

Carpenders Park (APP/P1940/V/26/3378268)

Individual Owner-Occupier Liability – The Council's Submissions

1 CONTEXT

1.1 The S106 Obligation

1.1.1 The Applicant intends to provide a planning obligation (**S106**) including:

- (a) Positive requirements to provide mitigation before first Occupation of specified threshold numbers of Residential Units (**Relevant Requirement**);
- (b) Negative restrictions on first Occupation of Residential Units above the specified threshold levels until the Relevant Requirement has been satisfied (**Relevant Restriction**).

1.1.2 The S106 includes the following clauses:

- (a) Clause 17.2: the effect of which is that the Relevant Restrictions will only be effective against Relevant Persons where the Secretary of State confirms in his decision that they satisfy the requirements of regulation 122 of the Community Infrastructure Levy Regulations 2010¹
- (b) Clause 12: providing that
 - (i) 12.1: Various persons will not be liable under the S106 (Relevant Persons²)
 - (ii) 12.2: Relevant Persons will be liable in respect of Relevant Restrictions where the SoS has determined that they should for the purposes of clause 17.2.

1.1.3 **Annex 1** to this note summarises the Relevant Clauses and the Relevant Restrictions relating to each.

1.2 Points Of Difference

1.2.1 The Council understands that the Applicant considers that the Proposals would be unacceptable without the Relevant Requirements being met (e.g. various financial contributions/ delivery of affordable housing).

1.2.2 As such, the Council understands that the Applicant considers that:

- (a) the Relevant Requirements satisfy regulation 122;
- (b) the Relevant Restrictions satisfy regulation 122 insofar as those restrictions are not enforceable against occupiers.

1.2.3 The Council **does not** seek to impose positive liability on the Relevant Persons for the Relevant Requirements (e.g. payment obligations/ delivery of the required infrastructure).

¹ Clause 17.2 – it does this by stating that the Relevant Clauses (identified in Annex 1 of this note) will not apply unless held to be r.122 compliant

² This includes *individual owners and/or occupiers of Residential Units*

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- 1.2.4 For the reasons below, however, the Council does say that the *restrictions on occupation* should be enforceable against *occupiers who would otherwise be occupying in breach* of the S106.

2 INTENDED EFFECT

2.1 Positive and Restrictive Obligations

- 2.1.1 Planning obligations are a statutory creation with particular intended effect:

The purpose of this section is to confer a special status on unilateral undertakings and contractual terms. The statute overrides the doctrine of privity of contract by allowing an obligation to be enforced against a subsequent owner of the land, even although that person is not a party to the obligation. In that respect it goes beyond the equitable rules relating to restrictive covenants, themselves an exception to the privity doctrine, because it allows an identified authority to enforce an obligation against successors when the authority do not own adjoining land for whose benefit the obligation was entered into, and also where the obligation is positive in character. The statute also steps away from contract by allowing for the discharge of an obligation without the consent of a party to it.³

- 2.1.2 A breach of planning obligations is a breach of contract. Civil remedies are therefore available.
- 2.1.3 S106(5) of the TCPA 1990 also provides that "[a] **restriction or requirement imposed under a planning obligation is enforceable by injunction**" [emphasis added]. In seeking such an injunction, the LPA is recognised to be exercising a public function in the public interest.
- 2.1.4 Whether the injunction is prohibitory or mandatory, "*the court is doing no more than holding the party in breach to its bargain*"⁴.
- 2.1.5 Planning obligations typically provide for both payment obligations and 'matching' restrictions on the use of the development
- (a) The obligation to perform (e.g. to pay or deliver something):
 - (i) Allows the LPA to apply for an injunction to require performance;
 - (ii) Does not, however, entitle the LPA to stop further occupations in breach of the threshold that has been agreed to the point at which development would be unacceptable without the obligation having been complied with
 - (b) A matching restriction on occupation (tied to the triggers/ thresholds for the positive obligation to pay).

This allows the LPA to obtain an injunction restraining, for example, further occupations above the threshold that has been breached (until the requirement has been complied with).
- 2.1.6 This provides certainty in the public interest that there is an effective remedy which also provides a clear incentive not to breach. This has particular importance where the vehicle that owns the development site goes insolvent after breaches have occurred. An injunction to

³ Encyclopaedia of Planning Law and Practice @ [P106.28]

⁴ *Newham LBC v Ali* [2014] 1 WLR 2743 @ [17] per Dyson MR

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pay a debt claim may be very difficult to enforce against an insolvent entity. In the meantime, occupations would be able to continue beyond the thresholds that were established and agreed as necessary to avoid unacceptable development.

2.1.7 Where performance has been found to be necessary for development to be acceptable in planning terms for r.122 purposes, this alignment is particularly important to avoid the proliferation of unacceptable development. In this case, the planning obligations are being given voluntarily to advance a case in front of an Inspector that development would not be unacceptable.

2.1.8 As noted above, **the Council is not seeking the ability to enforce payment obligations against Relevant Persons⁵**. It merely seeks to ensure that restrictions on occupation - that have been agreed to be necessary for the development to be acceptable – can be enforced against those who would otherwise occupy in breach of the agreed position.

3 PRACTICAL ISSUES

3.1 In practice, conveyancers acting for those acquiring elements of the development will identify the restrictions on occupation of properties. They will then either raise queries of the Council's Land Charges team (or, in the case of conditions, check the planning register) and, if restrictions are ongoing, ensure that purchase or letting contracts only go unconditional once they have been discharged. This ensures that individual occupiers are protected (by the professional conduct obligations of licenced conveyancers).

3.2 This does also mean that if the developer does not satisfy the relevant obligations by the time they were meant to be satisfied, the sale will not complete until they have been satisfied. This is no more than the bargain that the developer has committed to (as noted above in relation to the *Newham* judgment).

3.3 The Applicant's position that restrictions on occupation should not bind those who would otherwise occupy in breach is therefore counter to this basic position.

3.4 Assuming that a particular obligation does satisfy regulation 122 and the PPG, the issue is whether the obligation would be effective for its purpose if was not binding on those who would otherwise occupy in breach.

3.5 Given that the Council accepts that the Relevant Requirements would be excessive to enforce against occupiers in this case, the issue is whether the Relevant Restrictions (on occupation) should bind those who would otherwise occupy in breach.

4 THE SECRETARY OF STATE'S APPROACH

4.1 The points made above in relation to insolvency risk, delay, the nature of the planning function recognised by the Courts and the self-cleansing nature of conveyancing procedures are all relevant.

4.2 It is also relevant that planning permissions routinely contain an array of conditions prohibiting occupation of development. These entitle the LPA to obtain injunctive relief against occupation. The Secretary of State for Housing, Communities and Local Government (**SSHCLG**) regularly accepts and adopts such conditions as passing the NPPF/PPG necessity and other tests for planning conditions.

⁵ As defined in the draft S106

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4.3 In the recent *Frome* (Selwood Garden Community) Call In decision⁶, SSHCLG:

- (a) **Imposed ten conditions restricting occupation and capable of being enforced by occupiers⁷**. His reasons for doing so make clear the importance of being able to restrict occupation of homes for proper planning reasons⁸;
- (b) **Accepted the planning obligation containing the following wording was necessary, proportionate and reasonable for r.122 purposes:**

4.4 *This Deed shall not be enforceable against:*

4.4.1 *any owner or occupier or tenant of any Dwellings or any mortgagee or charge (including their receiver) of such owner, occupier or tenant, or any successor in title of any of the foregoing save for:*

- (a) **those provisions of this Deed that prohibit Occupation of any or a specified number of Dwellings until specific obligations have been discharged;**

[...]

[Emphasis added]

4.4 This is both highly material and no more than what the Council asks SSHCLG to endorse in this case.

4.5 It would be irrational to:

- (a) On the one hand, impose conditions said to be necessary to restrict occupation (and so without any suggestion that the condition would simply be ignored and not enforced against occupations in breach); but
- (b) On the other hand, conclude that a restriction on occupation *by way of planning obligation* should be incapable of enforcement against those whose occupation would breach a requirement imposed for an agreed r.122-compliant purpose.

4.6 There is, as noted above, also nothing unusual or objectionable in principle about planning controls regulating the circumstances in which homes may lawfully be occupied, or imposing controls that affect future occupiers. SSHCLG's decisions routinely impose conditions that prohibit occupation of dwellings or phases until specified infrastructure, mitigation, servicing, parking, travel-plan, drainage, contamination or safety measures are in place.

4.7 S106 obligations restricting occupation that themselves satisfy r.122 should therefore not be treated as inherently inappropriate merely because they could bite on occupiers.

⁶ APP/E3335/V/25/3360037 (2 April 2026)

⁷ C8 (noise mitigation), 9 (EV charging), 22 (surface water), 23 (foul drainage), 27 (contamination), 30 (archaeology), 34 (footpath/ carriageway), 35 (A36 junction works), 37 (A36 Phase 2 works requirement), 44 (hazardous substances consents)

⁸ See APP/E3335/V/25/3360037 (2 April 2026) @ DL[29] in relation to one of those conditions, for example, **confirming that the purpose of imposing the restriction on occupation was "to prevent any occupation of affected dwellings..."**

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4.8 The same approach has been taken in the Council's area on numerous S106 agreements, including the following recent examples shown in **Annex 2**:

- (a) Woodside Road, Abbots Langley - Taylor Wimpey (29 May 2026; permission granted by the Council)
- (b) the 17-49 Church Street, Sarratt - appeal (where the current Applicant did not take issue);
- (c) 97 Church Lane, Sarratt (7 December 2023) – appeal (Site B)
- (d) 76 and 78 Church Lane, Sarratt (11 December 2025) - appeal.

4.9 The Council's position is set out below with this context in mind on the points made in the Applicant's submissions provided the day before the S106 roundtable session was due to take place.

5 APPLICANT'S SUBMISSIONS

5.1 Chiswell Green and Hemel Decisions

5.1.1 The Applicant's submissions repeatedly conflate:

- (a) liability for the underlying *payment or delivery obligation*; vs
- (b) enforceability of the corresponding *restriction on occupation*.

5.1.2 These are separate and - as noted above - the Council does not seek (a) in relation to individual occupiers. It only seeks (b) – such that an occupier would **not** be required to pay (for example) the Healthcare Contribution, the SEND Contribution or the Secondary Education Contribution.

5.1.3 The important point is that if a planning obligation says that no dwelling, or no further dwelling above an agreed threshold, may be occupied until the relevant mitigation has been secured, that restriction should bind those who would otherwise occupy in breach of it.

5.1.4 The decision in **Chiswell Green** does not help the Applicant here: the wording accepted in that case excluded individual dwelling owners *from general enforcement but expressly preserved their liability where there were restrictions on occupation*⁹. The agreement is clear that the owners, occupiers or tenants are not to occupy in breach of those restrictions. This is merely what the Council seeks in this Application.

5.1.5 SSHCLG rejected the County Council's alternative wording (which would have made individual owners liable for site-wide obligations until *all* obligations had been complied with). That is also not the Council's position here and it is irrelevant to the issue above.

⁹ See the clauses relating to the Appeal A and Appeal B sites at **Annex 2** to this note. Both the Inspector and SSHCLG declined to engage clause 12.2 such that the saving in Clause 8.12 applied: the Inspector was therefore legally correct to note that (on this basis) *The legal agreement specifies triggers for each obligation and prevents occupations until such time as payments are made or obligations are otherwise met*. That arrangement was left undisturbed by the decision but the far broader liability under Clause 12.2 advocated by the County Council was rejected

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5.1.6 The wording rejected in the **Hemel Hempstead** decision should also be distinguished from this Application and the draft S106:

- (a) It related to *obligations* – it did not distinguish between positive obligations and restrictions in the way that the following do:
 - (i) The draft S106 in this case; and
 - (ii) The agreements relied on by SSHCLG in the *Frome* and *Chiswell Green* decisions

In contrast, the Inspector in the Hemel decision referred¹⁰ to the *payment liability* imposed on the occupiers. He did not refer to restrictions at all (because this distinction was not raised in the wording of the agreement unlike in the current case, in the *Frome* case and the *Chiswell Green* case);

- (b) The wording under scrutiny in Hemel would also have created broader liability for all obligations until full compliance, which is not the case here for the reasons given above;
- (c) The criticism made in the costs decision was also directed primarily at the authority's rejection of 'blue-pencil' wording.

5.1.7 In this Application, by contrast, the Council:

- (a) Has engaged with the use of the blue pencil clause;
- (b) Is clear (as is the draft S106) that there is **no payment liability for individual occupiers**;
- (c) Simply says that the occupation restriction should be capable of being enforced against those who would otherwise occupy in breach (as provided for in both the *Frome* and *Chiswell Green* agreements).

5.2 Other Responses

Applicant's Submission	Applicant's Paragraph	Council Response
Individual occupier carve-outs are standard industry practice and necessary to avoid individual homeowners being “on the hook” for significant obligations.	1.2, 2.5, 3.2	This misrepresents or misunderstands the Council's position. The Council does not seek to enforce payment or delivery obligations against individual occupiers. The Relevant Clauses (relating to the Relevant Restrictions) simply preserve enforceability of restrictions on occupation where occupation would otherwise occur in breach of an obligation that is necessary to make the development acceptable in planning terms. See paragraphs 1.2.3, 1.2.4 and 2.1.5 - 2.1.8 above.

¹⁰ At DL164 as cited by the Applicant at [3.13] of its submissions

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Applicant's Submission	Applicant's Paragraph	Council Response
The SSHCLG decision in Chiswell Green shows that the Secretary of State has rejected Hertfordshire's approach.	3.3-3.8	The relevant part of the Chiswell Green decision related to (and rejected) liability for site-wide obligations. It did not reject enforceable occupation restrictions. The wording in that agreement in fact preserved enforceability where there were "restrictions on the Occupation" of dwellings - these restrictions expressly bind owners, occupiers and tenants not to occupy in breach. The Council's position in this case simply reflects that distinction and so is consistent with the decision. The Council does not seek to promote the 'wider liability' approach that Hertfordshire County Council adopted.
The Inspector's decision in Hemel Hempstead is said to show that individual occupier liability is unreasonable.	3.9-3.15	This misconstrues both the Hemel decision and the Council's position in this Application. The Hemel decision concerned broader wording that sought to expose individual owner-occupiers to liability for all obligations until full compliance - in effect, seeking to create a guarantor position. In contrast, the Council does not seek payment liability for individual occupiers - none of the Relevant Clauses are payment obligations. As noted above, the Council simply seeks to ensure that a restriction on occupation is effective against a person who would otherwise occupy in breach. The Council also accepts the blue-pencil mechanism, in contrast to the refusal to do so that was subject to criticism in the Hemel decision.
Occupiers would be "prevented from occupying" until payments or actions outside their control have occurred.	3.17-3.18	This is the intended effect of an occupation restriction. The fact that the occupier cannot personally deliver the mitigation does not make the restriction inappropriate - it simply requires the developer to manage delivery. This is neither novel nor unreasonable - it is just a normal part of planning controls. See paragraphs 3.1 - 3.5 and 4.2 - 4.7 above.
The UU is effective without the disputed wording (on the basis that the Council can enforce against the developer and stop the development at key points)	3.19(a)-(c)	A payment obligation alone does not prevent further unlawful occupations after breach, particularly where the developer is insolvent, has disposed of units, or is otherwise unable or unwilling to comply. The matching occupation restriction provides a direct and proportionate remedy against the activity that has been agreed would otherwise make the development unacceptable: occupation before the relevant mitigation is secured. See paragraphs 2.1.3 to 2.1.6 above.
Notification obligations and injunction powers exist under section 106(5) TCPA 1990	3.19(b)-(c)	This reflects the Council's position and does not assist the Applicant. As noted above, s.106(5) expressly includes enforcement of a "<u>restriction or requirement</u>" by injunction. The Council's case is simply that, where the <i>restriction</i> is "no occupation until X", the restriction should be enforceable against the person whose occupation would breach it. That is in line with the statutory power and well-justified for the reasons given above.
The ability to enforce occupation restrictions against occupier is said not to satisfy r.122 (on the basis that it is not necessary or fairly and	3.21-3.22	The issue is the effectiveness of the existing obligation without enforceability against those who would otherwise occupy in breach (not that a further obligation is being added to which r.122 is then being applied).

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Applicant's Submission	Applicant's Paragraph	Council Response
reasonably related in scale and kind)		The <i>enforceability of a restriction</i> is necessary (for the measure to be effective) and proportionate, where: (1) The underlying mitigation is necessary (2) The occupation trigger is the mechanism that ensures the development does not proceed beyond an acceptable point before mitigation is secured. That is the case here.
Percentage occupation triggers are impossible for purchasers to understand or manage.	3.23(a)-(b)	The developer controls the sequence of sales, completions and occupations and is able to manage compliance with occupation triggers. Purchasers are protected through normal conveyancing, enquiries, certificates and completion mechanics as noted above. The proper approach is to ensure effective development and disposals management, rather than removal of enforceability of the restrictions that serve the public interest.
It is suggested that purchasers, lenders and insurers would be deterred.	3.23(c)-(d)	This would apply to the many planning conditions and obligations that restrict occupation until mitigation is secured (but which in practice do not interfere with schemes in the way suggested – as noted above). If the Applicant's position were right, it would suggest that very widespread use of occupation-restrictions of any kind (whether by condition or planning obligation) in Secretary of State and local planning authority decisions would have to cease. In practice, such controls are routinely accommodated through conveyancing and development-management processes. The Applicant's submissions do not demonstrate that this scheme is materially different for these purposes.
Enforcing against individual occupiers would be administratively burdensome and reputationally unattractive.	3.23	The restriction is principally a preventative measure. Its existence incentivises compliance and allows effective relief if occupation is threatened or occurs in breach. Either way, the possibility that enforcement may be unattractive is not a reason to render a planning restriction that is itself agreed to be necessary unenforceable. This also stands to be compared to the position on planning conditions noted above, where there is a clear logical and practical disconnect between the case made by the Applicant and the reality of scheme delivery.
The Sarratt instance where the Applicant signed up to this wording is said to be one where it did so only to avoid a dispute.	3.20	The Applicant has accepted this wording in a way that clearly undercuts its suggestion of an invariable wider practice. It now seeks a different outcome in a Called-In case on grounds which do not withstand proper scrutiny.
Blue Pencil mechanism	3.25-3.27	The Council has engaged constructively. Its position is that SSHCLG should conclude that the disputed wording simply preserves enforceability of occupation restrictions against persons who would otherwise occupy in breach, while not imposing payment liability on individual occupiers.

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ANNEX 1 – OBLIGATIONS

'Relevant Clause'	Relevant Restriction	Effect - Occupation restricted until...
12.2.1	Schedule 3 (2.3)	Healthcare Contribution paid to the Council
	Schedule 3 (3.3)	Housing with Care Contribution paid to the Council
	Schedule 3 (4.3)	Beryl Bikes Contribution paid to the Council
12.2.2	Schedule 4 (3.3)	First Bus Service Contribution paid to the County Council
	Schedule 4 (4.3)	Bus Infrastructure Contribution paid to the County Council
	Schedule 4 (6.2.4)	Second SEND Contribution paid to the County Council
	Schedule 4 (6.2.6)	Third SEND Contribution paid to the County Council
	Schedule 4 (7.2.4)	Second Secondary Education Contribution paid to the County Council
	Schedule 4 (7.2.6)	Third Secondary Education Contribution paid to the County Council
12.2.3	Schedule 5 (4.1)	No more than 50% of Market Units until 60% of the Affordable Housing Units have been Provided
		No more than 80% of Market Units until all of the Affordable Housing Units have been Provided
12.2.7	Schedule 7 (2.2)	No Occupation until Housing with Care Land has been Transferred to the Care Delivery Partner on the Transfer Terms
	Schedule 7 (3.2)	Not more than twenty-five percent (25%) of the Residential Units unless and until the Housing with Care Scheme is approved
	Schedule 7 (4.4)	Occupation of any Housing with Care Unit unless and until the Communal Facilities have been Completed
12.2.8	Schedule 8 (2.2)	More than 85% of the Market Units unless and until the Children's Home has been Completed

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ANNEX 2 – AGREEMENT EXCERPTS

Chiswell Green – Appeal A

- 8.12 SAVE where Clause 12.2 applies, the obligations in this Deed will not be enforceable against owners of individual Dwellings nor against those deriving title from them nor their mortgagees or charges **save for where there are restrictions on the Occupation of the Dwellings then such restrictions on Occupation shall bind the owners occupiers or tenants of the Dwellings who shall not Occupy any Dwelling in breach of such restrictions.**

Chiswell Green – Appeal B

- 9.13 **Save for restrictions on Occupation** the obligations in this Deed (to the extent that they shall have been complied with by the Owner) will not be enforceable against the individual owners lessees or occupiers of any Affordable Housing Units (excluding a First Homes Owner) and any Chargee and successors in title of the same) or any mortgagee or chargee of any Affordable Housing Dwellings or any purchasers therefrom or any successors in title save that the Affordable Housing obligations in paragraph 3 and 6 of Schedule 2 shall remain binding unless and until they cease to have effect pursuant to paragraph 6 of Schedule 2

Land at Woodside Road (Wilcon Homes [Taylor Wimpey]) – 192 homes – 29 May 2026¹¹

9 Release and Discharge

- 9.1 The obligations contained in this Deed shall not be binding on nor enforceable against:
- (a) an individual owner-occupier of a Dwelling **SAVE** for the obligations in favour of the Council at paragraphs **1.6-1.15** (inclusive) of Schedule 2 and paragraphs **4** and **5** and **6** of Schedule 4 AND the obligations in favour of the County Council in Schedule 3 which shall remain enforceable until fully complied with;

97 Church Lane, Sarratt (7 December 2023) – appeal (Site B)

5.8 Individual Occupiers and Owners

Except for paragraphs 3.4, 4.4, 5.1, 5.2, 5.3, 5.4, 5.5, 6.5, 6.10 - 6.13 (inclusive) and **7.1 - 7.4** (inclusive), **10, 11, 14.3 15.3 and 16.2** of Schedule 4 and paragraphs **2.5, 3.1** and **9.3** of Schedule 5, this Deed shall not be enforceable against individual owners or occupiers of the Development (including their respective successors in title).

¹¹ Ref 25/0896/FUL

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76 and 78 Church Lane, Sarratt (11 December 2025) - appeal

8 Release and Discharge

8.1 The obligations contained in this Deed shall not be binding on nor enforceable against:

- (a) an individual owner-occupier of a Dwelling (other than paragraphs 1.5, 1.6, 1.7, 1.8, 1.9, 1.10 and 1.11 of Schedule 2);
- (b) any statutory undertaker or other person who acquires any part of the Site or any interest in it solely for the purposes of the supply of electricity gas water drainage telecommunication services or public transport services; or
- (c) the Owner after it has disposed of all its interests in the Site but not so as to release the Owner from liability for any subsisting breach, non-performance or non-observance of its obligations arising before they part with their interest.