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Relaxation of Planning Obligations and CIL Liabilities - the Principles and the Practice.

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Renegotiating s.106 agreements

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Context

- Too early to understand impact of pandemic on viability (Planning, June 2020)
- Rate of sales down (5-10%). Prices?
- 2 key issues:
  (a) timing of payment
  (b) quantum

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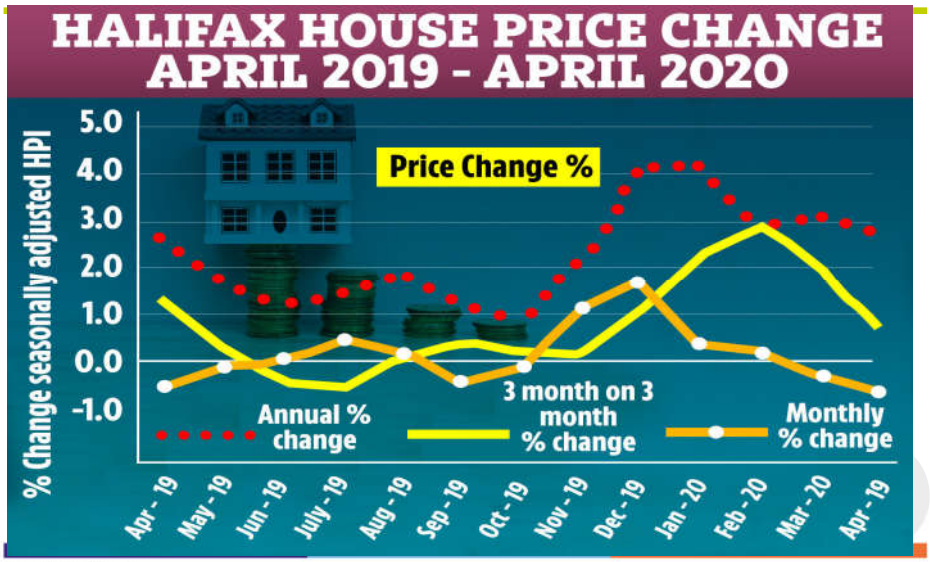

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106A.— Modifications/discharge of obligations

(1) A planning obligation may not be modified or discharged except—

(a) by agreement between the appropriate authority and the person or persons against whom the obligation is enforceable ; or

(b) in accordance with this section and section 106B

(2) An agreement falling within subsection (1)(a) shall not be entered into except by an instrument executed as a deed.

(3) A person against whom a planning obligation is enforceable may, at any time after the expiry of the relevant period, apply to AA for the obligation—

(a) to have effect subject to such modifications as may be specified in the application; or
(b) to be discharged.

(4) In subsection (3) "the relevant period" means—

(a) such period as may be prescribed; or (b) if no period is prescribed, the period of five years beginning with the date on which the obligation is entered into.

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(5) An application under subsection (3) for the modification of a planning obligation may not specify a modification imposing an obligation on any other person against whom the obligation is enforceable.

(6) Where an application is made to an authority under subsection (3), the authority may determine—

(a) that the planning obligation shall continue to have effect without modification;

(b) if the obligation no longer serves a useful purpose, that it shall be discharged; or

(c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications.

(7) The authority shall give notice of their determination to the applicant within such period as may be prescribed.

(8) Where an authority determine [under this section] that a planning obligation shall have effect subject to modifications specified in the application, the obligation as modified shall be enforceable as if it had been entered into on the date on which notice of the determination was given to the applicant.

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How to modify or discharge a planning obligation?

- By agreement at any stage
- By application under s.106A

Authorities have no obligation to renegotiate until **5 years** after the original agreement is signed.

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Test: Does the obligation "serve a useful purpose"?

- V wide test. High evidential burden for developers.
- Application to modify an obligation is "an all or nothing" decision.
- 4 key qs (*Garden & Leisure Ltd v NE Somerset* [2004] 1P&CR 39 at [28]
    i. What is the current obligation?
    ii. What purposes does it fulfil?
    iii. Is it a useful purpose?; and
    iv. Would the obligation serve that purpose equally well if it had effect subject to the proposed modifications?

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Does obligation have to serve a "*planning* purpose"?

- *R. (on the application of Batchelor Enterprises Limited) v North Dorset DC [2004] J.P.L. 1222*.HC accepted agreed position that useful purpose = useful *planning* purpose.
- Doubted in *R oao Renaissance Habitat Ltd) v West Berks* [2011] J.P.L. 1209 and in *R (Mansfield DC) v SSHCLG* [2018] EWHC 1794 (Admin) Garnham held:
  - S.106A does not bring full range of planning considerations as grant/ refusal of pp;
  - Should not read in word "planning" which does not appear into s.106A
- A distinction of significance?

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- Does not require that useful purpose is related directly to the underlying development or its mitigation (*Mansfield* at 42 and 43)).
- Purpose now served by obligation may be a different one from that intended to be served when the planning obligation was entered (applying *JA Pye (Oxford) Ltd v South Gloucestershire DC (No.1) [2001] 2 P.L.R. 66*).

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Application Process

- Form of application. TCP (Modification and Discharge of Planning Obligations) Regs 1992 reg 3. Duty on applicant to provide clear reasons and evidence for modification.
- Notification and publicity obligations.
- 8 week determination period.
- Right of appeal against adverse determination or non-determination.

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Modification of Affordable Housing requirements

- S.106BA - a blueprint?
- No longer in force since April 2016.
- Temporary measures effectively forced LA's to renegotiate s.106 agreements when asked to. Gave developers opportunity to appeal to PINS if not satisfied or no determination within 28 days.
- Onus on developer to show AH req means development is not economically viable before. If so reqs could be modified to make scheme viable.

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Tips for LPAs

- Be flexible, pragmatic – want to avoid scheme or business failure
- Ask for evidence for why purpose no longer served or of non-viability.
- No need to wait for central government – eg MCC has delayed s.106 to completion; Wakefield delaying CIL collection
- Beware opportunism –Warning of past (mis) use of s.106BA even after values recovered.

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Enforcement of Planning Obligations

Principal authority is *Ali v Newham LBC* (2014) EWCA Civ 676

Injunction is prescribed enforcement remedy – s.106(5)

Court of Appeal held that where there is a breach of PO Court will usually grant an injunction on LPA's application:

- Normal contractual principles apply
- Court doing no more that holding party to its obligation
- CA expressly rejected applying same broad discretion available to Court under s.187B
- Injunction only withheld on normal equitable principles e.g. delay, unconscionable behaviour
- Submission that the s.106 no longer achieves any planning purposes, and planning merits generally, are not a basis for withholding injunction;

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- Outstanding planning application or appeal not usually be a good reason for withholding injunction; CA held it "will usually be irrelevant"
- However, that was basis (exceptionally) for CA to suspend injunction in *Ali*. Such discretion should be exercised "sparingly"
- Qu. whether an outstanding application under e.g. s.106A etc. would be basis for withholding or suspending an injunction?
- Approach seems to be that injunction will generally follow where there is a breach of a PO. Would therefore be unwise for a covenantor not to seek to resolve difficulties in terms of compliance before breach proceedings;
- LPA can of course allow time for resolution before instigating enforcement proceedings (but should be wary of effect of delay).

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Covid-19 Guidance – Variation of S.106 Obligations

MHCLG Guidance of 13 May 2020:

- Recognises that there is greater flexibility than in respect of CIL
- Objective is to "remove barriers to developers" and avoid "sites stalling"
- In effect, purpose is to address cash flow issues
- Where delivery under a s.106 is triggered during COVID 19 outbreak:
  - local authorities are encouraged to consider whether it would be appropriate to allow the developer to defer delivery
  - Local authorities should take a pragmatic and proportionate approach to the enforcement of section 106 planning obligations during this period

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- Advice is to secure deferment by deed of variation (but time-limited)
- LPA should be wary of extinguishing a covenant in totality, at least without sound planning reasons
- Likely that LPA who is approached by coventantor or successor to vary, in accordance with MHCLG advice, would be required to consider this request and where basis is made out, acting reasonably, to defer.

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S.106 Other Matters

Legal importance of s.106 is to provide:

- for covenants to be enforceable against successors in title without necessity any LPA land to be benefitted, and
- for positive covenants to be enforceable against successors in title.
- But (subject to terms) covenants remain enforceable in contract against original covenantor.

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If successor in title, important to check:

- Does deed meet legal requirements for s.106 - esp s.106(9)

If not, likely to be fatal to reliance on s.106 (see *Southampton CC v Hallyard Ltd.* (2009) 1 P&CR 5)

- Do covenants fall within s.106(1) (see e.g. *R (Khodari) v RBKC* (2017) EWCA Civ 333).

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Community Infrastructure Levy

Introduction

- Flexibility for collecting authorities in respect of liability and the recovery of CIL is limited
- The CIL Regulations 2010 are expressed largely in mandatory terms with little discretion provided for, e.g. reg. 69 - collecting authority *must* serve a demand notice
- Through the 13 May 2020 Guidance, the intention of Government is to introduce amending regulations to introduce flexibility

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- Intention seems to be for amendments to be directed to SMEs only
- Requires regulations to be laid before Parliament
- Currently no draft regulations before Parliament
- In the interim, MHCLG has, in 13 May 2020 Guidance, set out how, in the context of the limited discretion within 2010 Regs, a collecting authority might exercise flexibility.
- Effect of Guidance in practice is that the collecting authority must consider the exercise of discretion.

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Introduction or Amendment of Instalments Policy

- MHCLG advises review of instalments policy (and introduction of such a policy where none has been published)
- Instalments policy provided for by reg.69B
- Broad discretion available as to whether to adopt or amend an instalments policy
- No requirement for consultation (unless SCI provides otherwise)
- Policy and amendment can take effect on day after published (69B(2)(a))
- NB. requirement for instalment policy to be deposited for inspection (reg.69B(3))

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- Very broad discretion as to the terms of instalments policy including number of instalments, amount or proportion payable in any instalment, date of first payment and minimum liability before instalments policy is engaged
- BUT Ministerial Guidance suggest any policy or amended policy can only apply in respect of developments commenced after it is published- amendment cannot be retrospective
- This limitation is not set out in re.69A but *may* be the effect reg.70 - which requires payment "in accordance with that instalment policy" - if "that policy" means the policy in the form in which it existed at commencement.
- reg.69 provides that amount payable pursuant to instalments must be set out in demand notice (but demand notice maybe revised (reg.69(3))

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- One Collecting Authority has not, it seems, amended its instalments policy but has served revised demand notices with a 3-month deferment period "where a developer can prove they meet the small or mediums sized criteria"; Qu. what is the power to do this?
- Payment by instalments only applies where person has assumed liability and commencement notice has been served - does not apply where CO determines deemed commencement date;
- If instalment is missed, liability payable in full - reg.70(8) - no discretion.

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Exceptional Circumstances Relief

- Provided for by reg.57 but rarely made available by CO
- Requires charging authority to make relief available in its area by giving notice
- Practical Requirements and Limitations (not discretionary) -
  - claim must be made *and determined* before commencement of development (reg.57(9)
  - must be accompanied by (a) independent assessment of economic viability, and (b) explanation why in opinion of claimant payment would have "unacceptable impact on economic viability of the development"
  - "Independent person" is appointed by the claimant but must be agreed with the charging authority
  - can only be made where there is a s.106 obligation in place (reg.55(3)(b));

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- Cannot be claimed or given where social housing relief or charitable relief is granted
- Will be lost (but may be reclaimed) if land is disposed of before commencement;
- Development must commence within 12 months of grant of relief.

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- Discretion can be only exercised in favour of relief where:
  - relief has been made available by CA in area
  - S.106 is in place for the development
  - CA satisfied that payment would have unacceptable economic effect on development
  - Relief would not amount to State Aid (reg.55(3)); and
  - Authority is satisfied that there are "exceptional circumstances" which justify grant of relief and it is "expedient" to do so (reg.55(1))

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- Issues which arise:
  - Would collecting authority be unreasonable if it did not consider, if requested, introducing Exceptional Circumstances Relief?
  - What would be reasons for not doing so?
  - What are the "exceptional circumstances" which need to be found under reg.55(1)(a)? Context suggests circumstances must be more than economic hardship?
  - Only challenge to refusal of relief is JR
  - Resource hungry process for CA
  - Need for full transparency from landowners\developers.

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Phased Development

- Where planning permission for development is expressly phased, each phase is itself a chargeable development and CIL liability accrues accordingly (reg.9(4))
- Opportunity to phase development such that CIL is then payable in phases may be significantly beneficial in cash flow terms
- Esp. if phase 1 is limited to infrastructure works where CIL liability may be zero
- "Phased planning permission" means (by reg.2(1)) "a planning permission which expressly provides for development to be carried out in phases"

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- However, the planning permission for the chargeable development must, as a matter of construction, be a "phased planning permission" - see *R (Oval Estates Ltd) v BANES* (2020} EWHC 457 Admin.
  - No phasing condition on outline pp;
  - Phasing drawing referred to in RM approval
  - S.96A application, post commencement, which introduced phasing drawing into list of drawings on Plan List set out in OPP.

- Swift J. held that:
  - Planning permission for was not a "phased planning permission"
  - S.96A non-material amendment did not change CIL liability which had accrued on commencement.

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- Points to note:
  - Safest course is to include an express phasing condition on the face of a planning permission
  - Following *Oval Estates*, reliance on s.96A to introduce phasing is doubtful
  - However, a phasing condition could be introduced via s.73 and thereby the provisions relating to the effect of s.73 consents under reg.9(7)-(9) are engaged.

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Relief from Late Payment Surcharge

- Reg.85 provides that a collecting authority "may" impose a late payment surcharge;
- Perfectly clear that imposition of surcharge is discretionary;
- Some commentators have referred to potential for reversal of surcharge liability which has already accrued or even repayment;
- No power to do so in CIL Regs; Is power implied?.

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Late Payment Interest

- Late Payment Interest provide for by reg.87
- A person in default "must" pay late payment interest at prescribed rate
- No discretion
- MHCLG indicated that this is one of the provisions it intends to legislate upon
- As matters stand, and until then, no discretion to waive late payment interest

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CIL Enforcement

- In the event of default, the powers in CIL Regs. Chapters 2 and 3 are engaged
- These include power to serve CIL Stop Notices (reg.90), to apply for a liability order (reg.97) and power of distraint (reg.98), to seek committal (reg.100), to seek charging orders (reg.103), etc. in the event of default
- All discretionary as to timing of taking enforcement action

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- However, Magistrates *must* make liability order if satisfied that amount has not been paid (reg.97(5)); Court has greater powers and discretion re: committal (reg.100(3)) and charging orders (reg.104(1))
- However, unlikely, without good reason, that a collecting authority can simply waive liability by taking no enforcement action at all
- Collecting Authority should be cautious about losing opportunity practically to enforce.

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