housing.
• A list of exemptions follows, e.g.: (a) landscaping, (b) surface water balancing ponds, (c) highways, (d) nature habitats, (e) town or village green.
Market Value

• In invariably defined by reference to the RICS Valuation Standards current at the date of the option.

• Currently, the RICS Valuation Global Standards 2017 incorporating the IVSC International Valuations Standards.

• However it could be the Professional Standards UK January 2014 (revised April 2015) i.e. Market Value for residential property: The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm’s length transaction after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.

• In this scenario, it is probable that the SPP is the optimum pp of the purpose of the valuation.
Methodology

• This will be dictated by the guidance published by the RICS.

• Two methods of valuation: comparable and residual.

• Both methods will be used to sense check any valuation.

• Valuing by comparison is objective. However, the lack of comparables likely.

• Residual valuation method is therefore likely to be determinative.
The Residual valuation method probably is partly objective and partly subjective.

It relies upon comparison and cost and is subject to many assumptions.

A summary residual valuation calculation is: (value of the completed development) – (development costs + developer’s profit).

Gross Development Value is the market value of the proposed development assessed on the special assumption that the development is complete as at the valuation date in the then prevailing market conditions.
Methodology (continued)

• The net residual value will take into account the Site Specific Costs.

• What is a base build cost and what is a SSC is often difficult to distinguish between.

• Invariably fertile battle ground when a dispute arises under the Option.

• An example of a SSC might be the cost of cleaning up contamination.
Conditional contract

• Subject to the grant of a ‘Qualifying Planning Permission’.

• QPP is one in a form acceptable to the Buyer (acting reasonably), including a commercially viable scheme or the Buyer having regard to its commercial interests in respect of the same.

• Subject to the grant of a ‘Satisfactory Planning Permission’, which is free from ‘unacceptable planning conditions’.

• ‘Unacceptable planning conditions’ may be expressly defined or subject to a sweeping up clause: any other condition which in the opinion of the Buyer is unsatisfactory.
• Rentokil Initial 1927 Plc v Goodman Derrick LLP [2014] High Court.

• An unsuccessful claim for damages for professional negligence brought by a highly sophisticated commercial client.

• Sweeper-up condition: “...any other condition in the reasonable opinion of the reasonable developer in any other way restricting the carrying out of and/or the use of the use or occupation of the whole or any part of the Development or requires the incurring of expenditure which would be likely to have a materially detrimental effect on the financial viability of the investment value of the Development”.
Conditional contract continued

- Can the buyer exercise an absolute discretion?
- Yes if the contract provides for this. Closer to an option than a conditional contract.
- However, the discretion is probably still subject to the scrutiny of the Court.

*Abu Dhabi National Tanker Vo v Product Star Shipping Ltd (The Product Star No 2) [1993]*.

- The discretion must be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably.
Conditional contract continued

• The longstop date.
• The provisions providing for extension e.g. planning appeal, JR etc.
• *Cohen v Teseo Properties Limited [2014]*.
• Rights of waiver in respect of conditions.
• One or both parties entitled to waive?
• *Walker v Kenley [2008]*. It may result in a loss of consideration for the Seller.
• *Extra MSA Services Cobham v Accor UK [2011]*. A conditional contract cannot be terminated by the party relying upon its own breach.
Emerging trends / issues

• Sellers should be less generous in relation to sweeping up conditions on the grant of a SPP.
• Sellers should force the buyer to define precisely the unacceptable planning conditions.
• The incidences in which the time for the satisfaction of a condition may be extended require careful definition.
Promotion Agreement

• The agreement is initially conditional from the Promoter’s point of view.

• The condition concerns the requirement for the acquisition of additional land to achieve the Optimum Price for the Promotion Land; usually an enhanced access.

• Optimum Price: the most deliverable price reasonably obtainable pursuant to the agreed sales programme.

• Initial consideration still payable to the Owner despite conditionality.

• The parties are bound to perform their respective Planning Obligations.

• Conditionality will last until the Promoter makes its Planning Application.
Effective Period

• A fixed period (say 18 months) subject to extensions until the Lapse Date. Usual triggers for extension are listed below.
• SPP obtained but the whole of the Development Area has not been disposed of.
• A dispute is referred to the Expert for his decision.
• Planning Application submitted but not finally determined.
• Planning Application / Planning Permission subject to an appeal.
• SPP granted but the Challenge Period has not expired.
• During the Challenge Period a Planning Challenge is made but not disposed of.
Lapse Dates of the Effective Period

• After the receipt of the Expert’s Decision.
• The date upon which the Planning Application is finally determined.
• The dismissal of the Appeal.
• The grant of the SPP without a challenge being made.
• The final determination of the Planning Challenge.
• However, the Effective Period is always extended if SPP is obtained until the whole of the Development Area has been disposed of and all payments made to the parties.
The Promoter’s planning obligations / rights

• Creation and agreement / determination of the Planning Strategy, including proposals for (a) seeking of the PP for (usually) residential development for the Promotion Land (b) preparation of a Master Plan, (c) timetable.

• The Promoter may wish to make representations to an emerging Development Plan document or a competing application.

• Subject to the satisfaction of the original condition, the Promoter shall make the Planning Application at its sole expense.

• The Promoter shall use reasonable endeavours to obtain the SPP as soon as reasonably practicable consistent with the Planning Strategy and Master Plan.
The Promoter’s further obligations/ rights

• Keep the Owner informed.
• Upon a Planning Refusal the Developer must make a decision to pursue a Planning Appeal.
• In the event of disagreement, a duty to resolve the impasse (often Counsel’s opinion).
• The duty to prosecute an appeal.
• The duty to take reasonable steps to ensure that a SPP remains extant and subsisting.
• The right to require the inclusion of Third Party Land or the Owner’s retained land in the Proposed Development to enhance the obtaining or implementation of a SPP.
• Community Infrastructure Levy will be reflected in the Market Value.
The planning obligations of the Owner

- Not to prejudice the Planning Application.
- No material change in the state or character of the Promotion Land, save for (e.g.) farming.
- Not to encumber the Promotion Land.
- Not to encourage third parties to make an application in relation to the Promotion Land or a nearby site.
- To support the Planning Application / Appeal as requested by the Promoter.
The Planning Obligations of the Owner (continued)

• To support the Promoter’s objections to an application under The Commons Act 2006 or the making of a compulsory purchase order.

• To enter into a Planning Agreement e.g. a section 106 agreement.
Sales Programme

• The optimum method for the Disposal of the Development Area including (a) marketing strategy, (b) type, timing and price of disposals, (c) the terms of any Planning Agreement, (d) method of access and services

• A sales programme is to be agreed upon after the resolution of the LPA to grant an SPP.

• As part of that, the Market Value for the Development Area must be agreed.

• Appointment of an agent (often Owner’s agent).
Disposals / Proceeds of sale

- Upon the agreement of the sales programme, the Development Area shall be marketed.
- The Owner shall accept the Optimum Price unless reasonably apparent will not mature into a binding obligation.
- After the Optimum Price accepted the Owner shall proceed with the disposal.
- The parties agree to do everything necessary to ensure compliance with section 2 of the LP (MP) Act 1989.
- The deduction of the costs of the acquisition of Additional Land and then the agreed split of proceeds of sale.
Problems

• No agreement reached on sales programme.
• Dispute over additional land be it retained / Third Party land.
• Expert determination.
• Non-adherence to sales programme.
• Duty of good faith.
• Termination of agreement.
Planning clawback and overage

• What is it?

• Clawback: sharing in the enhanced value following grant of PP in favour of the purchaser.

• Overage: sharing in the sales proceeds following development.

• Approach of clause: deduction of developer’s costs or deduction of a Base Value

• Trigger event: grant or implementation of a PP of a certain type of use / a particular type of disposal; however permitted disposal is exempt

• Market value: normally defined by reference to current RICS standards by reference to a point in time
Problems

• Defining the trigger event
• Market value with and without planning permission to produce the additional consideration payable
• An effective release of the land from the effect of the clause
• The effect of the legal / equitable charge securing payment
• Anti avoidance key: say the grant of a linked PP is a trigger event
• Disputes normally the subject of expert determination