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Planning obligations and the Community Infrastructure Levy – covenants, contributions and levies in a time of lockdown

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Clive Moys' practice is focussed primarily upon real property, planning and development, and rating and valuation. He is a seasoned advocate, and an experienced litigator and adviser having been in practice for 30 years. Prior to call to the Bar, he began as a qualified solicitor in London local government helping him bring a valuable insight into the workings of local government to his work at the Bar.

This article focuses on two of the many important issues – one under section 106 of the Town and Country Planning Act 1990 and the other under the Community Infrastructure Levy ("CIL") regime – which are likely to arise in the residential development sector during the current lockdown and economic downturn. The first issue is early stage viability review mechanisms, which are designed to capture a share of any increased profitability, to be used for additional on-site affordable housing provision where implementation is delayed. The second issue is CIL liability notices under The Community Infrastructure Levy Regulations 2010, SI 2010/948.

Introduction

Planning permission for residential development – whether granted in outline or in full, whether by a local planning authority or by the Secretary of State on appeal – is, typically, linked to a planning obligation. Such planning obligations commonly take the legal form of a section 106 agreement or, less commonly, a unilateral undertaking. These important instruments are at the interface of Property, Contract and Administrative Law.

Either document will be executed as a deed by: "any person interested in [the] land … of a local planning authority ...". In practice this means: the freehold landowner (and leaseholder if there is one); a developer (if, as is often the case, it is a different entity to the landowner) – who has the benefit of a conditional contract or option to acquire the site; the mortgagee/lender/funder (if any); and, unless the obligation is provided by a unilateral undertaking, the local planning authority which, in a two-tier area, may well include the county council.

Depending upon the size of the site, and the nature of the scheme, the obligations may be many and various. Principally they will involve the payment of significant monetary contributions to mitigate the impact of the proposed development upon local services such as: education, primary and secondary; health and medical; highways and transport; leisure and open space; libraries and culture, as well as restricting the use of the land; or, requiring the land to be used in a specified way.

Since the 2008 financial crash ushered in the age of austerity the range of contributions which, supported and encouraged by national and local planning policy, a local planning authority routinely asks for (and gets) has increased. Not only has the local planning authority's own shopping list expanded, a range of other public sector service providers and parish councils may well add their own requests.

The above range of common planning obligations are of considerable monetary value[1] and importance to all the parties involved in the negotiation, drafting and completion of the section 106 deed. Paramount amongst such obligations may be the mechanisms included for the provision of affordable housing.

Affordable Housing

In London affordable housing comes in a bewildering range of mixes, tenures and types. Typically, a developer assumes a 6% profit on its affordable housing provision, contrasted with an assumption of 20% profit on the private market dwellings. In sum, one significant component of the developer's viability appraisal is the amount, type and timing of the affordable housing which it is obliged to provide under the section 106 agreement.

However, "affordable housing" may be defined – and whether or not it is "genuinely affordable" may be debatable – what is certain is that there is not enough of it. The need to build more – and faster – so that it may be "delivered" - to use the in vogue term, has many consequences. One such consequence, in London, has been the role of the Greater London Authority ("the GLA").

Viability – the fast track

The introduction of a 35 per cent affordable housing threshold, above which schemes benefit from the "fast-track", has been described as Sadiq Khan's flagship policy. The Mayor's 2017 Affordable Housing and Viability Supplementary Planning Guidance is seen as his most significant intervention in planning policy for homes – for referable schemes i.e. above 250 units – provides a route by which the dark arts of development viability appraisal may be by-passed. In other words, a developer offering 35% affordable housing provision will have such a scheme "fast-tracked" through the planning system.

Development involves many moving parts and is, in the best of times, a risky venture. Developers appreciate certainty and it seems that plenty have gone, or are going down, this route. Hence, developers are factoring in their having to provide 35% affordable housing in their own internal viability appraisals, and the price which they will pay to acquire a site. This understanding will apply to both the "promoting developer" and any other developer who subsequently purchases an "oven-ready" site.

However, the GLA will require the local planning authority to include provisions for viability review within the section 106 agreement linked to a planning permission granted for a fast-track scheme.

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[1] £6 billion – total value of planning obligations and CIL payments – 2016/17 MHC&LG March 2018 report

Development viability review mechanisms

The principle which underlies review mechanisms is that the level of affordable housing provision mandated by planning policy should, whenever possible and without rendering a scheme "unviable", be achieved on each site. In the case of a fast-track permission, this translates into at least an early stage review. Broadly, the idea is that if the development for which planning permission has been granted has not progressed to a given stage by a given point in time – typically two years from the date of the decision notice – then a development viability appraisal shall take place. Once the numbers have been "crunched" this could result in a requirement to make additional affordable housing provision – either on-site (preferred), or by an off-site commuted sum payment.

We are, of course, now in unprecedented circumstances. No one can say how long the lockdown will last, nor what the health, economic or social consequences will turn out to be.

As the situation unfolds, with recent subordinate legislation to facilitate virtual planning committee meetings[2] and, possibly, planning appeal hearings and inquiries taking place virtually, there is much for all involved in the planning system to ponder. Planning obligations and CIL payments are unlikely to be at the forefront of developers' or local planning authorities', minds, although East Suffolk Council says it is reissuing demand notices to allow a three-month extension and pausing CIL recovery.

A scenario

Assume a residential development site in London for which full planning permission was granted last autumn authorising the demolition of the redundant buildings on the land, followed by the erection of 1,000 dwellings in 4 blocks. The grant was not expressly for "phased development". The local planning authority's resolution to grant had been made subject to the completion of a section 106 agreement – to secure the diverse range of planning obligations (including 35% affordable housing by habitable room) broadly identified in the developer's heads of terms, and set out in more detail in the officers' report to committee recommending approval. Pre-commencement conditions were swiftly discharged. Encouraged by up-beat market sentiment and the "Boris bounce" the developer was on site early in 2020 and commenced development.

The local planning authority had, two years previously, adopted a CIL charging schedule with residential development liable to contribute to local infrastructure provision at a levy of £100 per sq. m. The developer served a notice of intention to commence development upon the relevant London borough council qua CIL charging and collecting authority.

On 26 March 2020 the developer reluctantly decided that construction should cease and the site be closed and "mothballed" pending further government health advice.

Possible issues

At least two issues arise in our scenario. The first concerns sites where development "commenced" before the lockdown began. In

[2] SI 2020 No. 392 laid before Parliament April 2, 2020

some cases there may be developers who were relaxed about early review clauses – based on their confident assumption that they could achieve the "substantial implementation" threshold within the 2 year period - thus avoiding the early review being triggered. The longer the period of lockdown, the more vulnerable such assumptions will become.

It is, of course, possible that legislative intervention will alter the landscape. A recent example was the enactment of the "stalled sites" provisions post-2008, by the temporary amendment of section 106 it was possible for the provisions of an affordable housing planning obligation to be revisited. However, the Government did not extend this beyond its initial three-year period – presumably taking the view that once we were over the worst it was no longer necessary.

For the present, unless a local planning authority agree to modify a section 106 agreement - which itself involves a deed of variation – a developer must wait 5 years before it may formally apply to have a planning obligation modified, with a right of appeal to the Secretary of State from a local planning authority's refusal under section 106A.

Secondly, there is the Community Infrastructure Levy ("CIL") regime to consider. Generally speaking, CIL is regarded as a complex and rigid system – an unforgiving tax regime which is aimed at developers contributing to the local infrastructure needs generated, in whole or in part, by their scheme. Again, assuming commencement on site has occurred prior to lockdown – as in our scenario – CIL levies will have been triggered.

Some charging authorities have adopted the discretionary "exceptional circumstances" relief based on development not being financially viable because of the CIL levy (Regulation 55). However, so far not that many authorities have elected to make this discretionary relief potentially available.

The statutory instruments which govern the CIL regime have been amended several times since 2010. Once again only time will tell whether the Government decides that further amendment is required to protect developers from having to make payments whilst they are unable to be on site making progress with their schemes.

Conclusion

The shortfall in new build housing supply generally – and affordable housing in particular - will inevitably be exacerbated by the current lockdown. Those of us involved in the world of planning and development are, in common with everyone, trying to come to terms with an unprecedented and evolving situation. The last recession led to short term legislative changes aimed at mitigating some of the harmful impacts of that economic downturn. The early signs indicate that the economic consequences of the Covid-19 lockdown will, sadly, be worse.

For developers who are focussed upon setting up virtual tours of show homes, furloughing staff and looking closely at their financial covenants considering the terms of section 106 planning obligations, or CIL payments, may well be much less of a priority. However, the longer we remain locked-down the more it will become necessary to carefully consider such exposure and how, if at all, it may be mitigated.

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