

**Delegated Report
Chigwell Primary School
EPF/1100/26/DOV**

Legal Context

Section 106A of the Town and Country Planning Act 1990 (as amended) provides that a planning obligation may be modified or discharged:

- At any time by agreement between the local planning authority and the person(s) against whom the obligation is enforceable.
- After the relevant period (five years from the date the obligation was entered into), by formal application to the authority (with a right of appeal under Section 106B if refused).

As the relevant period has expired, the latter applies here.

Case law has established that to determine if an application that falls under s106A is valid, the following test must be considered:

- 1) What is the current obligation?;
- 2) What purpose does it fulfil?
- 3) Is it a useful purpose?; and
- 4) Would the obligation serve the purpose equally well if it had effect subject to the proposed modification?.

Once these tests are applied, the Council may as per Section 106A section 6 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.

Legal Considerations

The Applicants Case

The completed s106 attached to EPF/1681/19 requires the physical delivery of a new primary school.

The proposal seeks to remove the existing obligation in its entirety and replace it with a financial contribution of £2 million towards educational purposes. For clarity, the contribution would not be ring-fenced for the delivery of the replacement Chigwell Primary Academy school and could be applied towards other educational purposes.

As set out in the submission, the following clauses are to be removed/modified.

1. Clause 1.1 (Definitions & Interpretations) modified
2. Deletion of Clauses 4, 4.1 & 4.2
3. The heading between Clauses 5.8 & 5.9 to be modified
4. Clause 5.10 modified to reflect the £2m financial contribution
5. Deletion of Clauses 5.11 – 5.21
6. Deletion of Schedule 2
7. Deletion of Plan 1 Appended to the s106.

1. Clause 1.1 (Definitions & Interpretations) Modified

Following definitions & Interpretations to be deleted;

Completion of Demolition - means completion of demolition of the Existing School Building in accordance with the Specification and "Complete Demolition" shall be construed accordingly

Completion of the External Works - means the works to the grounds of the New Primary in accordance with the Specification and "Complete the External Works" shall be construed accordingly

Completion of the New Primary School Building/Envelope - means completion of the New primary School in accordance with the Specification and "Complete the New Primary School Building/Envelope" shall be construed accordingly

Completion of the Substructure and Foundations - means the completion of the substructure and foundations of the new Primary School In accordance with Specification and "Complete the Substructure and Foundations" shall be construed accordingly

'Completion of the Superstructure - means completion of the superstructure of the New Primary School in accordance with the Specification and "Complete the Superstructure" shall be construed accordingly

Existing School Buildings - means the buildings shown on the Plan 1 attached to this Deed

Fitting Out and Handing Over - means the fitting out and completion in all respects of the New Primary School in accordance with the Specification and the transferring of full control and ownership of the buildings and associated outdoor works to the Second Owner and "Fitted Out and Handed Over" and "Fit Out and Hand Over" shall be construed accordingly

Instigate - means for the purposes of Clause 5.10 and Clause 5.11 of this Deed to undertake those works as defined in the Specification and instigation shall be construed accordingly

New Primary School - means the new Chigwell Primary Academy buildings and

works set out in Schedule 2 of this Deed forming part of the Development

Plan 1 - the plan annexed hereto numbered 1

Specification - means the Specification set out in Schedule 2 hereto

2. Deletion of Clauses 4, 4.1 & 4.2

Clauses 4 – 4.2 state:

4 *No Encumbrance*

4.1 *The First Owner and Second Owner HEREBY COVENANT with the Council and the County Council that they will not enter into any covenants or agreement relating to any part of the Site whose effect would be to preclude the carrying out or the planning obligations and covenants contained in this Deed.*

4.2 *The First Owner and Second Owner covenant and warrant to the Council and the County Council that they have full power to enter into this Deed and there is no other person having a charge over or any other interest in their respective interests In the Site whose consent is necessary to make this Deed binding on the Site and all estates and interests therein.*

3. The heading between Clauses 5.8 & 5.9 to be modified from:

Occupation of the Residential Dwellings and the Delivery of the New Primary School

To

Occupation of the Residential Dwellings

4. Clause 5.10 modified to reflect the £2m financial contribution

Original wording

5.10 To Instigate In relation to the new Primary School no later than four (4} months after the Commencement of the Residential Development.

Proposed wording

5.10 The First Owner has paid on [DATE] to the County Council the sum of Two Million Pounds (£2,000,000.00) towards the provision of additional educational infrastructure in the vicinity of the Site.

5. Deletion of Clauses 5.11 – 5.21

5.11 Not to further Commence in relation to the Residential Development until Instigation In relation to the New Primary School in accordance with Clause 5.10

5.12 To Complete the Substructure and Foundations prior to Occupation of 20% of the Residential Dwellings

5.13 Not to occupy more than 20% of the Residential Dwellings until Completion of

the Substructure and Foundations

5.14 To Complete the Superstructure prior to Occupation of 45% of the Residential Dwellings

5.15 Not to Occupy more than 45% of the Residential Dwellings until Completion of the Superstructure

5.16 To Complete the New Primary School Building/Envelope ensuring that it is watertight prior to Occupation of 60% of the Residential Dwellings

5.17 Not to Occupy more than 60% of the Residential Dwellings until Completion of the New Primary School Building/Envelope

5.18 To Fit Out and Hand Over the New Primary School prior to Occupation of 70% of the Residential Dwellings

5.19 Not to Occupy more than 70% of the Residential Dwellings until the New Primary School has been Fitted Out and Handed Over

5.20 To Complete the Demolition and Complete the External Works prior to Occupation of 80% of the Residential Dwellings

5.21 Not to Occupy more than 80% of the Residential Dwellings until Completion of Demolition and Completion of the External Works

6. Deletion of Schedule 2

SCHEDULE 2 – Specification

1. The First Owner and the Second Owner shall enter into a Development Agreement (DA) prior to the Implementation of the Development to carry out the following works in accordance with the DFE specification as well as the below specification.
 1. Instigation/Set Up of the Primary School means:
 - Provision of temporary site office accommodation and welfare buildings, fencing hoarding and signage for the purposes of construction of the new school building,

- Start of excavations for construction of the building.
2. Completion of Substructure and Foundation of the Primary School means:
 - Completion of construction of foundations
 - Start of works for incoming and outgoing services within the building envelope
 - Start of works for Incoming and outgoing services within the building envelope
 - Completion of works to the structure forming Internal floor base
 3. Completion of Superstructure of the Primary School means:
 - Construction of all external walls and internal load bearing walls
 - Construction of roof structure and completion of covering
 4. Completion of School Building/Envelope of the Primary School means:
 - Completion of connections to incoming and outgoing statutory services
 - Building is weathertight
 - Internal walls and partitions complete
 - Installation of windows and doors complete
 - External cladding and rainwater goods complete
 5. Fit out and handover of the Primary School means;
 - External hard surfaces comprising safe pedestrian access to building and external hard surface playground complete
 - Fixed furnishings and equipment fully Installed
 - Decoration and Internal finishes complete
 - School building and playground handed over and available for use
 - Site buildings and related fencing and signage removed or relocated for external works phase
 6. Completion of Demolition and External Works of the Primary School means:
 - Demolition of all buildings not being retained, including where required removal of groundworks thereto
 - Completion of laying out of parking areas and pathways, playing field, soft landscape areas including forestry area and fencing
 - Removal of temporary site office accommodation and welfare buildings and related fencing and signage

The Council's Case

Purpose of the Original Obligation

The planning permission was granted for:

“Construction of new Chigwell Primary Academy school, followed by demolition of existing buildings and creation of new playing field and playground, together with residential development comprising 59 number dwellings, together with car parking, garden spaces, vehicular access from High Road (A113), external landscaping and associated development.”

A fundamental component of the application was the case advanced by the applicant that the proposal constituted enabling development. The residential development was presented

as the mechanism by which the funding necessary to secure the delivery of a replacement Chigwell Primary Academy school would be generated.

The planning balance, and ultimately the grant of planning permission, was therefore predicated upon the direct relationship between the residential development and the construction of the replacement school.

To secure that outcome, the accompanying s106 Legal Agreement was structured to ensure the delivery of the school alongside the residential development. In particular, clauses 5.11 to 5.21 established a series of obligations and trigger points intended to prevent a scenario whereby the residential development could proceed independently of the replacement school. The obligations therefore served a clear and identifiable planning purpose which was central to the acceptability of the development.

Whether the Obligation Continues to Serve a Useful Purpose

The Council considers that the original obligation continues to serve a useful purpose.

Whilst the permission has been implemented, progress has stalled following the lapse of the Developer Agreement between the First Owner (Coral Properties Ltd) and the Second Owner (REAch2 Academy Trust). The Council also acknowledges that the Department for Education (DfE) has since included the school within its School Rebuilding Programme.

However, the Council does not consider that these circumstances negate the continuing need for an enforceable mechanism securing delivery of a replacement school.

Although the DfE has identified the school within its School Rebuilding Programme, there is currently no planning permission in place for a replacement school scheme promoted by the DfE. Even if such a planning permission were to be granted, limited weight can be attached to a permission which only has effect if implemented. The Council is aware of no legally binding commitment that would guarantee delivery of the replacement school within any particular timeframe. As such, there remains a genuine possibility that the school may not ultimately be delivered through the DfE programme. Government priorities, funding allocations and programme delivery arrangements can change over time.

In those circumstances, the Council considers that the planning purpose of the original obligation remains entirely relevant, namely ensuring that the residential development does not proceed without an effective mechanism for securing the replacement school which formed the basis of the enabling development case.

The Council therefore concludes that the obligation continues to serve a useful purpose.

Whether the Proposed Modification Would Serve That Purpose Equally Well

Having established that the obligation continues to serve a useful purpose, the relevant question is whether the purpose would be served equally well through the modified obligation proposed by the applicant.

The Council considers that it would not.

The applicant seeks to remove the existing mechanism that directly links the residential development to the provision of the replacement school. In its place, reliance is placed upon the possibility of future delivery by the DfE, together with a financial contribution towards education infrastructure.

In the Council's view, this fundamentally changes the nature of the obligation and significantly weakens the certainty of delivery of the replacement school.

The replacement school was not merely one of a number of planning benefits arising from the development. Rather, it was the principal public benefit advanced to justify the enabling development proposal. The original s106 Agreement was specifically drafted to ensure that benefit was secured.

The Council is not persuaded that a financial contribution of £2 million could reasonably be regarded as serving the same purpose. The Council are certain that the cost of delivering a replacement school substantially exceeds that sum. Consequently, such a payment would not secure delivery of the replacement school and would instead allow the residential development to proceed without the principal benefit that justified its approval. Nor does the Council consider that the possibility of future DfE delivery provides an equivalent level of certainty. Whilst inclusion within the School Rebuilding Programme is a material consideration, it is not a substitute for a legally enforceable planning obligation securing direct delivery of the school.

The Council therefore concludes that the proposed modification would not serve the original purpose of the obligation equally well.

Alternative Proposal

The Council sought to identify a pragmatic solution recognising the changing circumstances surrounding the DfE programme whilst still maintaining an appropriate level of certainty.

To that end, the Council proposed a revised obligation, as follows;

1. The Owner covenants with the Council that it shall, prior to First Occupation of the Development, comply with one of the following requirements:
 - a. pay to the Council the sum of £2,000,000 (Index Linked in accordance with the provisions of the Original s106 Agreement) within 28 days of the Demand Notice; or
 - b. in the event that the Department for Education does not deliver the School, construct and provide the School. In such case, no later than prior to First Occupation, the Owner shall submit to the Council for approval a detailed scheme for the delivery of the School, including a delivery timetable, and shall thereafter implement the approved scheme in full as per the agreed timetable.
2. The Owner shall give not less than [10] Working Days' prior written notice to the Council before First Occupation confirming whether paragraph 1(a) or paragraph 1(b) is to be implemented.

The Council considered that this approach appropriately balanced the uncertainties associated with future DfE delivery against the continuing need to secure the planning purpose underlying the original obligation.

The applicant declined that proposal.

Conclusion

The Council's position is that the original s106 obligations continue to serve a useful planning purpose. That purpose is the securing of the replacement Chigwell Primary Academy school which formed the basis of the enabling development case and was a fundamental component of the planning balance leading to the grant of planning permission.

The Council further concludes that the modifications sought by the applicant would not serve that purpose equally well. The proposed variation would remove the direct and enforceable link between the residential development and the delivery of the replacement school, thereby undermining the original basis upon which planning permission was granted.

For those reasons, the statutory test under s106A is not met. The planning obligation should therefore continue to have effect without modification, and the application should be refused.