Edited by Maria Lee and Carolyn Abbot

Taking English Planning Law Scholarship Seriously

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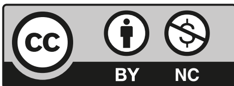

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Contracting affordable housing delivery? Residential property development, section 106 agreements and other contractual arrangements

Edward Mitchell

Introduction

Most development of land in England requires planning permission granted by the relevant local planning authority (LPA).[1] LPAs tend to grant planning permission subject to 'conditions' that control how, when and where development can be carried out.[2] Alongside this, section 106(1) of the Town and Country Planning Act (TCPA) 1990 gives LPAs the power to enforce 'planning obligations' that a developer has entered into and that apply further controls on how that developer uses and develops their land. These obligations typically seek to impose different requirements than those that would be sought through conditions attached to a planning permission,[3] and developers can enter into these obligations either by agreement with the relevant LPA or by making a 'unilateral undertaking'.[4] This chapter focuses on planning obligations entered into by agreement and refers to these as 'section 106 agreements'. These agreements involve a convergence, as Matthew White has put it, of 'general contractual principles . . . modified and supplemented by statutory provisions'.[5] They also play an essential role in shaping the built environment in England, so are an important subject for further analysis.

LPAs and developers applying for planning permission usually negotiate and sign section 106 agreements before the LPA has decided whether

to approve the developer's application.[6] This raises a question, therefore, about the extent to which proposed planning obligations can lawfully influence an LPA's decision-making when it is considering an application for planning permission. To that end, regulation 122(2)(a) of the Community Infrastructure Levy Regulations 2010 states that an LPA can only consider proposed planning obligations when determining a planning application if the obligations are necessary to address impacts that would make a proposed development 'unacceptable' in planning terms and that would thus compel the LPA to withhold the grant of planning permission.[7] Moreover, if a prospective developer does propose to provide planning obligations in a section 106 agreement, regulation 122(2)(b) and (c) of the 2010 Regulations states that the LPA can only take the proposed obligations into account if those obligations relate both 'directly' and 'fairly and reasonably . . . in scale and kind' to the development. This is to provide clarity for developers, before they begin negotiating with an LPA, about the contributions that they might be expected to provide, and to ensure that those contributions genuinely relate to appropriate town planning matters.[8] In practice, many LPAs have longstanding formal policies stating that they will seek to use section 106 agreements to impose controls on what those developers build or to secure contributions from them towards the preservation or enhancement of local infrastructure, services, facilities and amenities that either would be newly required or would otherwise be adversely affected as a result of a development.[9] These section 106 agreements are often intensely negotiated contracts containing a 'tightly drafted' and intricate web of highly detailed arrangements designed to govern how the developer delivers its obligations.[10]

The system described above is not the only method currently used in England for securing developer contributions to infrastructure or other public policy goals. The government introduced a discretionary levy in April 2010, called the Community Infrastructure Levy, which LPAs can also use to fund local infrastructure projects by charging developers a locally set fixed-rate tariff.[11] This levy sits alongside the system for securing planning obligations through section 106 agreements, although fewer than half of English LPAs had adopted it by the end of 2019.[12] Moreover, the levy cannot be used to secure the delivery of so-called 'affordable housing'.[13] LPAs seeking to secure affordable housing delivery by property developers primarily do this through planning obligations contained in section 106 agreements.[14] However, the government is, at the time of writing, proposing to change this by creating a new Infrastructure Levy that LPAs will use to fund the delivery of affordable housing and other types of infrastructure.[15] Nonetheless, the contractual

arrangements relating to affordable housing in section 106 agreements will continue to shape the places where ordinary people live for some years to come, as this chapter demonstrates. Studying these agreements also provides novel and important insights into the substance of the contractual arrangements that LPAs and developers make when negotiating what a developer will build.

To investigate how section 106 agreements operate in practice, this chapter presents a case study of the interlinked contractual arrangements relating to affordable housing that were created for three residential development projects. The projects studied here are unremarkable developments that happen all the time, everywhere in England, and were chosen because of their everydayness. The developments are located in the author's home town and the author stumbled across their most striking features by accessing the relevant LPA's online planning database and by reading documents relating to the developments. Nevertheless, the interlinking contractual arrangements governing affordable housing delivery in these developments are, as this chapter shows, surprising because of their complexity and their effect. This chapter reveals, therefore, that mundane and small-scale housing delivery can produce highly technical and highly formal legal agreements. By drawing upon Ian Macneil's relational contract theory, this chapter asks why LPAs and private-sector developers create this type of contractual arrangement and examines the power dynamics that are visible in the contractual arrangements studied here.

The chapter proceeds as follows. The first section outlines existing academic scholarship on the role of section 106 agreements in securing the delivery of planning obligations. It then discusses scholarship that critiques the use of private contracting to deliver public policy objectives. It goes on to introduce and consider some applications of Macneil's relational contract theory before explaining how Macneil's ideas have already been used to analyse some aspects of contemporary planning practice. The second section examines the policy basis for affordable housing delivery in England and shows how current delivery methods cause instability and tension. Against this background, the third section introduces the contractual network that links affordable housing delivery at the three developments studied here. It goes on to reveal how the private sector developers constructing those developments used these contractual arrangements to shape when, where and how they delivered affordable housing. The fourth section illustrates how those arrangements created a contractual network that had a 'quality of bindingness'[16] that was skewed in favour of the private developers delivering the developments. The final section concludes by noting that, while it is well known that

contractual arrangements between private companies and public bodies do not always deliver underlying public policy objectives, this chapter provides a means to understand why such uneven outcomes occur.

Critiquing the role of contract in delivering planning obligations

Much of the scholarship over the last 30 years relating to section 106 agreements and planning obligations has focused on the theoretical justifications and policy rationales for extracting planning obligations from property developers.[17] That scholarship examines how landowners, planners and developers establish 'negotiating frameworks' within which they shape development trajectories and determine the planning obligations that a developer will provide.[18] Other work takes a more critical approach, explaining that the negotiated nature of planning obligations can create a tendency amongst councillors and planners to pursue vote-winning developer contributions rather than obligations with a robust planning justification.[19] Recent critical commentary has also questioned the prominence of 'viability' modelling and how this shapes the content and delivery of planning obligations.[20] This work emphasises how viability modelling often produces outputs that developers use to secure significant reductions in the amounts of affordable housing that LPAs will expect those developers to deliver and thus provides an important contextual basis on which this chapter builds.[21]

This chapter also develops another recent line of enquiry in legal and town planning scholarship that examines the turn to private contracting as the primary mode for the delivery of various public services and that points to serious and longstanding deficiencies in those contracting regimes. Mike Raco, for example, highlights how contracting practices enable private companies to shape and then govern the implementation of urban development and town planning goals.[22] According to Raco, this form of governance 'has become a more technical process, managed by contract-writers, lawyers and accountants'.[23] The contracts that emerge from this process tend often to be highly complex, opaque instruments that 'lock' public bodies into relationships that do not always deliver intended public policy objectives.[24] This chapter offers a new perspective on the turn to private contracting for the delivery of public services by analysing both the content of particular contractual arrangements and how those arrangements work in practice. Doing so provides

a rare insight into the granular details of interlinked section 106 agreements and reveals how LPAs and developers use contracts to establish how, when and where those developers provide affordable housing.

The approach adopted in this chapter uses Macneil's relational contract theory to examine how these section 106 agreements actually work. Macneil suggests that all contractual arrangements involve an interplay of 'common contract behavioral patterns and norms'.[25] He also explains that all contractual arrangements inhabit a point on a spectrum that has more 'discrete' and 'presentiated' contractual behaviour at one pole and entirely 'relational' contractual behaviour at the other.[26] A fully discrete arrangement will exist when contracting parties plan their relations in full and then consent to and achieve the complete implementation of that plan.[27] Presentiation is related to 'discreteness' and is 'the bringing of the future into the present', which means that a fully presentiated contract would entirely fix the contracting parties' future dealings.[28] However, Macneil explains that the concept of a fully discrete, fully presentiated contract 'is *entirely* fictional' because more 'relational' behaviours such as solidarity, reciprocity and trust inevitably intervene whenever contracting parties seek to create complex and long-term contractual relations.[29] Macneil's work shows, therefore, that it can be informative to analyse the balance, in any given contractual arrangement, between more discrete behaviour and more relational behaviour.[30]

Relational contract theory thus provides a framework for analysing many types of contractual arrangements. For example, Peter Vincent-Jones has used Macneil's ideas to study contracting regimes that the UK government created in pursuit of specific public policy objectives.[31] These regimes involved administrative contracts designed to regulate the behaviour of central government departments and agencies, economic contracts related to outsourcing and the quasi-market restructuring of central and local government service provision, or social control contracts imposed to regulate the behavioural interactions between state agencies and 'deviant' citizens.[32] Vincent-Jones shows that these contracting regimes rarely enabled the government to achieve its underlying policy objectives.[33] A reason for this failure, according to Vincent-Jones, was central government's 'top-down' imposition of these contracting regimes, which produced destabilising weaknesses in the relationships between the contracting parties.[34] These weaknesses flowed, Vincent-Jones suggests, from the absence of more relational contractual behavioural norms relating to fairness and reciprocity and a consequent lack of trust or cooperation between the contracting parties.[35] This chapter

draws on Vincent-Jones's insights to examine both matters of trust and dependency in section 106 agreements and the unevenness of the relationships that shape and that are re-established in those agreements.

Relational contract theory has also already been utilised in scholarship examining aspects of urban development and planning practice. Menno van der Veen and Willem Korthals Altes, for example, use Macneil's ideas as a framework to offer important insights into the interaction between formal contractual arrangements and the need for flexibility in the delivery of complex urban development projects.[36] In addition, this author has used relational contract theory to analyse contracts that oblige LPAs to use their powers of 'compulsory purchase' to redistribute ownership of private land and thus facilitate property development by private developers.[37] This work has illustrated how a type of 'one-sided flexibility' in these contracts embeds an asymmetric power dynamic in which LPAs become tied to a pre-determined course of action over which their private-sector development partners exercise tight control.[38] By applying a similar approach to the analysis of the contractual arrangements used to secure affordable housing delivery, this chapter shows that those arrangements can appear to embody contractual behavioural norms connected to discreteness and presentiation but that this appearance can mask the complex dealings that take place behind the scenes to shape how, when and where developers deliver affordable housing.

Planning policy, affordable housing and section 106 agreements

It is generally accepted that a sizeable proportion of households in England require subsidised housing because they would otherwise be unable to access homes of an acceptable standard via the private housing market.[39] The Government has sought to address this by using its National Planning Policy Framework (NPPF) to advocate the delivery of this 'affordable housing' by private property developers rather than public bodies. The NPPF currently defines the concept of affordable housing by reference to different ownership types, ranging from social rented[40] and affordable rented[41] through to mechanisms designed to enable occupiers either to acquire private 'for-sale' housing at discounted prices or to rent that housing at discounted rates that are nonetheless higher than those set for social or affordable rented housing.[42] The current NPPF uses definitions of affordable housing that are similar to those contained in

previous versions[43] and which LPAs have largely incorporated into their planning policies.[44]

The approach to affordable housing delivery advocated in the NPPF relies upon property developers incorporating some affordable housing alongside private market housing into the development projects they build.[45] It has also enabled successive governments to pursue the creation of 'mixed communities' through affordable housing delivery alongside private market housing while simultaneously replacing public spending on affordable housing with privately funded provision. This delivery method draws upon the additional value created when a developer receives planning permission for and constructs a new residential development but depends, therefore, on the developer being able to project a profit from a development before it will agree to provide affordable housing.[46] Moreover, to ensure that LPA affordable housing policies do not prevent new residential development proposals coming forward, the NPPF contains detailed guidance on how LPAs should formulate those policies.

To establish the specific amount of affordable housing that they will expect any given development to provide, the NPPF recommends that LPAs should assess the overall need for housing of different sizes, types and tenures in their areas.[47] However, the current NPPF then advises LPAs that they should only require affordable housing delivery where a proposed development will provide 10 or more dwellings in total.[48] The basis for this seems to be the government's concern that the costs, in terms of lost profit, of requiring smaller developments to provide affordable housing would make many of those developments 'unviable'.[49] Where a developer does seek planning permission for a development of 10 or more dwellings, the NPPF advises that LPAs should require the developer to make at least 10 per cent of the total number of dwellings available as affordable housing.[50] LPAs should then, according to the NPPF, expect developers to provide that amount of on-site affordable housing unless the developer can 'robustly justify' either off-site provision or a financial contribution to the LPA instead of providing actual affordable housing.[51]

The use of the phrase 'robustly justified' in the NPPF points to two sources of tension in the formulation and implementation of affordable housing policies. On the one hand, the NPPF states that all LPA policies, including those relating to affordable housing, 'should be underpinned by relevant and up-to-date evidence' that 'take[s] into account relevant market signals' and that supports the proposed policies.[52] The focus, moreover, is on ensuring the 'deliverability' of an LPA's development plan for its area.[53] This focus on 'market signals' and 'deliverability' has

been present in every NPPF.[54] The original NPPF, however, went further and expressly advised LPAs to conduct 'viability' modelling to assess how their policy proposals would affect the profitability of notional development projects.[55] While the NPPF is now less explicit about the need for viability modelling to assess the prospect of competitive economic returns to notional property developers, the effect of these practices has often been to compel LPAs to prioritise private profit-making over public housing need when formulating their affordable housing policies.[56] Alongside this, controversies involving viability modelling practices have also arisen from the ways that LPAs have implemented those policies in response to individual applications for planning permission.[57] The NPPF has stated, in all its iterations since 2012, that LPAs should not expect a specific development to provide affordable housing if the developer produces verifiable evidence showing that affordable housing delivery would reduce the development's profit-making potential to an extent that would threaten overall delivery.[58] At times, this has created what Antonia Layard calls a 'duel of the spreadsheets' when developers and LPAs separately seek to establish the mix of housing that a given development should provide.[59]

LPAs create the contested policy framework for affordable housing delivery in their development plan documents and, as should be expected given that LPAs use assessments of both local housing need and local economic conditions when formulating their policies, the content of affordable housing policies tends to vary from one LPA to the next. Nevertheless, LPA policies have consistently stated that, when a development proposal does trigger a requirement to provide affordable housing, LPAs will usually only grant planning permission if the developer signs a section 106 agreement that purports to impose binding duties on the developer to provide that housing.[60] Studying the actual commitments contained in section 106 agreements thus sheds new light on the processes through which LPAs and developers establish how, when and where to deliver affordable housing.

Affordable housing delivery: contracting options for people in housing need

Recent legal and planning scholarship on affordable housing delivery has tended to overlook the actual content and operation of clauses relating to affordable housing in section 106 agreements. By examining three interlinked residential development projects, this chapter demonstrates

the extent to which the contractual arrangements between private developers and LPAs can grant those developers control over affordable housing delivery. The first development studied here involved the construction of 110 dwellings on land adjacent to Brook Street, in the centre of Colchester (the Brook Street development).[61] Brook Street is a narrow residential street that acts as a major thoroughfare for vehicular traffic.[62] It is also an Air Quality Management Area, which means that required air quality standards are neither being nor are likely to be achieved in the area.[63] Colchester Borough Council (Colchester Council) granted Mersea Homes Limited (Mersea Homes)[64] planning permission for the Brook Street development in April 2006.[65] Prior to the grant of planning permission, Colchester Council and Mersea Homes had made a section 106 agreement, which, among other things, stated that Mersea Homes would provide four affordable homes as part of the Brook Street development.[66] The Brook Street planning permission was originally due to expire in April 2011 but, in 2010, Mersea Homes applied for, and Colchester Council approved, an extension of that expiry date to April 2014. The reasons for this extension are outside this chapter's scope, but contractual arrangements made for the Brook Street development following that extension shaped affordable housing delivery both at Brook Street and elsewhere in Colchester.

On 29 May 2013, Colchester Council, Mersea Homes and Hills Residential Construction Limited (Hills)[67] signed a supplementary section 106 agreement for the Brook Street development (the first Brook Street 2013 agreement). This agreement noted that Mersea Homes owned the Brook Street site at that time, but that Hills would soon acquire ownership of 55 per cent of it. The agreement then stated that the two developers had agreed to provide an extra 21 affordable homes at Brook Street. These extra dwellings were, however, only part of an overall commitment by the two developers to provide an additional 68 affordable homes at Brook Street.[68] This would increase the total amount of affordable housing to 72 dwellings, which would represent 65 per cent of the total number of dwellings to be constructed. Colchester Council's local development plan documents state that developments of this size should provide 20 per cent affordable housing,[69] so the council and the two developers had agreed an affordable housing amount that was far higher than that required in the council's affordable housing policies.

However, on 29 May 2013, Colchester Council, Mersea Homes and Hills had also signed a separate contract made pursuant to section 1(1) of the Localism Act 2011 (the second Brook Street 2013 agreement).[70] The reference here to the Localism Act 2011 is striking because it indicates

that the second agreement was probably *not* a section 106 agreement. Local authorities derive their power to make contracts from statute. Section 111 of the Local Government Act 1972 permits local authorities to make contracts that enable them to perform their statutory functions, whereas section 106 of the TCPA 1990 gives LPAs more specific powers to make contracts securing the delivery of planning obligations. Section 1(1) of the Localism Act 2011 confers a much broader power, allowing local authorities to 'do anything that individuals may generally do'. Subsequent case law confirms that this entitles local authorities to make contracts that do not relate directly to the performance of their statutory functions.[71] Since the second Brook Street 2013 agreement was probably not a section 106 agreement, the council could not consider the obligations therein when determining applications for planning permission relating to either the Brook Street development or any other developments. This also means that the duties imposed on the developers in the second Brook Street 2013 agreement would be enforceable against Mersea Homes and Hills but not against anyone who subsequently acquired ownership of the development site from them.[72] Similarly, it means that the rights created in the second agreement were personal to the two developers but were nonetheless binding on Colchester Council. Finally, it also means that Colchester Council was not obliged to keep a public record of the second agreement and, since the council also appears to have chosen not to include it in its online planning database, the second agreement's existence was seemingly hidden from view.[73]

Despite Colchester Council's decision not to publish the second Brook Street 2013 agreement, it is possible to piece together its purpose by examining the other developments discussed in this case study. The second development considered here is called 'Chesterwell'.[74] It is significantly larger than the Brook Street development and will provide around 1,600 new residential dwellings, a new primary school, a new secondary school and other local services, facilities and amenities on the edge of Colchester.[75] Mersea Homes and Countryside Properties (UK) Limited are constructing the development in a series of phases. The whole development, according to Mersea Homes, 'combines beautiful green spaces, timeless design and modern amenities to offer the perfect backdrop to family life'.[76] Mersea Homes and Countryside Properties jointly applied for 'outline' planning permission for Chesterwell in 2012. Developers often seek outline rather than 'full' planning permission when they want to obtain confirmation from an LPA that it regards a development proposal as acceptable 'in principle'.[77] A developer seeking to proceed with a development that has outline planning permission must, however, make

subsequent 'reserved matters' applications before they can start building.[78] In those reserved matters applications, the developer usually seeks approval for the specific details of either a phase of a development or a whole development, so an application for outline planning permission is a logical early step for a developer proposing to build a large project in a series of phases. A developer applying for full planning permission should, by contrast, provide all the reports, drawings, plans and other documents that an LPA needs to permit a developer to start building.[79]

Mersea Homes and Countryside Properties jointly made a section 106 agreement with Colchester Council for Chesterwell in June 2014 (the Chesterwell agreement),[80] and the council then granted outline planning permission. The Chesterwell agreement contains affordable housing obligations alongside a wide range of other planning obligations. While the agreement governs the delivery of obligations for the whole Chesterwell development, Mersea Homes obtained reserved matters approvals for, and has been constructing, phases one and two. Mersea Homes is also constructing phase four but has, at the time of writing, been in dispute with Colchester Council over vehicular access for that phase. Countryside Properties is constructing phase three. This chapter focuses on phase two, which would provide 146 dwellings in total, of which, according to the Chesterwell agreement, 22 should have been affordable homes.

The third development discussed here is taking place at the disused Rowhedge port (the Rowhedge development).[81] On 11 March 2016, Hills applied to Colchester Council for permission to construct 86 dwellings on part of that site. Hills describes this development as 'an idyllic riverside village' encapsulating 'all the finer details of everyday life'.[82] Colchester Council's planning committee approved the grant of planning permission subject to the council, the developer and Essex County Council signing a section 106 agreement obliging the developer to provide on-site affordable housing alongside various other planning obligations. In November 2016, Colchester Council, the county council, a company that is part of the Hills group[83] and other interested parties duly signed a section 106 agreement (the Rowhedge agreement)[84] and Colchester Council granted planning permission.

The Rowhedge agreement's affordable housing clauses provide a key insight into the network of contractual arrangements that link affordable housing delivery at these developments. The Rowhedge agreement obliges Hills to provide affordable housing but creates a contractual right for the developer to elect either to provide the 17 affordable homes that Colchester Council's planning policies would ostensibly require, or to

provide only two affordable homes.[85] An outsider trying to understand this contractual right to elect must follow a series of cross-references leading from the Rowhedge agreement back to the second Brook Street 2013 agreement. The Rowhedge agreement states that, in the second Brook Street 2013 agreement, the council and the two developers agreed that the over-supply of affordable housing at Brook Street meant that the two developers had earned something called 'the Brook Street Affordable Housing Allowance'. This allowance derived from the actual floorspace of the additional Brook Street affordable housing and would be allocated to the two developers in separate portions equivalent to their respective land interests on the Brook Street site.[86] Mersea Homes and Hills could thus apply their respective shares of the allowance to other developments in Colchester Council's area, meaning that the developers had a contractual right to deviate from the council's affordable housing policies on those other developments.

Nicky Morrison and Gemma Burgess have suggested that one of the advantages to LPAs of the use of section 106 agreements is that they can secure affordable housing delivery in places where that type of housing would not otherwise be available.[87] This principle underpins current affordable housing policy in England and is designed to ensure the creation of mixed communities consisting of housing of different types and tenures. The effect of the contractual arrangements discussed here, by contrast, was to enable two private developers to supply extra affordable housing on one of the most polluted streets in Colchester in exchange for the opportunity to elect to supply less of that housing at more upmarket developments elsewhere in the area. Consequently, the arrangements discussed here seem to have produced a contraction in the range of potential living spaces available in Colchester for people in housing need while granting private developers significant freedom to choose when, where and how they would deliver that housing.

Prescription and choice in contracts for affordable housing delivery

The contractual arrangements discussed here gave the respective developers a right to elect when, where and how they would deliver affordable housing. This section now shows how that right interacted with the complex and technical clauses relating to affordable housing delivery in the Chesterwell and Rowhedge section 106 agreements. It does this by first

analysing the affordable housing provisions in the Chesterwell agreement and then examining the equivalent provisions in the Rowhedge agreement.

Mersea Homes chose to apply its share of the Brook Street allowance to the second phase of the Chesterwell development.[88] However, the Chesterwell agreement does not indicate that Mersea Homes had this option available to it. Instead, the Chesterwell agreement states that the developer of any phase of the development should ensure that at least 15 per cent of the total number of dwellings to be constructed for that phase should be affordable housing. Of that 15 per cent, the agreement states that two-thirds should be affordable rented and that the remainder should be available for purchase or rent at prices or rates that are higher than affordable rented housing but lower than market prices or rates. To achieve this, the agreement obliges the developer to confirm the number and sizes of affordable homes to be provided in a phase whenever they make a reserved matters application for that phase. The agreement then states that the council can respond by either commenting upon, amending or approving an affordable housing proposal within 60 working days of receipt, or the council can request a monetary contribution from the developer towards off-site provision of some, but not all, of the required on-site affordable housing. If the council does request a monetary contribution, the agreement states that the developer must provide it. On the other hand, the agreement expressly states that the council cannot require an alternative affordable housing mix that would 'adversely affect' the viability of either a phase of the development or the whole development.

Once the developer and the council agree an affordable housing proposal for a Chesterwell phase, the Chesterwell agreement also contains further obligations that manifest as a series of staging posts. Stage one of the affordable housing delivery mechanism in the Chesterwell agreement states that the developer will not permit the occupation of more than 40 per cent of the market dwellings in a phase until it has exchanged a contract with a registered affordable housing provider for the transfer to the provider of half the affordable housing in that phase. Stage two states that the developer will not permit the occupation of more than 80 per cent of those dwellings until it has arranged the transfer of the remainder of that phase's affordable housing. Finally, the agreement states that the developer will not begin a new phase of the development until all the affordable housing in an earlier phase is ready for occupation. However, if the developer fails to reach an agreement with a registered affordable housing provider for the transfer of the affordable housing for a phase on terms that the developer deems acceptable, the developer can

instead sell all the affordable housing required for that phase at full price on the open market. In those circumstances, the agreement states that the developer should pay a 'fallback' monetary contribution to the council in an amount equivalent to 20 per cent of the market value of those dwellings before it permits the occupation of more than 85 per cent of the market dwellings in that phase.

If, as Macneil suggests, contractual behaviour inhabits a point on a spectrum between highly relational behaviour and highly discrete behaviour,[89] the affordable housing delivery mechanism described above looks like an attempt to maximise the 'discreteness' of the contractual arrangements for the Chesterwell development. Morrison and Burgess have noted that attempting to secure affordable housing delivery through section 106 agreements causes tension between LPAs and property developers,[90] so it is perhaps unsurprising that Colchester Council and Mersea Homes tried to plan mechanisms that had a strong 'quality of bindingness'[91] and that left very little room for 'tacit assumptions' about how each party would behave.[92] However, this reveals a contracting regime in which the parties seem to have been unwilling to place trust in the choices that their partners might make. While Vincent-Jones explains that individuals and organisations usually create contractual arrangements to achieve mutually beneficial outcomes,[93] he also argues that those arrangements that do not support contractual behavioural norms relating to trust and cooperation can tend to minimise the potential for any joint welfare maximisation.[94] Moreover, this author has shown elsewhere that the 'quality of bindingness' running through the contractual arrangements made for town planning processes is often skewed against LPAs.[95] This unbalanced power dynamic also emerges here in the way that the Chesterwell agreement purports to control precisely what Colchester Council can do when it receives an affordable housing proposal for a Chesterwell phase. The express prohibition in the Chesterwell agreement of any action that might undermine development viability is particularly striking, and reflects a broader mismatch in the way that the contractual arrangements used in town planning processes tend to reduce the range of actions open to LPAs while giving private developers the tools to predict and control precisely what an LPA will do. On the other hand, where there is flexibility in the contractual arrangements for the Chesterwell development, that flexibility favours the developer. According to the terms of the Chesterwell agreement, phase two should have provided 22 affordable homes, of which 14 would be affordable rented and eight would be for purchase or rent at prices or rates that are higher than affordable rented housing but lower than market prices or rates. Instead, Colchester Council agreed that

Mersea Homes, by applying its share of the Brook Street allowance to the second Chesterwell phase, was entitled to provide only eight affordable homes, of which none would be affordable rented.[96] Consequently, there is a striking contrast between the substance of the Chesterwell agreement and the actual effect of the contractual arrangements between Mersea Homes and Colchester Council. The existence of this substantial freedom to choose was thus largely hidden from public view.

Hills elected to apply its share of the Brook Street allowance to the Rowhedge development,[97] although the Rowhedge agreement does expressly acknowledge that Hills had this choice available to it. The Rowhedge agreement states that, if Hills did choose to use its allowance, it would need to provide two affordable homes instead of the 17 affordable homes that would otherwise be required. Alongside this, the agreement then contains affordable housing clauses that would apply regardless of the amount of affordable housing that the developer elected to deliver. These clauses create a series of staging posts akin to those described above in the Chesterwell agreement and appear to have been carefully planned to restrict the future choices available to the parties. By comparison, the cross-references in the Rowhedge agreement to the Brook Street allowance are jarringly imprecise. For example, the agreement states that the Brook Street allowance

> effectively provides [the two developers] with the opportunity to transfer all or part of their affordable housing requirement from [their] other development sites (one of which is [the Rowhedge development]) to their development at Brook Street, Colchester.

The language used in section 106 agreements tends to be 'tightly drafted' and, where possible, based on wording that has been tested in earlier agreements and incorporated into standard clauses which are then available for subsequent agreements.[98] However, the use of the word 'effectively' in the Rowhedge agreement in relation to the Brook Street allowance suggests that Colchester Council and Hills were either unable or unwilling to speak directly about what they had created. They may have been unable to speak directly about the implications of the allowance because they had created a novel network of contractual arrangements and were grappling to find the appropriate words to describe it. Alternatively, this may have been a product of reflexive hesitancy flowing from an awareness that the arrangements reshaped affordable housing delivery in ways not envisaged in either central government guidance or Colchester Council's planning policies.

This discussion of affordable housing delivery at the Chesterwell and Rowhedge developments shows that aspects of the contractual arrangements did allow the developers more flexibility than might have been expected given the rigid structure of the formal contract documents. Macneil has observed that reciprocal flexibility is essential for durable contractual relations,[99] and Tom Dobson has explained that effective town planning often requires LPAs to be willing to use planning obligations and section 106 agreements in creative ways.[100] The network of contractual arrangements studied here suggests that Colchester Council does take a flexible approach to what it can do with its formal contracts. However, this creative contractual behaviour produced an over-supply of affordable housing on a polluted street in the centre of Colchester and an under-supply at more upmarket developments elsewhere in the area. The contracting regime within which these arrangements were created is also one which, using Marc Galanter's well-known terminology, favours those developers who are 'repeat players' and who can use the longevity of their relationship with an LPA to influence the implementation of affordable housing policies.[101] These findings thus show how developers can use contractual arrangements to establish control over when, where and how they provide affordable housing. They also demonstrate how dependency, mistrust and the pursuit of this control can shape the contracts used in town planning processes and enable developers to manipulate contemporary town planning decision-making.

Conclusion

In simple quantitative terms, the loss of affordable housing at the Rowhedge and Chesterwell developments may not seem too serious. After all, the developers involved in those developments had to deliver extra affordable housing elsewhere before Colchester Council would permit a deviation from its policies on affordable housing delivery. However, the point of this chapter is to highlight the small things that different types of contractual arrangements do to shape the places where ordinary people live. It is well known that private property developers attempt to use viability modelling practices to ensure that they do not have to provide affordable housing as part of their development projects.[102] The developments discussed in this case study now show that well-connected developers can also deploy a complex network of partially hidden contractual arrangements to create a type of one-sided flexibility that enables them to compel LPAs to bend their rules relating to affordable housing. This

unbalanced power dynamic is a familiar consequence of the contractual arrangements used in contemporary planning practices.[103] The outcomes are also an inevitable product of the turn to quasi-market solutions to deliver public policy goals and are part of a trend that Raco,[104] Linda Fox-Rogers and Enda Murphy[105] and this author[106] have already analysed in relation to planning and that Vincent-Jones has examined in relation to public contracting more generally.[107] Macneil, albeit in a different context, also notes that specialisation often begets a relationship of dependency that can shape contractual behaviour.[108] It is thus unsurprising that, when LPAs rely on private developers to provide affordable housing, those developers will seek to create contractual arrangements that enable them to choose when, where and how they fulfil their public policy obligations. Nevertheless, this case study provides new perspectives on opportunism and the pursuit of control in town planning processes and shows how developers can create flexibility even amidst highly formal contractual behaviour. It also highlights the need for a robust study of both the contractual arrangements that other LPAs make to secure affordable housing delivery and the granular details of section 106 agreements produced for other types of property development.

Notes

1. Town and Country Planning Act (TCPA) 1990, section 57(1).
2. TCPA 1990, section 70(1).
3. Cunliffe 2001, 33 (see also Mole 1996, 183). For example, planning obligations might require the delivery of complex infrastructure and the details of that delivery would be beyond the scope of a condition attached to a planning permission.
4. A developer might make a unilateral undertaking if an LPA refuses to agree a negotiated planning obligation (e.g. *R (on the application of Millgate Developments Ltd) v Wokingham Borough Council* [2011] EWCA Civ 1062; [2012] 3 EGLR 87).
5. White 2013, 1232.
6. Crook 2016, 68.
7. Community Infrastructure Levy Regulations 2010 SI 2010/948.
8. Crook 2016, 95–6.
9. The government's National Planning Policy Framework (NPPF) states that LPAs should use their local development plans to specify the developer contributions they will seek: Ministry of Housing, Communities and Local Government (MHCLG) 2021a, [34].
10. White 2013, 1244.
11. Dobson 2012 and Amodu 2020 provide a detailed discussion of this levy.
12. Lord et al 2020, 9.
13. Planning Act 2008, section 216 and Community Infrastructure Levy Regulations 2010, regulation 59 list the matters to which LPAs can apply levy funds. They do not include affordable housing. See also MHCLG 2020a, [144].
14. The government estimates that 52 per cent of new affordable housing in 2019–20 in England was delivered through section 106 agreements: MHCLG 2020b, 5.
15. MHCLG 2020c, 60–7.
16. Vincent-Jones 2006, 158.
17. Healey, Purdue and Ennis 1996; Mole 1996; Cunliffe 2001; Amodu 2008.
18. Claydon and Smith 1997; Ennis 1997.

19. Fox-Rogers and Murphy 2015.
20. Christophers 2014; Layard 2019; Mitchell 2020; Ferm and Raco 2020.
21. Christophers 2014; Mitchell 2020.
22. Raco 2012. See also Campbell and Henneberry 2005.
23. Raco 2012, 454, resonating in a very different context with Carolyn Abbot's discussion of legal expertise in planning inquiries.
24. Raco 2012, 453. See also Fox-Rogers and Murphy 2015, Mitchell 2021 and, in relation to other public contracting regimes, Vincent-Jones 2006.
25. Macneil 2000, 879.
26. Macneil 2000, 894–5.
27. Macneil 1980, 60.
28. Macneil 1980, 60.
29. Macneil 1980, 11 (emphasis in original). Macneil explains that behaviours such as contractual solidarity and reciprocity are more 'relational contract norms': Macneil 1983–4, 361–6.
30. Mitchell 2013, 178.
31. Vincent-Jones 2006; Vincent-Jones 2007.
32. Vincent-Jones 2006, 21–5.
33. Vincent-Jones 2007, 267.
34. Vincent-Jones 2007, 269.
35. Vincent-Jones 2006, 352; Vincent-Jones 2007, 269.
36. Van der Veen and Korthals Altes 2011; Van der Veen and Korthals Altes 2012.
37. Mitchell 2021.
38. Mitchell 2021, 10.
39. Bramley 2019. For a broader discussion of housing in this volume see Maria Lee's chapter.
40. Rents for social rented housing are set nationally: MHCLG 2021b, [3.4]–[3.7]. LPAs and registered social housing providers generally own and manage social rented housing.
41. LPAs or registered providers usually own affordable rented housing. It can be let at a rent up to 80 per cent of local market rent: MHCLG 2021b, [3.10]–[3.14].
42. MHCLG 2021a, Annex 2.
43. See e.g. Department for Communities and Local Government (DCLG) 2012, Annex 2.
44. See e.g. Colchester Borough Council (Colchester Council) 2011, [3.1]–[3.5].
45. Tony Crook explains how this approach emerged and its current manifestations: Crook 2016, 74–83. See also Morrison and Burgess 2014, 426–9.
46. Morrison and Burgess 2014.
47. MHCLG 2021a, [61]–[62]. The original NPPF contained similar guidance: DCLG 2012, [47] and [50].
48. MHCLG 2021a, [64] states that LPAs should only seek affordable housing from 'major' developments. A residential development is a major development if it provides 10 or more homes: MHCLG 2021a, Annex 2.
49. Crook 2016, 78.
50. MHCLG 2021a, [65].
51. MHCLG 2021a, [63].
52. MHCLG 2021a, [31].
53. MHCLG 2021a, [34].
54. See e.g. DCLG 2012, [173].
55. DCLG 2012, [173].
56. Mitchell 2020, 41; see also Layard 2019 and Christophers 2014. The current NPPF now simply notes that viability assessments are necessary in some circumstances, and it provides generic guidance on how LPAs should conduct these: MHCLG 2021a, [58].
57. Crosby, McAllister and Wyatt 2013; Ferm and Raco 2020.
58. DCLG 2012, [50]; MHCLG 2021a, [63].
59. Layard 2019, 217. The courts considered viability disputes in *Kensington and Chelsea RLBC v Secretary of State for Communities and Local Government* [2010] EWCA Civ 1466 (also known as *Vannes KFT v Kensington and Chelsea RLBC*) and *Parkhurst Road Ltd v Secretary of State for Communities and Local Government* [2018] EWHC 991 (Admin); [2019] JPL 855.
60. See e.g. Colchester Council 2011, sections 4 and 5.
61. Colchester is the largest town in the Borough of Colchester, a local government area that includes neighbouring towns and villages in part of Essex, eastern England. Colchester Borough Council (Colchester Council) and Essex County Council share local government

administrative responsibilities in the area. For example, Colchester Council formulates and implements area-wide planning policies whereas the county council administers various highways and transport matters and state education provision: see https://www.colchester.gov.uk/info/cbc-article/?catid=our-services&id=KA-02065 (accessed 12 June 2022).

62. Colchester Council 2020, 2–3.
63. Colchester Council illustrates local Air Quality Management Areas on a plan available at https://cbccrmdata.blob.core.windows.net/noteattachment/Air%20Quality%20Management%20Area%20Map%20-%202018.pdf (accessed 12 June 2022). The underlying law on air quality standards and local authority reviews is in the Environment Act 1995, sections 80–91.
64. Mersea Homes Limited is a regional property developer: https://www.merseahomes.co.uk/the-experience (accessed 12 June 2022).
65. Colchester Council published the planning documents referred to in this chapter on its online planning database https://www.colchester.gov.uk/planning-search-results/ (accessed 12 June 2022). The author has copies available for inspection on request. Documents relating to the Brook Street development are also available on the council's planning database under reference numbers F/COL/04/1747 and 101983.
66. Colchester Council 2016, [14.1].
67. Hills Residential Construction Limited is a regional property developer that is part of a wider group of companies: https://www.hillsgroup.co.uk/construction/projects/ (accessed 12 June 2022). This chapter uses the shorthand 'Hills' to refer to all companies in the group.
68. Colchester Council 2017, [4.2].
69. Colchester Council 2014, policy H4.
70. The statutory basis of the second Brook Street 2013 agreement is recorded in schedule 4B of the Rowhedge agreement, as discussed later in this chapter. Its existence is also recorded in Colchester Council 2016, [14.1] and Colchester Council 2017, [4.1].
71. *Hussain v Sandwell Metropolitan Borough Council* [2017] EWHC 1641 (Admin); [2018] PTSR 142, [125].
72. Section 106 agreements are automatically enforceable against the person making the obligation and any person deriving ownership of the affected land from that person (TCPA 1990, section 106(3)).
73. Section 106 agreements are local land charges (TCPA 1990, section 106(11)). Local land charges are recorded on a searchable register (Local Land Charges Act 1975, section 3). Article 40(3)–(4) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 No 595 (DMPO 2015) also requires LPAs to place a copy of section 106 agreements on their planning registers. DMPO 2015 article 40(3)–(4) replaces the Town and Country Planning (Development Management Procedure) (England) Order 2010 No 2184, article 36(3)–(4), which contained similar provisions. This legislation does not apply to agreements made under section 1(1) of the Localism Act 2011.
74. Documents discussed here from Colchester Council's planning database for Chesterwell are available under reference numbers 121272 (outline planning permission) and 161593 (phase two reserved matters approval).
75. David Lock Associates 2012, [1.02].
76. Publicity material downloaded from https://www.merseahomes.co.uk/ on 29 November 2021 and held on file by the author. Countryside Properties (UK) Limited is a subsidiary of Countryside Properties plc, which is another regional property developer: https://www.countrysidepartnerships.com/about-us (accessed 12 June 2022).
77. MHCLG 2021c, [005].
78. MHCLG 2021c, [006]. See also TCPA 1990, section 92(1)–(2) and DMPO 2015, articles 2(1) and 5(1).
79. MHCLG 2021c, [004]. See also TCPA 1990, section 62 and DMPO 2015, article 7(1). The developers constructing the other developments discussed here sought and obtained full planning permission.
80. The Chesterwell agreement records that Mersea Homes and Countryside Properties owned most of the Chesterwell site at the time of the agreement. The other individuals who owned the remainder were also signatories. Essex County Council was a signatory so that it could secure transport and education obligations detailed in the agreement.
81. Rowhedge is a village situated approximately three miles south-east of Colchester. Documents on the council's planning database for the Rowhedge development are available under reference number 160551.

82. Publicity material downloaded from https://www.hills-residential.co.uk/ on 15 November 2021 and held on file by the author.
83. The company that signed the Rowhedge agreement is called Grange Marsh Properties Limited (Grange Marsh). The agreement does not state that Grange Marsh is part of the Hills group but company records downloaded on 14 December 2021 from Companies House and held on file by the author show that Grange Marsh and other Hills companies have the same registered office address, company secretary, directors and shareholders. The reasons why Grange Marsh but not another Hills company signed the Rowhedge agreement are beyond this chapter's scope. As stated above, this chapter uses the shorthand 'Hills' to refer to all companies in the group.
84. The county council entered into the agreement because it required the developer both to provide new access roads that the county council would then adopt and maintain and to make financial contributions to address local education needs. The individuals who owned the development site also signed the agreement. The agreement records that Hills had agreed a separate contract with those landowners for the purchase of the development site.
85. Colchester Council's Core Strategy states that developments of this size should provide 20 per cent affordable housing (Colchester Council 2014, policy H4). Providing 17 affordable housing dwellings, of which the agreement states that 14 would be affordable rented and three would be for purchase or rent at prices or rates that are higher than social rented housing but lower than market prices or rates, would satisfy this policy goal.
86. See also Colchester Council 2016, [14.1] and Colchester Council 2017, [4.3]–[4.4]. The allowance amounted to 2,046 square metres of affordable housing. Since Hills owned 55 per cent of the Brook Street site, it was entitled to an allowance of 1,125 square metres. Mersea Homes received the remainder.
87. Morrison and Burgess 2014, 430.
88. Colchester Council 2017, [4.7]–[4.8].
89. Macneil 2000, 894.
90. Morrison and Burgess 2014, 432.
91. Vincent-Jones 2006, 158.
92. Macneil 1980, 25.
93. Vincent-Jones 2007, 269.
94. Vincent-Jones 2007, 269.
95. Mitchell 2021.
96. Colchester Council 2017, [4.9].
97. Colchester Council 2017, [4.3].
98. White 2013, 1244.
99. Macneil 1983–4, 363.
100. Dobson 2012. See also Healey, Purdue and Ennis 1996, 158.
101. Galanter 1974.
102. Layard 2019; Mitchell 2020.
103. Mitchell 2021 provides another example.
104. Raco 2012.
105. Fox-Rogers and Murphy 2015.
106. Mitchell 2021.
107. Vincent-Jones 2006.
108. Macneil 1980, 32.

References

Amodu, Tola (2008). '"For the Record"? Understanding Regulatory Processes through Archival Materials: The Example of Planning Agreements', *Journal of Law and Society* 35: 183–200.

Amodu, Tola (2020). 'Revisiting the Rules. The Pervasiveness of Discretion in the Context of Planning Gains: The Case of the Community Infrastructure Levy', *Public Law*: 643–60.

Bramley, Glen (2019). *Housing Supply Requirements across Great Britain for Low-Income Households and Homeless People: Research for Crisis and the National Housing Federation; Main Technical Report*. Edinburgh: Heriot-Watt University. Available at https://core.ac.uk/download/pdf/287503808.pdf (accessed 12 June 2022).

Campbell, Heather and John Henneberry (2005). 'Planning Obligations, the Market Orientation of Planning and Planning Professionalism', *Journal of Property Research* 22: 37–59.

Christophers, Brett (2014). 'Wild Dragons in the City: Urban Political Economy, Affordable Housing Development and the Performative World-Making of Economic Models', *International Journal of Urban and Regional Research* 38: 79–97.

Claydon, Jim and Bryan Smith (1997). 'Negotiating Planning Gains through the British Development Control System', *Urban Studies* 34: 2003–22.

Colchester Borough Council (2011). *Supplementary Planning Document. Affordable Housing*. Available at https://cbccrmdata.blob.core.windows.net/noteattachment/Adopted_AH_SPD_Aug11.pdf (accessed 12 June 2022).

Colchester Borough Council (2014). *Core Strategy*. Adopted December 2008. Selected policies revised July 2014. Available at https://cbccrmdata.blob.core.windows.net/noteattachment/Core%20Strategy.pdf (accessed 12 June 2022).

Colchester Borough Council (2016). *Report to Planning Committee in Respect of Application no.: 160551 Related to Development at Rowhedge Wharf, High Street, Rowhedge, Colchester*. Available in Colchester Borough Council's planning database for planning application 160551 (accessed 20 December 2021).

Colchester Borough Council (2017). *Affordable Housing at the Chesterwell Development (formerly known as North Growth Area Urban Extension) and the use of the Brook Street Affordable Housing Allowance.* Available at https://colchester.cmis.uk.com/colchester/Document.ashx?czJKcaeAi5tUFL1DTL2UE4zNRBcoShgo=KcTnJhsdk9t50U%2BkbpmYbKRf9yKEeOScGRgrmq6Pf3KAk3H6O6DOnw%3D%3D&rUzwRPf%2BZ3zd4E7Ikn8Lyw%3D%3D=pwRE6AGJFLDNlh225F5QMaQWCtPHwdhUfCZ%2FLUQzgA2uL5jNRG4jdQ%3D%3D&mCTIbCubSFfXsDGW9IXnlg%3D%3D=hFflUdN3100%3D&kCx1AnS9%2FpWZQ40DXFvdEw%3D%3D=hFflUdN3100%3D&uJovDxwdjMPoYv%2BAJvYtyA%3D%3D=ctNJFf55vVA%3D&FgPlIEJYlotS%2BYGoBi5olA%3D%3D=NHdURQburHA%3D&d9Qjj0ag1Pd993jsyOJqFvmyB7X0CSQK=ctNJFf55vVA%3D&WGewmoAfeNR9xqBux0r1Q8Za60lavYmz=ctNJFf55vVA%3D&WGewmoAfeNQ16B2MHuCpMRKZMwaG1PaO=ctNJFf55vVA%3D (accessed 12 June 2022).

Colchester Borough Council (2020). *Findings for the Clean Air for Colchester Community Engagement*. Available at https://cbccrmdata.blob.core.windows.net/noteattachment/CBC-Environment-Clean-Air-Survey-Findings-2020-Findings%20report%20from%20Clean%20Air%20for%20Colchester%20Community%20Engagement.pdf (accessed 12 June 2022).

Crook, Tony (2016). 'Planning Obligations Policy in England: *De Facto* Taxation of Development Value'. In *Planning Gain: Providing Infrastructure and Affordable Housing*, edited by Tony Crook, John Henneberry and Christine Whitehead, 63–114. Chichester: John Wiley.

Crosby, Neil, Pat McAllister and Peter Wyatt (2013). 'Fit for Planning? An Evaluation of the Application of Development Viability Appraisal Models in the UK Planning System', *Environment and Planning B: Planning and Design* 40: 3–22.

Cunliffe, Michael (2001). 'Planning Obligations – Where are We Now?', *Journal of Planning and Environment Law* Supp (Occasional Papers No. 29): 31–63.

David Lock Associates (2012). *Colchester North Outline Planning Application. Planning Statement*. Available in Colchester Borough Council's planning database for planning application 121272 (accessed 20 December 2021).

Department for Communities and Local Government (2012). *National Planning Policy Framework*.

Dobson, Tom (2012). 'Community Infrastructure Levy: Will it Deliver?', *Journal of Planning and Environment Law* 13 Supp: OP117-OP138.

Ennis, Frank (1997). 'Infrastructure Provision, the Negotiating Process and the Planner's Role', *Urban Studies* 34: 1935–54.

Ferm, Jessica and Mike Raco (2020). 'Viability Planning, Value Capture and the Geographies of Market-Led Planning Reform in England', *Planning Theory & Practice* 21: 218–35.

Fox-Rogers, Linda and Enda Murphy (2015). 'From Brown Envelopes to Community Benefits: The Co-option of Planning Gain Agreements under Deepening Neoliberalism', *Geoforum* 67: 41–50.

Galanter, Marc (1974). 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', *Law & Society Review* 9: 95–160.

Healey, Patsy, Michael Purdue and Frank Ennis (1996). 'Negotiating Development: Planning Gain and Mitigating Impacts', *Journal of Property Research* 13: 143–60.

Layard, Antonia (2019). 'Planning by Numbers: Affordable Housing and Viability in England'. In *Planning and Knowledge: How New Forms of Technocracy are Shaping Contemporary Cities*, edited by Mike Raco and Federico Savini, 213–24. Bristol: Policy Press.

Lord, Alexander et al (2020). *The Incidence, Value and Delivery of Planning Obligations and Community Infrastructure Levy in England in 2018–19*. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/907203/The_Value_and_Incidence_of_Developer_Contributions_in_England_201819.pdf (accessed 12 June 2022).

Macneil, Ian R. (1980). *The New Social Contract: An Inquiry into Modern Contractual Relations*. New Haven, CT: Yale University Press.

Macneil, Ian R. (1983–4). 'Values in Contract: Internal and External', *Northwestern University Law Review* 78: 340–418.

Macneil, Ian R. (2000). 'Relational Contract Theory: Challenges and Queries', *Northwestern University Law Review* 94: 877–908.

Ministry of Housing, Communities and Local Government (2020a). *Guidance. Community Infrastructure Levy*. Available at https://www.gov.uk/guidance/community-infrastructure-levy (accessed 12 June 2022).

Ministry of Housing, Communities and Local Government (2020b). *Affordable Housing Supply: April 2019 to March 2020, England*. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/940517/AHS_2019-20.pdf (accessed 12 June 2022).

Ministry of Housing, Communities and Local Government (2020c). *White Paper: Planning for the Future.*

Ministry of Housing, Communities and Local Government (2021a). *National Planning Policy Framework*.

Ministry of Housing, Communities and Local Government (2021b). *Guidance. Rent Standard – April 2020 (Updated 15 November 2021)*. Available at https://www.gov.uk/government/publications/rent-standard/rent-standard-april-2020 (accessed 12 June 2022).

Ministry of Housing, Communities and Local Government (2021c). *Guidance. Making an Application*. Available at https://www.gov.uk/guidance/making-an-application (accessed 12 June 2022).

Mitchell, Catherine (2013). *Contract Law and Contract Practice: Bridging the Gap between Legal Reasoning and Commercial Expectation*. Oxford: Hart Publishing.

Mitchell, Edward (2020). 'Planning, Property and Profit: The Use of Financial Viability Modelling in Urban Property Development', *Northern Ireland Legal Quarterly* 71: 35–55.

Mitchell, Edward (2021). 'Compulsory Purchase and the State Redistribution of Land: A Study of Local Authority-Private Developer Contractual Behaviour', *Journal of Property, Planning and Environmental Law* 13: 1–16.

Mole, David (1996). 'Planning Gain After the Tesco Case', *Journal of Planning and Environment Law* Mar: 183–93.

Morrison, Nicky and Gemma Burgess (2014). 'Inclusionary Housing Policy in England: The Impact of the Downturn on the Delivery of Affordable Housing Through Section 106', *Journal of Housing and the Built Environment* 29: 423–38.

Raco, Mike (2012). 'The Privatisation of Urban Development and the London Olympics 2012', *City* 16: 452–60.

Van der Veen, Menno and Willem K. Korthals Altes (2011). 'Urban Development Agreements: Do They Meet Guiding Principles for a Better Deal?', *Cities* 28: 310–19.

Van der Veen, Menno and Willem K. Korthals Altes (2012). 'Contracts and Learning in Complex Urban Projects', *International Journal of Urban and Regional Research* 36: 1053–75.

Vincent-Jones, Peter (2006). *The New Public Contracting: Regulation, Responsiveness, Relationality*. Oxford: Oxford University Press.

Vincent-Jones, Peter (2007). 'The New Public Contracting: Public Versus Private Ordering?', *Indiana Journal of Global Legal Studies* 14: 259–78.

White, Matthew (2013). 'Renegotiating Planning Obligations: An Overview of the Law', *Journal of Planning and Environment Law* 10: 1232–54.

Planning is at the heart of the response to many of the significant challenges of our time, from the climate and environmental crises to social and economic inequalities. It is embedded in, as well as partially constituting, our democratic systems, so that the challenges of democratic decision-making in a complex society cannot be avoided when thinking about planning. Planning law raises some of the most fundamental questions faced by legal scholars, from the legitimacy of authority to the relationship between public and private rights and interests. And yet, planning law has been relatively neglected by legal scholars.

The objective of *Taking English Planning Law Scholarship Seriously* is to create space for planning law scholarship in all of its variety, and for curiosity about law in all of its complexity. The chapters reflect this diversity and complexity, covering a range of the objects of planning (from housing to energy to highways) and a multiplicity of planning tasks and tools (from compulsory purchase to contracting to planning inquiries).

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