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How relevant today are section 106 agreements?

The role of Section 106 agreements is being challenged by reforms such as the Community Infrastructure Levy and changes in the Growth and Infrastructure Bill. Chad Sutton analyses the latest developments.

A 'section 106 agreement' is a legal agreement made pursuant to section 106 of the Town and Country Planning Act 1990 entered into between a local planning authority and persons interested in land which imposes planning obligations.

Planning obligations are used by local planning authorities to mitigate the negative impacts of a development and make it acceptable in planning terms. Examples of planning obligations include the payment of financial contributions, works requirements and restrictions on the use of the development.

In the past, Section 106 agreements have played an important role as the traditional method by which local planning authorities have funded infrastructure requirements within their areas. This role is now being challenged by a wave of reforms to the planning system introduced by the Government, such as the Community Infrastructure Levy (CIL) and reforms proposed under the Growth and Infrastructure Bill 2012-2013.

I discuss the impact of these reforms, as well as the criticisms and continuing benefits of Section 106 agreements and whether these agreements still have a role to play, or should instead be confined to the pages of history.

The impact of CIL on the use of Section 106 agreements

CIL is a tax on development, the purpose of which is to fund infrastructure. CIL was introduced by the previous Labour Government because of a perception that the current system was failing to meet infrastructure costs, although this was before the economic downturn. The current Coalition Government chose to retain CIL, despite the Conservative's manifesto before the last election which proposed its abolition.

The legislative basis for CIL is provided in the Planning Act 2008, with the first Community Infrastructure Levy Regulations (the Regulations) made in 2010. CIL went 'live' on 6 April 2010. Since that time, there have been amendments to the Regulations in 2011 and in 2012. The Government has also on 15 April 2013 announced a consultation on further amendments to the Regulations.

CIL is calculated at a rate per square metre of floorspace within a chargeable development. The trigger for the payment of CIL is the commencement of development and any reliefs available from CIL for social housing and charities must be claimed before that date. Before CIL is charged, the local planning authority must prepare a charging schedule which must be published for consultation on the authority's website and is subject to independent examination by an inspector. CIL can only be spent on 'infrastructure' which is defined in Section 216 of the Planning Act 2008. Although this is broadly defined (including roads, schools, flood defences and open spaces), Regulation 63 amended this definition to provide that affordable housing itself cannot be funded by CIL.

The Regulations impose limitations on the use of Section 106 agreements such that these agreements are now essentially confined to addressing site specific impacts from development pursuant to the three tests for imposing planning obligations set out in Regulation 122. These tests are that the obligation must: be necessary to make the development acceptable in planning terms; directly related to the development; and fairly and reasonably related in scale and kind to the development.

Regulation 123 places further limitations on the use of pooled financial contributions under Section 106 agreements. It provides that where a local planning authority introduces CIL, or the deadline of 6 April 2014 is reached (the recent Government consultation proposes to extend this deadline to 6 April 2015), then in no circumstances can the authority impose more than five planning obligations for the funding of a particular type of infrastructure or infrastructure project.

CIL has several advantages over Section 106 agreements. There is more certainty, as the liability for CIL is set by reference to a rate fixed by a charging schedule, as opposed to negotiated obligations under a Section 106 agreement which can vary for different developments. CIL is also broader in its scope as it can catch more contributors, while Section 106 agreements are imposed by local planning authorities on a discretionary basis and therefore some developments make no contribution towards funding infrastructure.

Reforms to affordable housing provision under Section 106 agreements

Despite the introduction of CIL, Section 106 agreements remain the primary route for imposing affordable housing restrictions. However, there is a reform proposed by the Government in its Growth and Infrastructure Bill 2012-13 currently before Parliament which will affect affordable housing under Section 106 agreements.

Under Clause 5 of the Bill, there is a proposal to allow for a limited period of three years an application to be made to a local planning authority to vary or delete the affordable housing obligations within a Section 106 agreement where the obligations make the development economically unviable.

This reform further reduces the importance of Section 106 agreements, as affordable housing obligations, which are one of the primary remaining obligations secured by Section 106 agreements, can now be more easily removed from these agreements.

Criticism of Section 106 agreements

Section 106 agreements since their introduction have been the subject of much criticism and have led to practical issues for both local authorities and developers, including the following:

- Where the local planning authority is also the freehold owner of the land, the authority cannot covenant with itself under a Section 106 agreement, as if the obligation was breached it cannot enforce against itself. This is an important issue, as the parties want to ensure that there is a valid agreement which can be enforced effectively against not just the original parties but also successors in title and that the related planning permission is not subject to legal challenge.

- The completion of a Section 106 agreement is often expressed by a local planning authority to be a pre-condition to the grant of planning permission and this has resulted in cases where the grant of planning permission (and therefore the commencement of development) is delayed due to lengthy negotiations over the Section 106 agreement, which in some cases can take up to a year, if not longer.

- A common criticism is that planning obligations under Section 106 agreements are not being used for the purpose for which they were originally intended, which is to address the unacceptable impacts of development, and that the scope of planning obligations has expanded too far.

- In the current economic climate, there have been many developments which have stalled, despite being granted planning permission and there have been claims that Section 106 agreements containing onerous obligations entered into in more favourable times have served as an impediment to these developments proceeding by making these developments unviable. Developers have for this reason increasingly over the last few years sought to renegotiate the terms of Section 106 agreements with local planning authorities.

Continuing benefits of Section 106 agreements

Given the Government's reforms to the planning system and the alternatives now available for funding infrastructure such as CIL, one might ask whether there is any future for Section 106 agreements, however, there remains the following benefits of these agreements:

- The CIL regime has been criticised for being too complex and has since its introduction proved difficult for both local planning authorities and developers to comprehend and this has led to an increase in support for the use of Section 106 agreements from some local planning authorities which understand and are comfortable with Section 106 agreements and view these agreements as an easier system to understand than CIL.

- Section 106 agreements are flexible, as the terms of these agreements can be negotiated with local planning authorities on an individual basis and can cater to the different aspects of a particular development, as opposed to CIL which is a tax that is non-negotiable.

- A Section 106 agreement can be easily varied with the agreement of the local planning authority under a deed of variation, while CIL rates are set in the authority's charging schedule, which is more difficult procedurally to amend.

- Section 106 agreements remain with planning conditions the relevant mechanisms for the local planning authority to regulate a development by imposing on-site requirements. However, Section 106 agreements have advantages over planning conditions in that they can be used to require the payment of sums of money; they can provide for complicated wording of requirements such as mortgagee exclusions which would if imposed under a planning condition lead to the condition potentially being found to be imprecise and invalid; and the enforcement remedies available to a local planning authority for a breach of a planning obligation are stronger than that available for breach of a condition.

- Given that CIL cannot at present be used to fund affordable housing, Section 106 agreements continue to be the primary route for securing the provision of affordable housing.

In conclusion, there are clearly many issues associated with the use of Section 106 agreements which need to be addressed to ensure that these agreements are used for the purpose for which they were originally intended and that there is no delay to the grant of planning permission caused by the lengthy negotiation of these agreements.

Further, the Government's reforms to the planning system and introduction of alternatives to Section 106 agreements for the funding of infrastructure such as CIL, has significantly reduced the importance of Section 106 agreements.

However, despite their many imperfections, Section 106 agreements will still continue to play an important role in the planning system to regulate development and secure infrastructure, including notably affordable housing, as the CIL alternative is considered by some to be too complex, inflexible and it is an unknown for many local planning authorities, and planning conditions are not appropriate for securing the payment of monies and incorporating detailed requirements such as mortgagee exclusions.

The planning system over the last few years has been in a constant state of flux and only time will tell whether Section 106 agreements will actually last the test of time.

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