Date: 1 March 2021

Application by Aquind Limited for a Development Consent Order for the 'Aquind Interconnector' electricity line between Great Britain and France (PINS reference: EN020022)

Note on Planning Obligations: Interaction of Section 106 of the Town and Country Planning Act 1990 and Sections 104, 114 and 120 of the Planning Act 2008

For the Examining Authority

On behalf of
Mr. Geoffrey Carpenter & Mr. Peter Carpenter

Registration Identification Number: 20025030

Submitted in relation to Deadline 8 of the Examination Timetable

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INTRODUCTION

1. The ExA requested the Affected Party (during Issue Specific Hearing 4 on the draft DCO) to provide a Note on Planning Obligations and the Interaction of Section 106 of the Town and Country Planning Act 1990 and Sections 104, 114 and 120 of the Planning Act 2008 because the Applicant recently submitted a draft DCO containing draft Article 8(4) that purports within the draft order to deem the Applicant to have a land interest for the purposes of section 106 of the 1990 Act in advance of the making of the Order containing that provision. This is that Note.

SECTIONS

2. This Note is divided into the following Sections:

   SECTION A – Executive Summary

   SECTION B – Analysis

   SECTION C – Facts

   SECTION D – Law

   SECTION E – Planning Encylopedia Extracts

SECTION A - EXECUTIVE SUMMARY

3. There is no evidence that the Applicant is a person interested in land in each of the areas of each of the relevant local planning authorities concerned with the Application.

4. Section 104(3) of the Planning Act 2008 ("PA 2008") requires the Secretary of State to determine the application in accordance with Parliament's NSP EN-1. EN-1 requires consideration of development consent planning obligations. If, as a result of that evaluation, "when" the Secretary of State "has decided" an application for development consent, then he must either "make an order granting development consent" or refuse consent.

5. EN-1 contains numerous references to development consent planning obligations as a part of the decision making evaluation required under that NPS by Parliament. In the absence of a qualifying planning obligation existing at that evaluation stage, the evaluation must proceed on the basis of that absence because the guidance does not provide for a theoretical planning obligation to enable satisfaction of the guidance terms. Further, section 106 of the Town and Country Planning Act 1990 itself has preconditions to its satisfaction that require an applicant to be both interested in land, and to identify that interest in the deed comprising the planning obligation. In this Application, the Applicant has not before applied under section 120 of the PA 2008 to modify that statutory provision nor at Deadline 8 has it provided any evidence in front of the ExA (nor the Secretary of State) that it has an interest in land in any of the areas of any of the relevant local planning authorities. It follows that the Applicant cannot satisfy the EN-1 guidance requirements for the purposes of section 104 and 114 of the PA 2008.

6. The core decision making process of the PA 2008 establishes a statutory decision making sequence that cannot be circumvented under section 120(5)(a). The proposal of Article 8(4) by the Applicant cannot supply a lawful means by which to resolve that *legal* chronological impossibility arising: that Parliament's EN-1 and section 104 requires evaluation of the planning obligation in advance of the making of an order under section 114(1). That is, no reliance can in law be placed on Article 8(4) to seek to cure a legal requirement of section 106(9)(b) and (c) of the TCPA 1990 in advance of the Order containing that Article being both made under section 114 such that the envisaged Article 8(4) can have no status in law before the exercise of section 114.

SECTION B - ANALYSIS

7. The Examining Authority requested the Affected Party provide a Note on draft Article 8(4) proposed by the Applicant in its draft development consent order. The Applicant's article envisages a deeming provision by which the Applicant is in some way deemed by the *order,* if granted, to be a "person interested in land" for the purposes of the Town and Country Planning Act 1990, section 106, in particular, so as to become a party to a development consent planning obligation. The Applicant aspires to, thereby, satisfying a number of provisions in NPS EN-1 that relate to its project in the field of energy so as to ensure that that development for which development consent is required become acceptable.

8. The ExA reminded the Applicant at CAH 3 on 19th February 2021 that if it evaluated each development consent planning obligation as "necessary", then the Applicant would be required to enter into each.

9. The evidence before the ExA shows:

   a) **[REP7-018]**, Applicant's Statement of Reasons, paragraph 7.4.3 and Appendix D identifies no more than "Heads of Terms" "for an Option Agreement" and indicates a hope to agree an "Option Agreement" with: The Wardens and Fellows of Winchester College; "Heads of terms" sought to be agreed with MoD; and the Applicant "is hopeful" of agreeing further heads of terms with further parties;

   b) **[REP7c-030]**, Appendix 7, Mr Brice's Expert Report, paragraph 8.4, Table, evidences that "Heads of Terms" alone have been agreed and with only 2 parties.

10. There is no evidence as at Deadline 8 and before the ExA or Secretary of State that the Applicant has more than "Heads of Terms" agreed at all or more than such terms with about 3 parties (at best). It is trite law that "Heads of Terms" tend to precede a legally binding agreement and so have no legal force. There is no evidence in **[REP7-018]** or otherwise that the Applicant has an option to acquire any land within the Application Order Limits. The Applicant's evidence and promotion of Article 8(4) is consistent with it having no option to purchase any land within those Limits nor any qualifying interest in land at Deadline 8 shortly before close of the statutory examination period on the 8th March 2021.

11. Sections 104 and 114 of the PA 2008 establish a legal sequence of decision making whereby the application is first evaluated and then, *when*, the Secretary of State has decided to either make an order or to refuse consent. That is, an order is neither made nor can it have any legal status in relation to logically prior matters of planning obligations that it seeks to provide for in the evaluation of whether it may be in fact (and so in law) made at all.

12. Novel as it is, the Applicant's addition to the draft DCO, Article 8(4), fails to recognise and cannot overcome the chronological impossibility of the need to exercise a planning judgement under sections 104 and 114 of the Planning Act 2008 ("PA 2008") chronologically prior to the grant of the terms of the order itself that are envisaged to contain the draft provision. That is, the Applicant has put the decision cart before the decision-making horse.

13. Thereby, the Applicant's proposed drafting: a) accepts the need for a development consent planning obligation; whilst b) failing to provide the ExA and Secretary of State with a lawful vehicle by which to take each into account at the chronologically prior stage to the issue of the order itself; and c) is evidence from the Applicant that it (properly) accepts that it currently cannot in fact a qualifying "person interested in land" within the meaning of section 106(1).

14. Section 104(3) of the PA 2008 requires the decision to be made in accordance with (here) EN-1 and that NPS contains numerous references to a development consent obligation. The absence of such obligations therefore, appears at face value, to result in a refusal of the Application for that reason alone.

15. Can that legal situation be resolved? On analysis, it cannot.

16. Legal provision is made for development consent planning obligations in section 106 of the Town and Country Planning Act 1990 ("TCPA 1990") and to which Footnote 73 of EN-1 refers.

17. In addition to being required to satisfy the guidance tests in EN-1, paragraph 4.1.8, the development consent planning obligation must satisfy the logically prior statutory criteria.

18. Section 106, as modified by the PA 2008, contains statutory requirements for a qualifying candidate development consent planning obligation.

19. Section 106(1) can only be satisfied by a "person interested in land" and the obligation he may enter into is "enforceable to the extent mentioned in subsection (3)". Subsection (3) entitles the authority identified in subsection (9)(d) to enforce against any person entering into the obligation and "any person deriving title from that person". Subsection (9)(d) requires identification of the "local planning authority" by whom the obligation is enforceable". Further, (9)(b) requires the deed instrument comprised of the obligation to identify the "land in which the person entering the obligation is interested" and (c) requires identification of the person entering into the obligation and also "what his interest in the land is". Section 336(1) defines "land" to mean "means any corporeal hereditament, including a building, and, in relation to the acquisition of land under Part IX, includes any interest in or right over land".

20. No case appears to definitively hold what the scope of "a person interested in land" can encompass. In the *Hallyard* case, the High Court expressed the view that that phrase could not be satisfied by less than a "proprietary interest" because the combined language of the provisions of section 106, subsections (1), (3), (9), (11) and (12) of the 1990 Act (as opposed to of prior Planning Acts) are "strongly indicative" of the same. "The widest reading [of the phrase] was that the claimant should have a 'right in relation to the land'. In that case, subsection (9)(c) was not complied with because the agreement did not state what the right was.

21. The scope of "interested in land" can properly encompass both a legal interest and an equitable interest. The scope of "proprietory interest" can also encompass both such types of interest. An option to purchase is an equitable interest and a 'minor interest' that may be protected under the Land Registration Act 2002 or (for unregistered land) under the Land Charges Act 1972. However, a mere contract comprising "Heads of Terms" is not in itself a legally binding contract let alone an equitable interest in land (*rem*).

22. It follows that, in the evidenced absence (see its draft Article 8(4)) of the Applicant in fact having any qualifying "interest" in the "land" within the Order limits during the Examination Period, Aquind Limited cannot itself satisfy section 106(1) not section 106(9)(c). In turn, Aquind Limited cannot satisfy the requirements of section 104(3) and NPS EN-1 so far as they relate to planning obligations.

23. The requirement in *Sainsbury's*, therefore, for a "real" connection between a planning obligation and the area to which the Application relates, cannot be satisfied in this Application by such an obligation.

24. Because of the chronological impossibility of providing, *through* a DCO provision, a planning obligation to address the logically prior evaluation of whether or not to grant a DCO, no drafting of the DCO can overcome that sequence. In particular, this is because *Parliament* has endorsed in its NPS EN-1 terms consideration of a "development consent obligation" within the decision making process before (and not after) a grant of development consent.

25. A theoretical alternative to execution of a planning obligation and in the absence of agreement under section 106 with any relevant party or in the absence of the Applicant actually having an interest in land, would be to agree an Article and Protective Provision terms with each local planning authority. This could not supply a proxy planning obligation without the modification of section 106 under section 120(5)(a) of the PA 2008. However, the Application draft development consent order, as made originally and as most recently refined by the Applicant, does not include a proposed modification of section 106, nor consideration of whether that modification may be acceptable to the ExA, to any party who may be interested, or to the Secretary of State. Therefore such an alternative appears unavailable.

26. It follows that the Applicant's draft Article 8(4) is chronologically otiose, thereby purposeless, and an unlawful provision, not within the scope of section 120(3) or (4) of the PA 2008.

SECTION C – FACTS

27. The evidence before the ExA shows:

    c) **[REP7-018]**, Applicant's Statement of Reasons, paragraph 7.4.3 and Appendix D identifies no more than "Heads of Terms" "for an Option Agreement" and indicates a hope to agree an "Option Agreement" with: The Wardens and Fellows of Winchester College; "Heads of terms" sought to be agreed with MoD; and the Applicant "is hopeful" of agreeing further heads of terms with further parties;

    d) **[REP7c-030]**, Appendix 7, Mr Brice's Expert Report, paragraph 8.4, Table, evidences that "Heads of Terms" alone have been agreed and with only 2 parties.

28. The Applicant has sought to agree terms of a number of planning obligations under section 106 of the Town and Country Planning Act 1990. However, the Applicant has no interest in land by which to apparently qualifying within section 106(1) nor an interest in land that it can identify for the purposes of section 106(9)(c). On the face of it, the Applicant is currently unable to satisfy the requirements of section 106 for the purposes of sections 104 and 114 of the PA 2008.

29. By NPS EN-1, Parliament has made provision for consideration of development consent obligations in the evaluation of whether or not a particular project may or may not be acceptable. See "planning obligation" within the statutory guidance.

30. By paragraph 4.1.8 of EN-1:

> *The IPC may take into account any development consent obligations[73] that an applicant agrees with local authorities. These must be relevant to planning, necessary to make the proposed development acceptable in planning terms, directly related to the proposed development, fairly and reasonably related in scale and kind to the proposed development, and reasonable in all other respects*

31. By footnote 73 of EN-1:

> *Where the words "planning obligations" are used in this NPS they refer to "development consent obligations" under section 106 of the Town & Country Planning Act 1990 as amended by section 174 of the Planning Act 2008.*

32. By paragraph 5.3.19:

> *Where the applicant cannot demonstrate that appropriate mitigation measures will be put in place the IPC should consider what appropriate requirements should be attached to any consent and/or planning obligations entered into.*

33. By footnote 112:

> *Where mitigation is required using a condition or planning obligation, the tests set out at paragraphs 4.1.7 – 4.1.8 in EN-1 should be applied.*

34. Paragraph 5.7.10 includes:

> *… In addition, the development consent order, or any associated planning obligations, will need to make provision for the adoption and maintenance of any SuDS, including any necessary access rights to property. The IPC should be satisfied that the most appropriate body is being given the responsibility for maintaining any SuDS, taking into account the nature and security of the infrastructure on the proposed site. The responsible body could include, for example, the applicant, the landowner, the relevant local authority, or another body, such as an Internal Drainage Board.*

35. Paragraph 5.7.22 includes:

> *… There may be circumstances where it is appropriate for infiltration facilities or attenuation storage to be provided outside the project site, if necessary through the use of a planning obligation.*

36. Paragraph 5.10.21 includes:

… The IPC should also consider whether mitigation of any adverse effects on green infrastructure and other forms of open space is adequately provided for by means of any planning obligations, for example exchange land and provide for appropriate management and maintenance agreements. Any exchange land should be at least as good in terms of size, usefulness, attractiveness and quality and, where possible, at least as accessible.

37. Paragraph 5.12.8 provides:

The IPC should consider any relevant positive provisions the developer has made or is proposing to make to mitigate impacts (for example through planning obligations) and any legacy benefits that may arise as well as any options for phasing development in relation to the socio-economic impacts.

38. Paragraph 5.13.6 includes:

… Applicants may also be willing to enter into planning obligations for funding infrastructure and otherwise mitigating adverse impacts.

39. Paragraph 5.13.7 provides:

Provided that the applicant is willing to enter into planning obligations or requirements can be imposed to mitigate transport impacts identified in the NATA/WebTAG transport assessment, with attribution of costs calculated in accordance with the Department for Transport's guidance, then development consent should not be withheld, and appropriately limited weight should be applied to residual effects on the surrounding transport infrastructure.

40. Paragraph 5.15.7 provides:

The IPC should consider whether appropriate requirements should be attached to any development consent and/or planning obligations entered into to mitigate adverse effects on the water environment.

SECTION D – LAW

Planning Act 2008

41. By section 31 of the Planning Act 2008 ("PA 2008"):

> *Consent under this Act ("development consent") is required for development to the extent that the development is or forms part of a nationally significant infrastructure project.*

42. By section 32:

> *In this Act (except in Part 11) "development" has the same meaning as it has in TCPA 1990….*

43. By section 37:

> *1) An order granting development consent may be made only if an application is made for it.*
>
> *2) An application for an order granting development consent must be made to the Secretary of State.*

44. By section 104: (Emphasis added)

> *1) This section applies in relation to an application for an order granting development consent if a national policy statement has effect in relation to development of the description to which the application relates.*
>
> *2) In deciding the application the Secretary of State must have regard to –*
>
> *a) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision.*
>
> *3) The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies…*
>
> *7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.*

45. Section 114 provides:

> *1) When the Secretary of State has decided an application for an order granting development consent, the Secretary of State must either—*
>
> *a) make an order granting development consent, or*
>
> *b) refuse development consent…*

Town and Country Planning Act 1990

46. Section 55 of the Town and Country Planning Act 1990 ("TCPA 1990") provides for the development of land.

47. By section 336(1):

> *"development consent" means development consent under the Planning Act 2008; …*
> *"land" means any corporeal hereditament, including a building, and, in relation to the acquisition of land under Part IX, includes any interest in or right over land;*
> *"lease" includes an underlease and an agreement for a lease or underlease, but does not include an option to take a lease or a mortgage, and "leasehold interest" means the interest of the tenant under a lease as so defined; …*
> *"owner", in relation to any land, means a person, other than a mortgagee not in possession, who, whether in his own right or as trustee for any other person, is entitled to receive the rack rent of the land or, where the land is not let at a rack rent, would be so entitled if it were so let; …*
> *"the planning Acts" means this Act, the Planning (Listed Buildings and Conservation Areas) Act 1990, the Planning (Hazardous Substances) Act 1990 and the Planning (Consequential Provisions) Act 1990; …*

48. By section 106, provision is made for "development consent planning obligations": (Emphasis added)

> *1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A to 106C as "a planning obligation"), enforceable to the extent mentioned in subsection (3) —*
>
> *a) restricting the development or use of the land in any specified way;*
>
> *b) requiring specified operations or activities to be carried out in, on, under or over the land;*
>
> *c) requiring the land to be used in any specified way; or*
>
> *d) requiring a sum or sums to be paid to the authority …*
>
> *1A) In the case of a development consent obligation, the reference to development in subsection (1)(a) includes anything that constitutes development for the purposes of the Planning Act 2008.*
>
> *2) A planning obligation may—*
>
> *3) Subject to subsection (4) a planning obligation is enforceable by the authority identified in accordance with subsection (9)(d) —*
>
> a) *against the person entering into the obligation; and*
>
> b) *against any person deriving title from that person.*
>
> *4) …*
>
> *5) The instrument by which a planning obligation is entered into may provide that a person shall not be bound by the obligation in respect of any period during which he no longer has an interest in the land.*
>
> *6) …*
>
> *7) …*

8) …
9) A planning obligation may not be entered into except by an instrument executed as a deed which –
a) …
b) identifies the land in which the person entering into the obligation is interested;
c) identifies the person entering into the obligation and states what his interest in the land is;
d) identifies the local planning authority by whom the obligation is enforceable …

Local Land Charges Act 1975

49. By section 1 of the Local Land Charges Act 1975:

1) A charge or other matter affecting land is a local land charge if it falls within any of the following descriptions and is not one of the matters set out in section 2 below:—
a) or any similar charge acquired by a local authority or National Park authority under any other Act, whether passed before or after this Act, being a charge that is binding on successive owners of the land affected …
b) any prohibition of or restriction on the use of land — …
ii) enforceable by a local authority or National Park authority under any covenant or agreement made with them on or after that date,

being a prohibition or restriction binding on successive owners of the land affected;
e) any prohibition of or restriction on the use of land —
i) imposed by a Minister of the Crown or government department on or after the date of the commencement of this Act (including any prohibition or restriction embodied in any condition attached to a consent, approval or licence granted by such a Minister or department on or after that date), or
ii) enforceable by such a Minister or department under any covenant or agreement made with him or them on or after that date,
being a prohibition or restriction binding on successive owners of the land affected; …
d) any positive obligation affecting land enforceable by a Minister of the Crown, government department or local authority or National Park authority under any covenant or agreement made with him or them on or after the date of the commencement of this Act and binding on successive owners of the land affected; …

Cases

50. In *R(oao Sainsburys) v Wolverhampton CC* [2011] 1 AC 437, the Supreme Court considered a planning obligation in the context of compulsory acquisition of private property by local authorities under the Town and Country Planning Act 1990 in connection with the development or redevelopment of land. It raises for the first time, in the context of compulsory acquisition, a number of controversial issues which have arisen in the context of planning permission, including these: how far a local authority may go in finding a solution to problems caused by the deterioration of listed buildings; to what extent a local authority may take into account off-site benefits offered by a developer; and what offers (if any) made by a developer infringe the principle or policy that planning permissions may not be bought or sold. In resolving to make the CPO sought, the council took into account Tesco's commitment to develop the Royal Hospital site (and indeed passed a resolution which indicated that one of the purposes of the CPO was to facilitate the carrying out of the Royal Hospital site development).

51. At paragraph 84, the Supreme Court held:

… the exercise of powers of compulsory acquisition, especially in a "private to private" acquisition, amounts to a serious invasion of the current owner's proprietary rights. The local authority has a direct financial interest in the matter, and not merely a general interest (as local planning authority) in the betterment and well-being of its area. A stricter approach is therefore called for. As Lord Collins JSC says in his conclusions at para 71 of his judgment, a real (rather than a fanciful or remote) connection must be shown between any off-site benefits and the proposed redevelopment for which a compulsory purchase order is proposed.

52. At paragraph 131, the Supreme Court considered planning obligations and section 106:

This section is in very general terms and, in particular, no express restriction or qualification is placed on the undertaking to pay money to the authority. In these circumstances two separate questions arise. The first is whether, and if so what, implicit restrictions exist as to the nature of planning obligations that can lawfully be incurred. The second is the extent to which planning obligations that have been undertaken are material considerations to which the authority must have regard under section 70 of the Act. There are two relevant decisions that relate to the latter question.

53. At paragraph 137, it held:

My conclusion in relation to the effect of the authorities is as follows. When considering the merits of an application for planning permission for a development it is material for the planning authority to consider the impact on the community and the environment of every aspect of the development and of any benefits that have some relevance to that impact that is not de minimis that the developer is prepared to provide. An offer of benefits that have no relation to or connection with the development is not material, for it is no more than an attempt to buy planning permission, which is able in principle.

54. At paragraph 142, it held: (Emphasis added)

I can summarise the position as follows. (1) In deciding <u>whether</u> to exercise its powers of compulsory purchase for the purpose of development the council is <u>not permitted</u> to have regard to <u>unconnected</u> benefit that it may derive from the carrying out of the development, but (2) in deciding <u>who</u> shall carry out the development and, thus, to whom the land will be sold for that purpose, the council is entitled, and perhaps bound, to have regard to unconnected benefit offered by the developer.

55. It concluded, at paragraph 152:

The situation in this case is that there was no physical connection of any kind between the two sites. Development of the Royal Hospital site could not contribute anything to the carrying out of development on the Raglan Street site in any real sense at all. They were not part of the same land. There is no doubt that the development of the Royal Hospital site would bring well-being benefits to the council's area of the kind that section 226(1A) refers to. But to fall within that subsection they had to be benefits that flowed from the Raglan Street development, not anywhere else. It follows that the council were not entitled to conclude that the work which Tesco were willing to undertake on the Royal Hospital site would contribute to the well-being of the area resulting from its development of the site at Raglan Street for the purposes of section 226(1A) .

56. In *Southampton City Council v Hallyard Ltd* [2009] 1 P&CR 5, the High Court considered the enforcement of a planning obligation under section 106 of the TCPA 1990. It held, in essence, that:

8) Section 106(9) required a convenantor's *interest in land to be stated expressly*, and *the Customs House agreement failed to do so*. Although it was strictly unnecessary to determine the ancillary issue, the phrase "interest in land" suggested that a proprietary interest was required.

9) Section 106(9) prevented planning obligations being entered into except by an instrument which stated what the obligor's interest was in the relevant land. The language of subsection did not render promising a submission that its provisions were other than mandatory.

57. In particular, the Court considered section 106, at paragraph 46 and at 63 *et seq*. and that: (Emphasis added)

> *63. That clears the way for me now to address the various questions which arise under s.106 itself. The sixth question is whether the obligations on Cindan under the Custom House agreement are such as to come within the scope of s.106 . For s.106 to apply to an obligation and to make it a planning obligation, the circumstances set out in s.106(1) must be satisfied and the obligation in question must come within paras (a)–(d) of s.106(1) . Starting with the opening words of s.106(1) , Cindan was, at the relevant time, interested in land in the area of the City Council. It was the freehold owner of the St Mary's site. It is not necessary for present purposes to ask whether the covenants which Cindan entered into with the developer, Barratts, are within s.106 , as the self-same covenants were entered into with the City Council…*
>
> *75. It is not strictly necessary to decide whether the references to "interest in land" and similar references in s.106 require there to be a proprietary interest. The notes in the Encyclopaedia explain how this question may not matter very much in most cases. Indeed, even if the covenantor has to have a proprietary interest before he can enter into a planning obligation within s.106 , the section says nothing about the nature or expected duration or assignability of that proprietary interest. That might, conceivably, call into question the notion that there has to be such an interest as a pre-condition to s.106 applying.*
>
> *76. Nonetheless, my reaction to the language of s.106 is that it does require that the covenantor in relation to the planning obligation has a proprietary interest in the land. I regard the language of subss.(1), (3), (4), (9), (11) and (12) acting in combination, as strongly indicative of this intended meaning. I have considered the decision in Pennine Raceway Ltd v Kirklees MBC . There is, as one would expect, much in the judgments which is interesting and potentially relevant. However, it is not decisive of the meaning of interest in land in s.106 of the 1990 Act as amended by the 1991 Act. I can give my reasons succinctly as follows:*
>
> *(1) As I read the judgments, all three members of the court held that the claimant in that case had a sufficient proprietary interest;*
>
> *(2) Only one member of the court clearly rejected the idea that the section being considered in that case, namely s.164 of the Town and Country Planning Act 1971 required there to be a proprietary interest;*
>
> *(3) Section 164 of the 1971 Act had a quite different purpose from s.52 of the 1971 Act, s.52 being the predecessor of s.106 of the 1990 Act;*
>
> *(4) Eveleigh L.J.'s comment at 389 on the operation of s.52 was obiter;*
>
> *(5) Most significantly for present purposes, the wording of s.106 of the 1990 Act as amended by the 1991 Act, that is the wording to be applied in this case, is in many respects different from s.106 of the 1990 Act as enacted and from s.52 of the 1971 Act as considered in Pennine Raceways ; the original s.106 effectively repeated s.52 which was considered by the Court of Appeal in that case;*
>
> *(6) One of the ways in which the wording differs is in relation to further references being made in the new s.106 to "interest in land" in a way which suggests to me that the phrase refers to a proprietary interest; in any event, the widest reading of "interested in the land" in the Pennine Raceway case was that the claimant should have "a right in relation to the land", see at 388G–H; even on that basis, para.9(c) is not complied with here because the Custom House agreement does not state what that right is.*

SECTION E - PLANNING ENCYLCOPEDIA EXTRACTS

Extracts from the Planning Encyclopedia

58. (As at February 2021), the current edition of the practioners' Planning Encyclopedia includes as follows:

> *P106.05 This section substituted the former s.106 of the Town and Country Planning Act 1990 (re-enacting s.52 of the 1971 Act) and introduced a new form of planning instrument, the planning obligation. Unlike the planning agreement it replaced, a planning obligation may either be entered into bilaterally with the local planning authority or offered as a unilateral undertaking by the landowner, thereby overcoming the difficulties of a local planning authority refusing to enter into an agreement…*
>
> *P106.07 The introduction of a power for landowners to bind their land unilaterally is a major feature of s.106. The purpose is to overcome the logjam which sometimes occurred in planning appeals where the Secretary of State or his inspector was prepared to grant planning permission for the proposed development, but wished first to ensure that some legitimate planning objection to it—commonly the lack of adequate off-site infrastructure—was overcome. This could not then, nor now, normally be achieved by a planning condition, because it related to off-site works and required the payment of a financial contribution by the developer. It therefore needed an agreement under s.106…*
>
> *P106.10 The most common use of planning obligations is in connection with the grant of planning permission, although a planning obligation can be entered into independently of the grant of planning permission.*
>
> *To the extent that a planning obligation will overcome a legitimate planning objection to a development, its existence is a material consideration under s.70(2) in determining whether to grant permission, provided that it meets the tests set out in reg.122 of the Community Infrastructure Regulations 2010. Regulation 122 provides that a planning obligation may only constitute a reason for granting planning permission for the development if the obligation is (a) necessary to make the development acceptable in planning terms; (b) directly related to the development; and (c) fairly and reasonably related in scale and kind to the development. Regulation 122 therefore builds upon certain of the policy guidance previously contained in Circular 05/05 by making compliance with these three tests a legal requirement for the consideration of a planning obligation as a material consideration in support of a proposed development. The reg.122 requirements remain additionally as policy guidance in the NPPF. As a result, reg.122 develops considerably the previously evolved case law relating to when a planning obligation could be a material consideration…*
>
> *These authorities were reviewed by the Supreme Court in* R. (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton City Council [2011] 1 A.C. 437 *where it was held that for an off-site benefit to be material it had to be related or connected to the development in question and that that connection had to be real rather than fanciful or remote (applying the approach established by the above authorities in planning decisions to a decision to make a CPO under s.226 of the 1990 Act)…*
>
> *P106.11 An obligation must be entered into by a person "interested in land" in the area of a local planning authority. The Court of Appeal in* Jones v Secretary of State for Wales (1974) 28 P. & C.R. 280 *expressed the view that this expression (which remains unchanged from the earlier section) meant a person already owning an interest in the land, and not merely a developer proposing to develop it. But a different approach was taken, albeit* obiter *and without reference to the* Jones *case, by Eveleigh LJ in* Pennine Raceway Ltd v Kirklees Metropolitan Council (No. 1) [1983] Q.B. 382*:*
>
> > *"Counsel says that the reference in [s.106(3)] to persons deriving title under that person indicates that the person interested is a person with an interest in land so that it is possible for someone to derive title under him. I cannot read [subs.(3)] as saying that a person can only be interested in land under subsection (1) if it is possible for someone to derive title under him. I read it as saying that if in a particular case the person interested had such an interest which was transferable and had transferred it, then the agreement may be enforced against the transferee. I cannot read [subs.(3)] as limiting the meaning of subsection (1) so as to make subsection (1) apply only to persons who have an interest in land in a strict conveyancing sense. We are dealing with a*

statute which controls use and operations on land and provides compensation. It is not a conveyancing statute."

However, in Southampton City Council v Hallyard Ltd [2009] 1 P. & C.R. 5*, a case which was concerned with whether the formal requirements of s.106 had been complied with, Morgan J. at para.76 regarded the language of subsections (1), (3), (4), (9), (11) and (12) taken together as being "strongly indicative" of a requirement for a covenantor in relation to a planning obligation to have a proprietary interest in the land and gave six reasons for differing from Eveleigh J.'s* obiter *comments in* Pennine Raceway Ltd*.*

The issue whether a person may enter into a planning obligation, though he has no formal interest in the land which is transferable and does not propose to acquire such an interest, may not be of great practical significance. Such an agreement will by definition be enforceable only against that party, and there will be no need therefore to rely upon this section at all so long as the agreement falls within the general contracting power of the authority, as incidental to or consequential upon the exercise of any of its statutory functions (Local Government Act 1972, s.111). In particular, there is no basis for reliance on the special power conferred by subs.(2).

Of more practical significance is the contracting capacity of a covenantor who, though he does not yet own the freehold or leasehold that is necessary for him to be able to give effect to a planning obligation, nonetheless owns an "interest" in the land, such as a right under an option to purchase or a contract of sale. He may enter into an obligation, but since it is capable of binding nothing more than his limited interest, it is of little value unless and until he acquires the relevant estate.

P106.12 The benefit of the covenant therefore runs with the land: see, e.g. Smith v River Douglas Catchment Board [1949] 2 K.B. 500.

Where an obligation is provided unilaterally it cannot, by definition, impose any obligation on the local planning authority. It may, however, seek to do so indirectly, by making the authority's performance of some obligation a condition precedent to their being able to enforce obligations binding on the other party…

P106.13 The capacity of a party to a planning obligation to bind the land and other persons interested in it depends upon:

1. *The extent of that person's estate or interest in it. An obligation can be effective to bind only the estate or interest of the covenantor, and is, by virtue of subs.(3) enforceable also against those deriving title from the covenantor. But a covenantor has no power to bind a superior estate. Although a tenant may enter into a planning obligation, it will not bind the landlord without his consent: the landlord does not "derive title from" his tenant (subs.(3)). Such an obligation will therefore become unenforceable, except contractually against the original covenantor, upon the expiry or prior termination (through notice, forfeiture or surrender) of the lease.*
2. *Any existing third party rights affecting his estate or interest. A planning obligation is enforceable against subsequent tenants, mortgagees and other interested third parties with rights derived from the covenantor (for example, neighbours entitled to the benefit of easements or covenants relating to the land), though subject to any requirements of notice (see further below). But where third party rights affect an owner's interest before he enters into a planning obligation, it will bind only those who have consented to be bound by it: the Act does not create a charge against persons in possession which would bind even a prior mortgagee exercising a power of sale (cf.* Westminster City Council v Haymarket Publishing Ltd [1981] 2 All E.R. 555*: statutory charge in respect of surcharge for unpaid rates).*

These limitations on the capacity of covenantors mean that it is necessary for the local planning authority to examine closely the title of a person offering an obligation, and to obtain all necessary consents from third parties interested in the land, to the extent necessary to ensure that the obligation is enforceable. That is a normal conveyancing operation in the case of a bilateral obligation, but may be more complex where the obligation is to be unilateral. The Planning Inspectorate's published Good Practice Advice Note 16 (para.16) indicates that the obligation must give details of each person's title to the relevant land, which should be checked by the local planning authority. In hearings and at inquiries the inspector may rely on the authority's assurance to this effect, but in written representation cases the inspector will require evidence of title.