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Maximising positive outcomes for the local community – a legal perspective

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INTRODUCTION



- 1. Legal overview on mitigation, compensation, legacy and community benefit/social value**
- 2. Legal mechanisms to secure community benefits whether part of the DCO or not**
- 3. Key lessons for local authorities in terms of approaches that may be taken to secure benefits**



LEGAL AND POLICY FRAMEWORK (1)



- *Smyth v Secretary of State for Communities and Local Government* [2015] PTSR 1417
- Mitigation: Preventative safeguarding measure which “eliminates or reduces the harmful effects” so that “those harmful effects either never arise or never arise to a significant degree”
- Compensation: Measures which would not prevent harm from occurring but would (once harm has occurred) provide form of offsetting compensation

LEGAL AND POLICY FRAMEWORK (2)



- NPPF (July 2021) – The mitigation hierarchy (biodiversity)
- Overarching National Policy Statement for Energy (EN-1)
- EIA and Habitats Directive regimes
- Legacy benefits?



SECURING COMMUNITY BENEFITS (1)



- Requirements:
 - Akin to conditions that could have been imposed on a grant of planning permission
 - Precise, enforceable, necessary, relevant to the development, relevant to planning and reasonable in all other respects
 - What can developer/project deliver?
 - Approval process and content
 - Resource funding – discharges and monitoring



SECURING COMMUNITY BENEFITS (2)



- Development consent obligations:
 - Under section 106 TCPA 1990
 - Bilateral or unilateral
 - Entered into by person with interest in land to:
 - Restrict the development or use of the land in a specified way
 - Require specified operations or activities to be carried out in, on, under or over the land
 - Require the land to be used in any specified way
 - Require a sum or sums to be paid to the authority

SECURING COMMUNITY BENEFITS (3)



- Development consent obligations:
 - Automatically bind successors in title
 - What land can be bound by the document?
 - Alternatives?
 - A deed of covenant approach
 - A “deed of obligation” approach



SECURING COMMUNITY BENEFITS (4)



- What can be taken into account?
 - Any consideration relating to the use and development of land is *capable* of being a material consideration
 - *Wright*:
 - For a planning purpose;
 - Fairly and reasonably related to the development; and
 - Not so unreasonable that no reasonable planning authority could have imposed it.



SECURING COMMUNITY BENEFITS (5)



- What can be taken into account?
 - Do obligations satisfy the *Newbury* criteria?
 - Weight is a matter for the decision-maker
 - Planning Act 2008, Section 150(2)(c): Secretary of State must have regard to “*any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State’s decision*”.



SECURING COMMUNITY BENEFITS (6)



- What can be taken into account?
 - Policy - NPS EN-1 Paragraph 4.8:

“The [Secretary of State] may take into account any development consent obligations 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.”



KEY LESSONS (1)



- Early engagement
- Identify impacts – and ideally propose solutions
- Keep construction/operation and cumulative impacts in mind
- Is embedded mitigation an option?
- Involve local community and key community forums
- Mobilise officers and establish technical justification for position
- Allow a developer to work measures into proposals and private arrangements



KEY LESSONS (2)



- Justified and consistent position
- Begin negotiation on obligations package early to provide maximum chance of concluding during examination process
- Understand mechanism for provision of measures to facilitate delivery in practice



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