

Chapter 10: The provision of infrastructure and other improvements

INTRODUCTION

- 10.1 The development of land can impose significant burdens on an area's infrastructure. A housing development, for example, can increase the traffic on nearby roads, place additional pressures on schools, hospitals and community facilities, and limit the effectiveness of protective infrastructure like flood defences.¹
- 10.2 The necessary improvements can be carried out, or at least paid for (in whole or part), by private developers. Two mechanisms are commonly used to achieve this:
- 1) the Community Infrastructure Levy (CIL); and
 - 2) section 106 agreements, or "planning obligations".²
- 10.3 This Chapter provides an overview of both procedures, and makes some recommendations for reform. Our recommendations are limited, in the light of the more extensive review that is likely to be undertaken, once the necessary legislative powers (in relation to CIL) have been devolved to the Welsh Government. But they propose some changes which may be adopted in advance of such a review, to deal with certain specific technical problems that have arisen.

COMMUNITY INFRASTRUCTURE LEVY (CIL)

- 10.4 The CIL Review Group set up by the Government in 2015 defined CIL as
- The Government's preferred means of collecting developer contributions to infrastructure investment that has been identified as necessary to support the development of an area.³
- 10.5 The Levy is implemented by local authorities, who calculate the charge based on the site area or floorspace of the new development. The money received from several development projects can then be pooled together and used to fund the provision of the necessary infrastructure, which can include transport, schools, hospitals and other health and social care facilities within the relevant area.⁴

¹ Consultation Paper, para 10.28.

² TCPA 1990.

³ *A New Approach to Developer Contributions*, CIL Review Group, February 2016), para. 2.2.2.

⁴ A full list of infrastructure capable of being funded by charges collected under the Levy is contained in s 216, Planning Act 2008. Note that the provision of affordable housing is restricted by Community Infrastructure Levy Regulations 2010 [SI 2010/948], reg 63.

- 10.6 In order to implement CIL, a local authority must prepare a charging schedule, and adopt it after public consultations and a review by an independent examiner.⁵ Only three planning authorities in Wales have so far chosen to implement the Levy, but another six are in the process of producing and verifying their charging schedules.

We provisionally considered that the statutory provisions relating to CIL, currently in Part 11 of the Planning Act 2008 as amended by the Localism Act 2011, should be incorporated broadly as they stood into the Planning Code, pending any more thoroughgoing review that may take place in due course (Consultation Question 10-1).

- 10.7 In our Consultation Paper, we highlighted two key aspects of CIL arrangements in relation to Wales:

- 1) that the topic has been the subject of a number of legislative reviews over many years;⁶ and
- 2) that the Wales Act 2017 has only recently given the National Assembly legislative competence to regulate CIL.⁷

- 10.8 As a result, we suggested that changes of any substance to the CIL regime would be likely to arise at a later date, once the new legislative arrangements under the 2017 Act have been fully brought into force. We also suggested that a future review of the system, with a focus on Welsh needs and practices, was likely to be forthcoming. As a result, we recommended that the existing provisions were broadly carried forward unaltered into the new Code, pending the outcome of any such review.

- 10.9 We received 34 responses to this proposal, 30 of which agreed. Several consultees expressed agreement, subject to a more intensive review by the Welsh Government at a later date. Caerphilly CBC, Torfaen CBC and POSW South-East Wales, all agreed with our proposal, adding that a “thoroughgoing review can’t come soon enough”. Carmarthenshire CC, which also agreed, noted the need to avoid the existence of a “vacuum...while CIL [is being] reconsidered in its entirety by the Welsh Government”, particularly for planning authorities who have already adopted CIL.

- 10.10 We also received four equivocal responses. The Central Association of Agricultural Valuers and Pembrokeshire CC expressed discontent at the scope or content of the current CIL regulations. The Central Association of Agricultural Valuers suggested that CIL’s reliance on a development’s floorspace inappropriately penalises agricultural developments. Pembrokeshire CC suggested the regulation’s restriction on the use of CIL funds to pay affordable housing schemes renders the CIL regime less desirable to planning authorities. Bridgend CBC also asked whether carrying the provisions forward into the new Code would “make it more difficult to repeal CIL if that [was] the desired course of action”.

- 10.11 No substantive recommendations as to the scope of CIL Regulations have been made during the course of this review, and no limitation of the Welsh Government’s

⁵ Planning Act 2008, Part 11.

⁶ Consultation Paper, paras 10.28 – 10.32.

⁷ Welsh Ministers (Transfer of Functions) Order 2018 (SI 644), para 44(1). Note that the date on which it comes into force is yet to be determined.

freedom of action would arise from this proposal. It remains open to the Welsh Government to amend or revoke the CIL Regulations, as it sees fit. At present, however, we still consider that it is necessary to provide sensible interim arrangements, and in particular to ensure that the primary legislation relating to CIL is within the main Planning Bill, rather than (as at present) in a freestanding piece of legislation.

- 10.12 We therefore still consider that the proposed approach provides desirable interim arrangements.

Recommendation 10-1.

We recommend that the statutory provisions relating to CIL, currently in Part 11 of the Planning Act 2008 as amended by the Localism Act 2011, should be incorporated into the Planning Bill, pending any more thoroughgoing review that may take place in due course.

PLANNING OBLIGATIONS

- 10.13 Section 106 of the TCPA 1990 enables anyone interested in land to enter into a “planning obligation” – often in the form of an agreement with the planning authority, but in some cases a unilateral undertaking. Such an obligation can involve a restriction of the use of land or operations to be carried out on it, or require that particular activities are carried out, or oblige the landowner to pay sums of money to the authority, either for the maintenance of nearby infrastructure or to offset community costs incurred by the activity on the land.⁸
- 10.14 The need for a planning obligation arises as a result of the nature of the proposed development. Planning authorities may negotiate with anyone who is “interested in [the] land” with a view to their entering into an obligation, usually linked to a grant of planning permission.

We provisionally proposed that provisions relating to planning obligations, currently in sections 106 to 106B of the TCPA 1990, be incorporated broadly as they stand into the Planning Code, pending any more thoroughgoing review that may take place in due course. (Consultation Question 10-2)

- 10.15 Planning obligations differ from CIL in two key ways;
- 1) planning obligations are intended to render a specific development scheme acceptable, rather than to encourage the provision of infrastructure and other improvements throughout a wider area; and

⁸ TCPA 1990, s 106(1).

- 2) the number of developer contributions which may be pooled together to pay for new infrastructure is capped at five for planning obligations, but unlimited for CIL payments.
- 10.16 However, there is a significant overlap between the two procedures. Both operate to help provide local infrastructure, incidental to or directly arising from development. And, as we noted in our Consultation Paper, planning authorities regularly use planning obligations to obtain outcomes which could have been used under the CIL procedure, as a means of avoiding having to undertake the difficult and expensive exercising of implementing a charging schedule.⁹
- 10.17 Previous reviews of the subject have sought to determine the degree to which both procedures can be integrated. The CIL Review Group, for example, determined that both could be integrated under a proposed local infrastructure tariff scheme, which reserved planning obligations for large-scale infrastructure development. Alternatively, the Planning Officers' Society in England have argued for "development management levies" and "development management agreements" to be used instead.
- 10.18 For these reasons, any forthcoming review of CIL is likely to substantially effect the law relating to planning obligations. Our principal proposal therefore broadly mirrors Consultation Question 10-1, to ensure that the legislation relating to both CIL and planning obligations is included within the Planning Bill.
- 10.19 As with Consultation Question 10-1, the 32 responses were broadly supportive, subject to a desire to see a wider review of CIL and planning obligation regimes in general.
- 10.20 We therefore maintain the proposal.

Recommendation 10-2.

Subject to the following recommendations in this Chapter, we recommend that provisions relating to planning obligations, currently in sections 106 to 106B of the TCPA 1990, should be incorporated into the Planning Code, pending any more thoroughgoing review that may take place in due course.

We provisionally proposed that the rules as to the use of planning obligations, currently in regulation 122 of the CIL Regulations, should be included within the new Planning Code (Consultation Question 10-3).

- 10.21 Regulation 122(2) of the CIL Regulations sets out statutory test as to the validity of a planning obligation. These require that a proposed obligation be:
- 1) necessary to make the development acceptable in planning terms;

⁹ Consultation Paper, para 10.72.

- 2) directly related to the development; and
 - 3) fairly and reasonably related in scale and kind to the development.¹⁰
- 10.22 These regulations have been treated with a degree of caution by the courts, with Lord Hoffman emphasising that the first limb of the test was “unsuited to application by the courts”, describing it as “suffer[ing] from the fatal defect that it necessarily involves an investigation by the court of the merits of the planning decision” – a task for which he believed the courts to be unsuited.¹¹ Despite citing Lord Hoffman’s dictum with approval, Dove J describes the test as providing a “starting point” for discussions regarding the validity of an obligation, and held that it should be relied upon by authorities.¹² Thus, the test is still considered to be good law, and of value to the courts and to planning authorities.
- 10.23 In our Scoping and Consultation Papers, we described how secondary legislation should be reserved for “minor procedural and administrative details”, while primary legislation should be used for “broad principles...enshrined in general terms”.¹³ We suggested that the test in regulation 122(2) fell within this second category, and should therefore be contained in primary, rather than secondary legislation.
- 10.24 All 29 consultees who responded to this proposal supported it. Rhondda Cynon Taf CBC described the test as being of “sufficient clarity and importance” that it was more appropriately suited to primary legislation. The Association of Local Government Ecologists also agreed, subject to the proviso that “the interpretation of ‘necessary’ [should not] become too restrictive”. They suggested that too narrow an interpretation would “limit the ability of such agreements to be used to secure improvements or enhancements that are required under policy or other legal duties”.
- 10.25 We emphasise that this proposal would not result in any substantive change to the test, or its interpretation. Questions of interpretation would still fall to the courts, who would still be likely to interpret it as they currently do. By including it within primary legislation, however, the structure of the law is clarified.
- 10.26 We therefore consider that the proposal should be maintained, and recommend that the test is included within primary legislation.

¹⁰ Community Infrastructure Regulations (SI 2010/948).

¹¹ *Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759 at p. 780. This case concerned an obligation for the developer to provide a new link road to relieve traffic congestion which was likely to be only marginally exacerbated by the development of a new food superstore in the town centre.

¹² *R (Wright) v Forest of Dean DC and Resilient Energy Severndale* [2016] EWHC 1349 (Admin), at [52] and [59], upheld at [2017] EWCA Civ 2102.

¹³ Scoping Paper, chapter 3; Consultation Paper, paras 4.48 – 4.26.

Recommendation 10-3.

We recommend that the rules as to the use of planning obligations, currently in regulation 122 of the CIL Regulations, should be included within the Planning Bill.

Highways requirements

We provisionally suggested that it might be helpful for a provision to be included in the Code whereby a planning agreement under what is now section 106 of the TCPA 1990 – but not a unilateral undertaking – could include any provision that could be included in an agreement under section 278 of the Highways Act 1980 (execution of highway works), provided that the highway authority is a party to that agreement. (Consultation Question 10-4).

- 10.27 Agreements to alter highways are executed under section 278 of the Highways Act 1980. The provision allows highways authorities to enter into agreements with private persons for the execution of works, on the condition that they pay the cost (or part of the cost) of those works.
- 10.28 In Wales, each local authority is generally both the highways authority and the planning authority.¹⁴ There are two exceptions to the rule; in relation to motorways and trunk roads (where the Welsh Government is the highways authority) and in national parks, where the national park authority is the planning authority. Our proposal explicitly excluded such cases.¹⁵
- 10.29 We suggested in our Consultation Paper that there was scope to integrate the requirements of section 278 of the Highways Act and those of section 106 of the TCPA 1990. We noted that an integrated procedure would not always be appropriate, for example in circumstances where the highways issues were extensive in scope or highly complex, but suggested that the option to allow such arrangements to be included in one agreement could be helpful.¹⁶
- 10.30 We received 34 consultation responses to this proposal, 18 of which were in support. The Mineral Products Association applauded the “avoidance of duplication and the requirement for both acts to be satisfied separately”. Rhondda Cynon Taf CBC also agreed, on the grounds that it would avoid “the need for an applicant to resubmit...the same information...to both the Planning and Highways service areas of the same authority”.
- 10.31 Six consultees expressed support in principle but noted concerns about the unintended consequences of the proposal; and eight disagreed.

¹⁴ National Assembly for Wales, ‘Governance of Wales: Who is responsible for what? (Available at: <http://www.assembly.wales/en/abthome/role-of-assembly-how-it-works/Pages/governance-of-wales.aspx>)

¹⁵ Consultation Paper, para 10.46.

¹⁶ Consultation Paper, paras 10.47 to 10.49.

- 10.32 A key concern for consultees was the possibility that an integrated agreement might result in applications being significantly delayed. The Home Builders Federation, which disagreed with our proposal, noted that a “section 278 agreement is a far more technical approval process so it may add delay to the signing of the section 106 agreement whilst technical detail is agreed”. Monmouthshire CC also expressed concern that “any lack of approval by the highway authority would delay release of a planning permission”.
- 10.33 Consultees also expressed concern about the capacity of the integrated approach to complicate the process of obtaining planning permission. Neath Port Talbot CBC suggested that including “complex technical highway details [would] complicate the planning process and...further blur responsibilities”.
- 10.34 Some consultees disagreed with the proposal, as they considered that, even where a single local authority is both the highways authority and the planning authority, the issues involved in negotiating the two agreements are too separate to allow them to be integrated. Newport City Council suggested that an integrated process could result in “different signatories for the agreements and due to delays in implementing, figures [being] out of date”.
- 10.35 The Institution of Civil Engineers Wales pointed out that section 278 agreements relate to an existing highway, which may be some distance from the site of the proposed development, and may relate to the maintenance of a new highway. In either case, the developer may not have access to the highway land.
- 10.36 For smaller, simple alterations to highways, we consider delays to the determination of planning applications may not be as extensive as some consultees suggested. While delays might occur, while the highways and planning departments of the same authority come to an agreement about the technical details of the relevant works, the saving of resources that would otherwise be spent on producing two separate agreements could enable the application process to progress more quickly.
- 10.37 However, we recognise that such an approach would not work in many cases. And we agree that the proposal could lead to some difficulties in relation to questions of enforcement and implementation. We consider that greater coordination between the two arms of the local authority would be beneficial, both for applicants and for the general public; but this could best be encouraged through guidance. And it would probably be difficult to prescribe in statute the cases in which the new procedure would be available.
- 10.38 On balance, therefore, we therefore do not pursue this proposal further, considering that it is a matter that would be more suitable for more detailed consideration as part of any future review of the legislation relating to planning obligations.

Recommendation 10-4.

We recommend that any future review of the law relating to planning obligations should consider introducing a provision whereby a planning agreement (under what is now section 106 of the TCPA 1990) could in certain circumstances include provision that could be included in an agreement under section 278 of the Highways Act 1980.

Enforcement of planning obligations

We provisionally proposed that the enforcement of a planning obligation under section 106 of the TCPA 1990 should be made more straightforward by including the breach of such an obligation within the definition of a breach of planning control (Consultation Question 10-5).

- 10.39 Where a developer, either intentionally or unintentionally, fails to carry out the obligations agreed in a section 106 agreement, the TCPA 1990 provides authorities with the power to enforce the obligation by injunction or to enter the land and carry out the operations themselves, and to recover expenses incurred whilst doing so.¹⁷ Obstructing authorities is an offence punishable by a level 3 fine (£1,000) on summary conviction.¹⁸
- 10.40 More serious breaches of planning obligations can be prosecuted as fraud. The Serious Fraud Office has used a number of criminal offences to prosecute the use of “fraudulent arrangements” to avoid complying with obligations under a section 106 agreement.¹⁹
- 10.41 We suggested in our Consultation Paper that these provisions provided a piecemeal response to the enforcement of planning obligations, as there would be situations whether neither approach would be appropriate.²⁰ We suggested that instead, the enforcement of planning obligations should fall within the wider principles of planning enforcement law.²¹ However, we recognised that such an approach would raise a number of practical problems that would need to be resolved before it could be implemented.²²
- 10.42 Of the 42 consultees who responded to this proposal, 18 were in agreement. POSW and Caerphilly CBC both argued that including the breach of the obligation within the definition of a breach of planning control would make the enforcement system more

¹⁷ TCPA 1990, s 106(5) and (6).

¹⁸ TCPA 1990, s 106(8).

¹⁹ See *Serious Fraud Office v Evans* [2014] EWHC 3803 (QB), in which the Serious Fraud Office brought prosecutions against developers under the Fraud Act 2006, the Insolvency Act 1986 and the Companies Act 2006.

²⁰ Consultation Paper, para 10.51.

²¹ See **Chapter 12** below.

²² Consultation Paper, para 10.53.

straightforward. The Theatres Trust described the proposal as “strengthening the ability of planning authorities to enforce obligations”.

- 10.43 A further 20 consultees also agreed in principle, but expressed concern about how the proposal would work in practice. Planning Aid Wales asked about “the extent to which technicalities of enforcing breaches of planning control, including time limits are appropriate for breaches of section 106 obligations”.
- 10.44 Newport CC also drew attention to section 106(5), which provides that a restriction or requirement imposed by a planning obligation may be enforced by an injunction, and questioned whether that would have “less bite” if breaches of obligations were to be brought within the broader enforcement system.
- 10.45 Four consultees disagreed with the principle of the proposal altogether. The Bar Council argued that
- There are implicit difficulties of legal principle in putting the enforcement of breaches of planning control per se on the same footing as failures to comply with covenants within a section 106 agreement or a unilateral obligation. The first is in effect a breach of regulatory law which ultimately can end in prosecution for failure to comply with the enforcement notice and the second is in effect a breach of contract which is governed by civil law remedies.
- 10.46 The suggestion that breaches of section 106 obligations fall within the purview of contract law reflects the voluntary nature of planning obligations, which arise from a process of offer and acceptance between developer and the planning authority. On such an approach, authorities would have to apply to the courts for relief where a developer decides not to comply with obligations undertaken under a section 106 agreement, rather than carrying out the work directly themselves.
- 10.47 The contractual approach presents some problems in practice. It can result in uncertainty or delay in the performance of obligations, which can adversely affect the amenity of those in proximity to the site, including users of nearby roads and members of the community whose infrastructure is now under strain.
- 10.48 It is this aspect of a planning obligation which differentiates it from an ordinary contract – the fact that is made to ensure that “a development is acceptable in planning terms”²³ and to limit any adverse effects of a development. While the section 106 agreement is made and interpreted under ordinary contractual principles, compliance with it raises issues of wider interest and importance which goes to the validity of the planning permission itself.
- 10.49 We also have some sympathy with the observation from the Institution of Civil Engineers Wales to the effect that, if a breach of an obligation by a developer is to be the subject of enforcement action, so too should a breach by an authority (for example, to spend money paid under the obligation for the specified purpose). But it is difficult to see how that would operate in practice.

²³ See para 10.15.

- 10.50 We therefore consider that the topic more naturally falls within planning enforcement in general, and believe that a reform along the lines indicated could be beneficial. And we note the weight of consultee opinion in favour of that approach. However, we note the large number of detailed issues that would need to be resolved, and therefore conclude that this too is a matter that would be more suitable for consideration as part of any future review of the legislation relating to planning obligations.

Recommendation 10-5.

We recommend that any future review of the law relating to planning obligations should consider bringing the breach of a planning obligation under section 106 of the TCPA 1990 within the definition of a breach of planning control.

Section 106(12) empowers the Welsh Ministers to provide by regulations for the breach of an obligation to pay a sum of money to result in the imposition of a charge on the land, facilitating recovery from subsequent owners. We noted that no such regulations have been made and asked whether this causes a problem in practice (Consultation Question 10-6).

- 10.51 We noted in our Consultation Paper, that section 106(12) of the TCPA 1990 provides a power for the Welsh Ministers to make regulations which provide for charges to be imposed on the land where planning obligations require the payment of money. Failure to pay could then result in a charge on the land, so that any shortfall could be recovered by the authority upon sale of the land.²⁴ No such regulations have ever been made, and we asked whether consultees felt that such a power of recovery would be useful.
- 10.52 Some 33 consultees responded to this question. Fifteen suggested that the provision was unnecessary, with Neath Port Talbot CBC and Carmarthenshire CC noting that
- The regulation for direct charges on land have not been brought in as planning obligations are local land charges, and as such can effectively be turned into charges with a power of sale. Therefore it would seem that there is no need for direct charges over land, although they may be easier to enforce than local land charges.
- 10.53 Bridgend CBC provided a similar response, arguing that, as planning obligations are registered as local land charges, they are already capable of binding successive owners.
- 10.54 Eight consultees expressed some interest in giving effect to the power in section 106(12). Cardiff Council suggested that it could operate to speed up repayment process. Blaenau Gwent CBC also suggested that it would “provide an additional and useful enforcement tool”.

²⁴ Consultation Paper, para 10.55.

- 10.55 The local land charge register records any charges registered by public authorities against the land. Unmet planning obligations can be registered, and can then be discovered by prospective purchasers of the land.²⁵ Failure to register a local land charge will not affect its enforceability, but a purchaser would be able to claim compensation if the charge is not made visible to them on the register.²⁶ This framework appears to duplicate the power envisaged under section 106(12) of the TCPA 1990. Both appear operate to allow planning obligations to run with the land, rather than remain with the parties to the obligation.
- 10.56 We consider that the benefits outlined in favour of retaining section 106(12) – and making regulations in reliance on it – are substantially outweighed by the potential confusion that could arise from two overlapping procedures. Difficulties could arise in determining a successive owner's compensation rights if a planning authority fails to register an obligation on the local land charges register, but then claims from them the cost of undertaking works on their land. Additionally, it seems beneficial to provide prospective owners with a means of discovering if land is subject to any prohibitions, restrictions and obligations.
- 10.57 We therefore do not consider there to be any need for regulations empowering the recovery of expenses from successive owners, and recommend that the provision for the Welsh Ministers to make them is not restated in the Planning Code.

Recommendation 10-6.

We recommend that section 106(12) of the TCPA 1990, which empowers the Welsh Ministers to provide regulations whereby the breach of an obligation to pay a sum of money would result in the imposition of a charge on the land to facilitate recovery from subsequent owners, should not be restated in the Planning Code.

Expedition of negotiations as to planning obligations

We provisionally proposed that the use of standard clauses should be promoted in Welsh Government guidance (Consultation Question 10-7).

- 10.58 In our Consultation Paper, we suggested that the Welsh Government should promote within its guidance the use of standard clauses in planning obligations. This would facilitate the drafting of obligations by planning authorities and developers.²⁷
- 10.59 We received 38 responses to this proposal, all of which were in agreement. The Canal & River Trust noted that it would “save a considerable amount of time and expense to the planning authorities and its beneficiaries”. The Planning Inspectorate (PINS) also noted that it would also aid inspectors in assessing the legality of

²⁵ Local Land Charges Act 1975, ss 1 and 2.

²⁶ Local Land Charges Act 1975, s 10(1).

²⁷ Consultation Paper, paras 10.57 to 10.58.

unfamiliar clauses, and allow them to devote greater attention to the substance of the obligations.

- 10.60 Five consultees expressed agreement in principle, subject to some conditions. The Royal Town Planning Institute (RTPI) expressed support “subject to the ability for developers and planning authorities to revise these where required in specific cases”.
- 10.61 We agree, and consider that by including the clauses within guidance, users would have sufficient flexibility to use, amend, or disregard them. we consider that the proposal should be maintained.

Recommendation 10-7.

We recommend that the use of standard clauses in planning obligations should be promoted in Welsh Government guidance.

Resolution of disputes as to planning obligations

We provisionally considered that the introduction of a procedure to resolve disputes as to the terms of a section 106 agreement in Wales (along the lines of Schedule 9A to the TCPA 1990, to be introduced in England by the section 158 of the Housing and Planning Act 2016) might be useful (Consultation Question 10-8).

- 10.62 Schedule 9A of the TCPA sets out a dispute resolution procedure for disputed terms of a section 106 agreement. It allows planning authorities and applicants to refer their case to the Secretary of State, who may appoint a person (possibly, but not necessarily, an inspector) to consider the matter and to prepare a binding recommendation.
- 10.63 This provision applies only in England.²⁸ In our Consultation Paper, we suggested that a similar procedure might also be of value in Wales as well,
- 10.64 Of the 31 consultees who responded to this proposal, 21 expressed agreement. POSW South-East Wales, Monmouthshire CC and Ceredigion CC suggested that it would be a “useful tool”, while the Mineral Products Association suggested that the a “quick and transparent” procedure could usefully help to resolve disputes associated with obligations.
- 10.65 Remaining consultees expressed mixed opinions; three were equivocal in their responses while three disagreed entirely. Allan Archer described the procedure as “another complex remedy”, and asked whether there was “evidence to suggest that

²⁸ The procedure was introduced under Housing and Planning Act 2016, s 158, which applies only in England (not yet in force).

such arrangements are needed” in the light of the ability for applicants to appeal against non-determination or to submit “twin-tracked” applications.²⁹

- 10.66 We consider that a procedure that assists in the resolution of deadlock between planning authorities and applicants could be of value. Such disagreements can substantially delay or frustrate development, resulting in wasted resources and lost opportunities. The capacity to oblige the Welsh Ministers, to provide upon request a report on any remaining points of contention between both parties, which seems to provide a simple solution to the problem.
- 10.67 Additionally, we do not consider either of the suggested alternatives as being sufficiently quick or flexible to mitigate the need for a separate procedure. Appeals against non-determination can result in significant delays, while twin-tracked applications require careful handling.
- 10.68 Consultees also expressed concern about the form and nature of the dispute resolution procedure applying in England. The RTPI argued that it was “a little premature to make a convincing case” for the provision’s introduction, noting that it was “untested in practice”. The Law Society, which provided an equivocal response, felt that “the machinery in England is likely to prove cumbersome and difficult to operate”.
- 10.69 Problems are bound to emerge when implementing new procedures, and they are unlikely to be sufficiently addressed in their entirety by the time the Planning Code comes into force. We therefore consider that, while such a dispute resolution mechanism may indeed be helpful, it would be appropriate to delay the introduction of a formal statutory machinery pending a more general review of the law relating to planning obligations, by which time it may be possible to learn from experience of the English procedure.

Recommendation 10-8.

We recommend that any future review of the law relating to planning obligations should consider introducing a procedure to resolve disputes as to the terms of a section 106 agreement, possibly along the lines of Schedule 9A to the TCPA 1990.

Restriction on the use of planning obligations

We provisionally considered that it might be useful to introduce a procedure for the Welsh Ministers to impose restrictions or conditions on the enforceability of planning obligations as they relate to particular categories of benefits to be provided (along the lines of section 106ZB of the TCPA 1990, introduced by section 159 of the 2016 Act with

²⁹ A practice where two applications are submitted at or around the same time; one is appealed as soon as the relevant time limit for determination has expired, while the other is the subject of continuing negotiations with the authority. See Consultation Question 8-6 [X-REF PARAS] for more information.

regard to obligations relating to the provision of affordable housing) (Consultation Question 10-9).

- 10.70 Section 106ZB empowers the Secretary of State to make regulations to restrict or to impose conditions on the enforceability of planning obligations entered into with regard to provision of affordable housing. Such regulations might include conditions on the enforceability of planning obligations relating to housing of a certain size or for developments of a specific nature (including the provision for a certain type of housing).³⁰ As before, this provision applies only in England.³¹
- 10.71 The regulations would not formally invalidate planning obligations relating to affordable housing which do not comply with the prescribed conditions, but would render them unenforceable.³²
- 10.72 We suggested in our Consultation Paper that it might be useful for a similar provision to be developed in relation to Wales in relation to a wider variety of categories of conditions, and asked consultees for suggestions about what those categories might include.
- 10.73 We received 30 responses to this proposal, many of which mirrored responses received to Consultation Question 10-8. The RTPI asked whether it would be
- premature to make a convincing case for bringing forward provisions similar to the Housing and Planning Act in England, that are not yet in force and therefore untested.
- 10.74 No consultee provided suggestions for additional categories of benefits which should also be subject to this procedure.
- 10.75 Upon re-examination, we consider that, here too, the imposition of additional restrictions or conditions solely for planning obligations relating to affordable housing is likely to be overly complex. As we noted in relation to Recommendation 10-5, there is already a degree of uncertainty about the ways in which a planning authority can enforce a planning obligation.
- 10.76 In the light of the discussion above, we consider that it would be more appropriate to earmark this issue for consideration during the broader review of the CIL and section 106 system in Wales, as the Law Society and Newtown and Llanllwchaearn Town Council both suggested.

³⁰ Explanatory Notes to the Housing and Planning Act 2016, at para 454.

³¹ It was introduced under section 159 of the Housing and Planning Act 2016 (not yet in force). See Recommendation 10-9.

³² Housing and Planning Act 2016, s 106ZB(1).

Recommendation 10-9.

We recommend that any future review of the law relating to planning obligations should consider the introduction of a procedure for the Welsh Ministers to impose restrictions or conditions on the enforceability of planning obligations as they relate to particular categories of benefits.

Planning obligations binding authorities in relation to their own land

We provisionally proposed that planning authorities should be able to enter into planning obligations to bind their own land in appropriate cases (Consultation Question 10-10).

- 10.77 In the Consultation Paper, we suggested that it might be helpful for a planning authority to be able to enter a planning obligation to bind its own land in certain circumstances. This could apply in the case of a local authority owning land outside the area for which it is the planning authority (for example, land in the area for which the planning authority is either a neighbouring local authority or a national park authority) or in relation to land that an authority proposes to dispose of – perhaps following a land assembly exercise.
- 10.78 However, we realise that thought would need to be given as to how the law as it applies generally should be modified in relation to such cases – particularly as to what such a planning obligation might require, how it could be enforced, and how it could be discharged or modified.
- 10.79 Respondents to the Scoping Paper had suggested that it would be helpful for planning authorities to be able to bind their own land with planning obligations. Where local authorities want to dispose of land, but want to restrict or oblige the activities carried out on it by future owners, it was suggested that they should be provided with a power to do so.
- 10.80 Of 34 consultees who responded to this proposal, 27 consultees were in agreement, including the Law Society and Huw Williams (Geldards LLP), who said “Agree strongly. The problem identified arises where a local authority is the owner of land, possibly having assembled a site itself with a view to its future development with the benefit of planning permission”. Bridgend CBC described how “existing restrictions can frustrate the disposal of Council owned assets”. And Pembrokeshire CC and the Planning Officers’ Society of Wales also agreed, noting how local authorities are often tempted to use public land as a way of extracting the maximum possible financial gain (rather than incorporating any planning or environmental considerations). They described the sale of council-owned land as a “fraught exercise”.
- 10.81 Four consultees expressed concern about the difficulties of enforcing such obligations. Lawyers in Local Government argued that the proposal should be given effect only when it has been satisfactorily resolved as to how an authority can covenant with itself; enforce against itself; and prosecute or take injunctive

proceedings against itself. The CLA expressed a similar sentiment, neither agreeing nor disagreeing with the proposal, but asked for “more detail on the pros and cons”.

- 10.82 Clearly an authority cannot enter into an agreement with itself. And it cannot require an unknown future purchaser to carry out or pay for works. However, where an authority has assembled a site, it is likely to be willing to grant planning permission for its development, but only on the basis that certain consequential works are carried out (or payments made). In those circumstances, would be helpful for future developers to know the basis on which planning permission would be (or has been) granted.
- 10.83 We consider that it should be possible for an authority to grant permission for the development of its own land, and at the same time pass a resolution setting out the terms of an obligation that would be deemed to have been entered into by any third party acquiring the land. The purchaser of the land could then rely on the permission that has been granted, knowing the terms of the obligation that is deemed to have been entered into. The arrangement would be dependent on the authority selling the land within a specified period – say, five years (the period within which the permission must be implemented) or such other period as may be specified.
- 10.84 We therefore recommend accordingly.

Recommendation 10-10.

We recommend that a planning authority should be given power, when granting planning permission for the development of its own land, to pass at the same time a resolution setting out the terms of an obligation that will be deemed to have been entered into by any third party acquiring the land within a specified period.

Planning obligations binding those other than owners of land

We provisionally proposed that a person proposing to enter into a contract for the purchase of land be able to enter into a planning obligation so as to bind that land, which would take effect if and when the relevant interest is actually acquired by that person (Consultation Question 10-11).

- 10.85 Section 106(1) of the TCPA 1990 limits the classes of person who can enter into planning obligations, setting out that they can only be entered into by a “person interested in the land”. Those who do not yet own a freehold or leasehold interest in the land but own an interest in it by virtue of an option to purchase or a contract of sale are therefore able to enter into a section 106 agreement, but only so as to bind that limited interest. And those who are merely contemplating purchasing the land have no interest at all.
- 10.86 We suggested that section 106(1) should be amended to allow anyone to enter into obligations, which would come into effect if and when a relevant interest is actually acquired. So, for example, where two developers both wish to obtain planning permission for the development of a piece of land, the authority might be willing to

give permission to one or other or both, but only subject to a planning obligation. At present, that is impossible.

- 10.87 We received 35 responses to this proposal. 14 consultees were in agreement, including PINS, who suggested that the proposal “would simplify and speed up arrangements and thus expedite development being permitted”.
- 10.88 The remaining 21 consultees were split as to whether or not the conditional agreement should run with the land or with the prospective owner. There are problems associated with either approach. If the agreement were to run with the land, it would effectively allow a third party to bind land which they did not own, potentially contrary to the actual landowner’s wishes, as the Central Association of Agricultural Valuers suggest.
- 10.89 If the agreement were to run with the prospective owner, the entire agreement would have to be renegotiated by the planning authority if the purchase did not go ahead. Neath Port Talbot CBC argues that this would be problematic, as they note that “planning permission normally goes with the land rather than the applicant and this amendment would effectively turn that on its head”. And PEBA noted that “it would need to take account of the possibility that the land may be sold to some other person. If planning permission (which runs with the land) has been granted, it will be important that the purchaser (whoever it is) is bound”.
- 10.90 We had envisaged that section 106 agreements between the planning authority and someone other than the owner would be a form of conditional contract, which would only become effective upon the actual acquisition of the land. In effect, they would be a draft set of obligations, which would become formalised upon sale. Unless and until the sale is completed, however, we consider that it would be unfair to allow land to be bound by prospective owners, who may not eventually gain any interest in the land whatsoever.
- 10.91 While we note the concerns of planning authorities in relation to the additional work that the proposal might create, we suggest that prospective owners and developers would be unlikely to invest the requisite resources in the negotiation of a section 106 agreement without a strong desire to purchase the land in question. We therefore consider that the proposal will merely bring forward in time the work required of planning authorities in relation to the negotiation of planning obligations, rather than increase it.
- 10.92 If on the other hand a prospective owner (A) enters into a conditional agreement with the authority, and subsequently a third party (B) buys the land, the original conditional agreement would lapse. However, B and the authority would both be aware that its terms had been acceptable to the authority; any subsequent agreement with B would no doubt retain many if not all of the features of the agreement with A, and should therefore not involve the authority in any significant extra work. But to ensure that in this situation a new obligation would be entered into, it would be necessary to impose a condition to the effect that the permitted development must not start until an obligation has been entered into that is in terms identical to the provisional obligation.
- 10.93 Subject to the above points, therefore, we reaffirm the proposal.

Recommendation 10-11.

We recommend that a person other than the owner of land (including but not limited to a person considering entering into a contract for the purchase of it) should be able to enter into a planning obligation relating to the land, which would take effect if and when a relevant interest is actually acquired by that person. Any permission linked to such a provisional obligation should be subject to a condition that, in the event that the land passes into the hands of a third party, the permitted development is not to be started until an agreement in the same or substantially the same terms has been concluded with the authority.