Section 106 Money and its allocation

NALC County Committee

18 January 2020

Summary

This note sets out the restrictions placed on the ability for a local planning authority (LPA) to insist on a developer providing funds for a local community through a section 106 planning obligation (s106 Agreement).

Background

1: Section 106 of the Town & Country Planning Act 1990 (and its predecessor section 52 Town & Country Planning Act 1971) allows an LPA to enter into a legally enforceable agreement with a developer in connection with the development of land.

2: The law is more restrictive than it has been applied in practice by many LPAs over the years.

Planning obligations may only constitute a reason for granting planning permission if they meet the tests that they are necessary to make the development acceptable in planning terms. They 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.[1]

This is an area of practice where there have been many changes of detail and/or emphasis over the years and it is reasonable to expect more in the future.

3: In the past, developers and LPAs were happy to use S106 Agreements as a convenient vehicle for the provision of off-site community facilities not perhaps directly connected with the actual development. Developers saw these as goodwill payments for the local community.

4: Opponents of particular developments portrayed such payments as akin to the sale of planning permission by the LPA, particularly where the LPA in another guise obtained funds for funding which was not used within the community affected by the development.

[1] https://www.gov.uk/guidance/planning-obligations

5: To some extent, the concept behind *Community Infrastructure Levy* (CIL) regularised these payments by permitting LPAs to introduce a formula-based levy. The City Council has recently introduced CIL in parts of its area. If CIL has been introduced then the Local Council is automatically entitled to 15% of the amounts received by the LPA, rising to 25% if there is a Neighbourhood Plan. There are restrictions on how the Local Council can use this money.

6: Northumberland does not have CIL as yet and may well not seek to introduce it for several potentially valid planning considerations. The two LPAs in Northumberland would therefore have to use section 106 as a means of securing funding for off-site works but only if they are a material planning consideration.

7: Therein lies the difficulty as the legislation is clear that a section 106 Agreement is not a substitute for CIL. Indeed, a recent decision of the Supreme Court makes it clear that any such attempt could lead to a planning approval being overturned as happened in that case. In *R (on the application of Wright) (Respondent) v Resilient Energy Severndale Ltd and Forest of Dean District Council (Appellants)* [2019] UKSC 53[2] where the developer proposed that a turbine would be built and run by a community benefit society and that an annual donation would be made to a local community fund. The Council took this donation into account in granting planning permission and made the permission conditional on the development being undertaken by the community benefit society and the provision of the donation. In doing so, the Council had regard to government policy to encourage community-led wind turbine developments.

8: The Supreme Court unanimously held that the three tests for a material planning consideration had not been met. The Court's press summary is in the appendix (links removed).

9: It is possible for LPAs to have formula-based policies for the provision of such matters as school places and affordable housing, an example is the County Council's approach to affordable housing. A recent change has given greater flexibility by removing a limit of five contributions into a pot. Those policies and formulas must be evidenced-based and published by the LPA.

The position of Local Councils

10: A Local Council can come to an agreement with a developer for the provision of, or contribution towards, community facilities. [Local Councils need to be able to identify the power under which they would provide

[2] Available via https://www.supremecourt.uk/cases/uksc-2018-0007.html

such facilities]. It may well be more difficult to bring such an agreement within the terms of section 106 and a separate legal route may be needed.

11: On the newer larger estates, residents are now having to make annual payments towards the cost of maintaining communal areas, play equipment and surface water drainage within the site. Current practice is that such facilities would not transfer into public ownership as happened in the past.

Conclusion

12: Developers may be prepared to make a modest contribution towards the provision of a Local Council's services, but it is unlikely this can be directly secured through the planning system. It may be that if the LPA were prepared to reduce its requirements under an S106 Agreement, then the developer might be prepared to use the "saving" as a contribution towards local facilities. The issues are ones which Local Councillors will wish to explore when the relevant LPA provides a briefing on development control issues.

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Appendix

PRESS SUMMARY

R (on the application of Wright) (Respondent) v Resilient Energy Severndale Ltd and Forest of Dean District Council (Appellants) [2019] UKSC 53 On appeal from [2017] EWCA Civ 2102

JUSTICES: Lady Hale (President), Lord Reed (Deputy President), Lord Lloyd-Jones, Lord Sales, Lord Thomas

BACKGROUND TO THE APPEAL

The case concerns a challenge by way of judicial review by the respondent, Mr Wright, to the grant of planning permission by the second appellant (the "Council") to the first appellant ("Resilient") for the change of use of land at a farm in Gloucestershire from agriculture to the erection of a wind turbine.

In its application for planning permission, Resilient proposed that the turbine would be built and run by a community benefit society and that an annual donation would be made to a local community fund. The Council took this donation into account in granting planning permission and made the permission conditional on the development being undertaken by the community benefit society and the provision of the donation. In doing so, the Council had regard to government policy to encourage community-led wind turbine developments.

Mr Wright challenged the grant of permission on the grounds that the donation was not a material planning consideration and the Council had acted unlawfully by taking it into account. He succeeded at first instance and in the Court of Appeal. Resilient and the Council now appeal to this court. The Secretary of State for Housing, Communities and Local Government was given permission to intervene and made submissions in support of the appeal.

The issue on the appeal is whether the promise to provide a community fund donation qualifies as a "material consideration" for the purposes of section 70(2) of the Town and Country Planning Act 1990 as amended (the "1990 Act") and section 38(6) of the Planning and Compulsory Purchase Act 2004 (the "2004 Act").

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Sales gives the judgment, with which all members of the Court agree.

REASONS FOR THE JUDGMENT

Planning permission is required for development of land, which includes the making of any material change in use (sections 57(1) and 55(1) of the 1990 Act). The planning authority must have regard to the development plan and any other considerations material to the proposed change of use (section 70(2) of the 1990 Act and section 38(6) of the 2004 Act).

A three-fold test for "material considerations" is found in *Newbury District Council v Secretary of State for the Environment [1981] AC 578* ("Newbury"). This requires that the conditions imposed: (1) be for a planning purpose and not for any ulterior purpose; (2) fairly and reasonably relate to the development; and (3) must not be so unreasonable that no reasonable planning authority could have imposed them. It is logical to equate the ambit of "material considerations" with the scope of the power to impose planning conditions, because if the planning authority has the power to impose a condition it follows that it could treat the imposition of that condition as a material factor in favour of granting permission. The relevance of the Newbury criteria to determine the ambit of "material considerations" in the 1990 and 2004 Acts is well established and is not in contention on this appeal.

It is a fundamental principle of the planning system that planning permission cannot be bought or sold. A principled approach to identifying material considerations in line with the Newbury criteria is important to protect landowners and the public interest, since it prevents a planning authority from extracting money or other benefits unrelated to the proposed use of the land as a condition for granting permission and from deciding whether to grant permission by reference to such matters rather than by reference to the planning merits of the proposed development in issue. This protection has been established by Parliament through statute, as interpreted by the courts, and cannot be overridden by general policies laid down by central government.

In the present case, the community benefits promised by Resilient did not satisfy the Newbury criteria and therefore did not qualify as a material consideration under either the 1990 or the 2004 Act. The benefits were not proposed to pursue a proper planning purpose, but rather for the ulterior purpose of providing general benefits to the community. They did not fairly and reasonably relate to the development for which permission was sought; the community benefits did not affect the use of the land but were instead proffered as a general inducement to the Council to grant planning permission, in breach of the principle that planning permission cannot be bought or sold.

The statutory concept of a "material consideration" as interpreted by the courts does not vary according to government guidance and policy statements. On the other hand, a change in national policy can affect the issue of whether a decision satisfies the third limb of the Newbury test, by making it clear that a reasonable local planning authority can properly consider that a particular condition is justified in terms of planning policy.