

Who's Planning What

June 2008

Section 106 update

Developers are often required to contribute money towards improvements in the local area as part of their proposals. These contributions are called planning obligations and are usually paid to the local authority under a section 106 agreement or undertaking. Although the Government intends to replace this mechanism with the Community Infrastructure Levy, section 106 agreements are likely to continue to be used for some time. The following cases are important reminders for developers to get things right when planning obligations are involved:

In September 2006 the planning committee of a council resolved to grant planning permission subject to a section 106 agreement being completed. A few weeks later the council issued the permission, but without the agreement having been completed.

The Council realised its mistake and in July 2007 issued judicial review proceedings in an attempt to get the permission quashed – some seven months after the permission had been issued. The judge accepted that issuing the permission before the agreement had been completed was unlawful and agreed to quash the permission.

It is disappointing that the developer was not able to take advantage of the council's mistake and get out of having to enter into a section 106 agreement. It does highlight the importance, though, of getting legal advice on the validity of permissions even when everything appears fine. This can help prevent problems arising in the future.

Our next case involves a planning appeal for a development of sheltered accommodation. One of the council's reasons for refusal was that the developer had failed to make necessary financial contributions. As part of the appeal the developer sent the inspector two section 106 undertakings and asked the inspector to choose the undertaking she thought was most appropriate.

The inspector judged the undertakings against government guidance on planning obligations and found them flawed. In particular, she said that the undertaking which would pay money on the grant of permission was unreasonable, as the development might not ever take place. She also explained that she was unable to choose between the two undertakings, as the developer had signed both. This meant the contributions would be paid twice, which would be unfair and unreasonable. As a result of this failure to follow government guidance, the developer lost the appeal.

While government guidance is not the law, it is still very important to consider it, as this developer found out to his cost. Seeking legal and planning advice on such issues can help result in successful applications and appeals.

Finally, the courts recently had to look at whether a particular document was a section 106 agreement. The court assessed it against the statutory requirements and said that it failed the test and thus wasn't a section 106 agreement.

The consequences of such a finding can be disastrous for developers and lead to planning permissions being revoked by the council. It is therefore always very important for section 106 agreements to be drafted by specialist lawyers.

By Paul Courtine, Solicitor in the Planning Team at leading North law firm Ward Hadaway.

This briefing is for general guidance only. It represents our understanding of English law and practice as at June 2008, but is not intended to be a comprehensive statement of the law. Readers are advised to seek specific guidance from Ward Hadaway.