Coronavirus and Completing Section 106 Agreements

With the prospect of further easing of the Lockdown and attempts to achieve a "new normality" there remain a number of practical considerations that, short of swift amending legislation, will continue to challenge the development industry and the planning professions as we move into the remainder of 2020.

On 13th May 2020 Robert Jenrick MP, the Minister for Housing, Communities and Local Government, announced specific guidance on easing certain procedural requirements during the Coronavirus Crisis[1].

However, regarding the completion and formal execution of Section 106 agreements the challenge remains somewhat greater and its successful resolution more procedurally complicated, yet still achievable. In April's PEP Newsletter article "Coronavirus and Executing Documents Remotely"[2] my colleagues, David Sawtell and Gethin Thomas, drew attention to the power under Section 234 of the Local Government Act 1972 which provides that documents may be signed on behalf of the Authority by the Proper Officer (usually, under Delegated Powers by the Head of Legal Services or he Director of Law and Governance). Under sub-section 234(2), any document purporting to bear the signature of the proper officer of the authority shall be deemed, until the contrary is proved, to have been duly given, made or issued by the authority of the local authority. It is specifically provided that *'the word "signature" includes a facsimile of a signature by whatever process reproduced".* However, there are no specific provisions in the Local Government Act 1972 which govern the use of a local authority's seal. However, a local authority's standing orders frequently require the affixing of its seal to be attested by the chairman, vice chairman or other elected member, and also by the clerk or his or her deputy. As such, the procedure for the use of an electronic seal will be governed by each local authority's constitution. It may be that the individual person required to fix the seal is to be the person responsible for carrying out an electronic sealing of a document, but subject to delegated authority in accordance with a given constitution, it may also be possible to have others undertake the process of electronically sealing documents. So, sealing can be achieved.

Indeed, one local authority to whom I have given advice has pragmatically decided to appoint external solicitors to hold a power of attorney to execute deeds on its behalf.

Nevertheless, in the context of planning obligations, Section 106(9) of the Town and Country Planning Act 1990 provides specifically as follows:

> *"A planning obligation may not be entered into except by an instrument executed as a deed which—*
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> *(a) states that the obligation is a planning obligation for the purposes of this section;*
>
> *(b) identifies the land in which the person entering into the obligation is interested;*
>
> *(c) identifies the person entering into the obligation and states what his interest in the land is; and*
>
> *(d) identifies the local planning authority by whom the obligation is enforceable. and, in a case where section 2E applies, identifies the Mayor of London as an authority by whom the obligation is also enforceable*

[1] https://www.gov.uk/guidance/coronavirus-covid-19-planning-update

[2] April 2nd, 2020: https://www.39essex.com/planning-environment-and-property-newsletter-april-2020/

For example, where a decision notice await the completion of the "Section 106", or, with say a multi-phase scheme a necessary Section 73 modification (with linked Section 106)[3] the ability to agree the terms of the final document or its completion may still impeded by the outworkings of the CV-19 Lockdown. Is there another way of unlocking the situation?

After yielding to pressure from the development industry to allow formal endorsement of "Arsenal-type" conditions in the initial version of the national Planning Policy Guidance (published 6 March 2014) MHCLG's current advice (Paragraph: 010 Reference ID: 21a-010-20190723), effective since 23 July 2019, reads as follows:

Is it possible to use a condition to require an applicant to enter into a planning obligation or an agreement under other powers?

A positively worded condition which requires the applicant to enter into a planning obligation under section 106 of the Town and Country Planning Act 1990 or an agreement under other powers, is unlikely to pass the test of enforceability.

A negatively worded condition limiting the development that can take place until a planning obligation or other agreement has been entered into is unlikely to be appropriate in the majority of cases. Ensuring that any planning obligation or other agreement is entered into prior to granting planning permission is the best way to deliver sufficient certainty for all parties about what is being agreed. It encourages the parties to finalise the planning obligation or other agreement in a timely manner and is important in the interests of maintaining transparency.

However, in exceptional circumstances a negatively worded condition requiring a planning obligation or other agreement to be entered into before certain development can commence may be appropriate, where there is clear evidence that the delivery of the development would otherwise be at serious risk (this may apply in the case of particularly complex development schemes). In such cases the 6 tests should also be met.

Where consideration is given to using a negatively worded condition of this sort, it is important that the local planning authority discusses with the applicant before planning permission is granted the need for a planning obligation or other agreement and the appropriateness of using a condition. The heads of terms or principal terms need to be agreed prior to planning permission being granted"

So, if such an approach is to be utilised, first, does the current Coronavirus Crisis qualify as "*exceptional circumstances*"? Arguably, most certainly!

Secondly, is there "*clear evidence that the delivery of the development would otherwise be at serious risk"*? While the guidance is clearly contemplating "complex development schemes", arguably, the need, in the public interest, to ensure the deliverability., and, early delivery of, say, new housing sites requires a more robust approach to be taken[4], and, thereby the maintenance of a continuous (and genuine) five year housing land supply. In that regard, Mr Justice Dove notes at paragraph 108 of his judgment in the combined cases of *Canterbury City Council v SSHCLG* and *Crondall Parish Council v SSHCLG [2019] EWHC 1211 (Admin)*[5] observes as follows: "[The Inspector] *was entitled to*

[3] See, for example, my recent article "*Section 106s And The "Technical Traps" Submission*": https://www.localgovernmentlawyer.co.uk/planning/318-planning-features/43546-section-106s-and-the-technical-traps-submission

[4] See further my "Doing Different" articles : https://www.39essex.com/category/newsletters/ for 7th and 14th May 2020

[5] These challenges are better known for how the "fall-out" from the ECJ decisions in *People over Wind* and *Sweetman* ECJ should be handled by the SSHCLG in an appeal context.

conclude, as he did, that the policy objective of significantly boosting the supply of homes contained in paragraph 59 [of the NPPF] *did not cease to apply when housing land supply in excess of five years could be established*"

Thirdly, are there agreed Heads of Terms or a draft Section 106 already prepared, and, in the public domain prior to determination, or, as a referral back to Members as a significant material change in planning circumstances? Here, it is worth bearing in mind that Article 40(3)(b) of the Town &Country Planning (Development Management Procedure) (England) Order 2015 ("the DMPO") specifically requires a copy of *"any planning obligation or section 278 agreement entered or proposed to be entered into in connection with the application"* to be uploaded onto the on-line Planning Register i.e drafts as well as executed deeds, a procedural requirement all too often overlooked by local planning authorities.

Fourthly, does the Applicant consent to this course of action and has been duly notified? Odd though it may seem, in this context, but Section 100ZA(5),of the 1990 Act combined with The Town and Country Planning (Pre-Commencement Conditions) Regulations 2018 require, by Regulation 2(1) the giving of prior notification and the text of the proposed pre-commencement condition. It should also be noted that Regulation 2(4) requires that the Council's notice must include:

(a) the text of the proposed pre-commencement condition,

(b) the full reasons for the proposed condition, set out clearly and precisely,

(c) the full reasons for the proposed condition being a pre-commencement condition, set out clearly and precisely, and

(d) notice that any substantive response must be received by the authority or, as the case may be, the Secretary of State no later than the last day of the period of 10 working days beginning with the day after the date on which the notice is given."

So, by way of conclusion, where there is a will there are ways to overcome the present challenges and successfully too.

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