Current Legal Problems, Vol. XX (2024), pp. 1–36
https://doi.org/10.1093/clp/cuae005
Advance Access published 2 May 2024

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Contracting in the Public Interest? Re-examining the Role of Planning Obligations in Contemporary Town Planning Processes

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Abstract This article investigates how local authorities in England seek to compel property developers to mitigate the impact of property development on local communities and on local infrastructure needs through the use of planning obligations made by agreement with developers pursuant to section 106 of the Town and Country Planning Act 1990. I pose three important new questions about these 'section 106 agreements'. How do these agreements contribute to a development culture in which private developers do not always perform their public policy obligations? How does the presence of ostensibly binding promises in these agreements facilitate the exercise of regulatory decision-making in planning and property development processes? How do local authorities manage the implementation of novel developer obligations designed to shape broader community relations? I answer these questions by examining two case study development projects. In doing so, I highlight the limited role that these agreements have as an instrument for ordering the 'private' relations between a local authority and a developer. I then look outside the private ordering function of these agreements to scrutinise the public-facing work they do. Here, I highlight how a section 106 agreement carries a powerful expressive force, despite its weakness as a private ordering device, that developers and local authorities can use to justify contentious development proposals involving coercive compulsory purchase powers and potentially adverse equalities implications. The article thus adds to what is already known about the use and implementation of planning obligations, and sketches a research agenda that would inform debate about the future of this area of planning practice.

Keywords: compulsory purchase; planning obligations; private ordering; public contracting; public sector equality duty; section 106 agreements.

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Thank you to the two anonymous reviewers for their constructive criticisms and helpful guidance. I am also very grateful for feedback from Dimitrios Kyritsis, Maria Lee, Maurice Sunkin and Chris Willett. All views and errors are my own.

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1. *Introduction*

Town planning in England has a longstanding problem. How can local authorities most effectively compel property developers to mitigate the impact of property development on local communities and on local infrastructure needs? Local authorities currently attempt to do this through 'planning obligations' made by agreement with developers pursuant to section 106(1) of the Town and Country Planning Act (TCPA) 1990. But current practices relating to these 'section 106 agreements' have met with substantial criticism. These agreements can provide disproportionate flexibility for private actors to act for self-interested commercial reasons when planning obligations relate to the delivery of affordable housing.[1] They also often contain complex, intricate and intensely negotiated obligations, leading to concerns about a lack of transparency,[2] and a perception that drawn-out negotiations unnecessarily delay the grant of planning permission.[3] Other recent concerns focus upon the role of 'viability' modelling in the determination of planning obligations,[4] the 'numerical hegemony' that pervades local authority decision-making,[5] and the challenges that local authorities face when attempting to monitor and enforce these obligations.[6]

The focus of this article is different. It considers important new questions about the complex framework of rights, duties, monitoring arrangements and sanctioning powers that section 106 agreements create. I investigate how these agreements function as an instrument for ordering the ostensibly 'private' bilateral relations between a property developer and a local authority. In doing so, I ask how these agreements

[1] E Mitchell, 'Contracting Affordable Housing Delivery? Residential Property Development, Section 106 Agreements and Other Contractual Arrangements' in M Lee and C Abbot (eds), *Taking English Planning Law Scholarship Seriously* (UCL Press 2022).

[2] P Wyatt, 'Experiences of Running Negotiable and Non-Negotiable Developer Contributions Side-by-Side' (2017) 32 Plan Pract Res 152, 158.

[3] Central government often evokes concerns around perceived slow decision-making when considering reform to planning processes (M Lee and others, 'Techniques of Knowing in Administration: Co-production, Models, and Conservation Law' (2018) 45 JLS 427; E Fisher, 'Law and Energy Transitions: Wind Turbines and Planning Law in the UK' (2018) 38 OJLS 528).

[4] J Ferm and M Raco, 'Viability Planning, Value Capture and the Geographies of Market-Led Planning Reform in England' (2020) 21 Plan Theory Pract 218.

[5] A Layard, 'Planning by Numbers: Affordable Housing and Viability in England' in M Raco and F Savini (eds), *Planning and Knowledge: How New Forms of Technocracy Are Shaping Contemporary Cities* (Policy Press 2019), 213.

[6] G Burgess and S Monk, 'Delivering Planning Obligations - Are Agreements Successfully Delivered?' in T Crook and others (eds), *Planning Gain: Providing Infrastructure and Affordable Housing* (John Wiley 2016), 202.

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contribute to a development culture in which private developers do not always perform their public policy obligations. I refer to this question throughout this article as the 'development culture question'. Alongside this, I ask about the 'public' work these agreements do. How does the presence of ostensibly binding promises in section 106 agreements facilitate the exercise of regulatory decision-making in planning and property development processes? How do local authorities manage the implementation of novel developer obligations designed to shape broader community relations? I refer to these questions, respectively, as the 'regulatory decision-making question' and the 'implementation and community relations question'.

In answering these questions, I examine section 106 agreements negotiated for two case study development projects. A case study approach enables thick and detailed understanding of these complex phenomena. This methodological approach is particularly suited to planning law research because it offers a way to get inside highly technical processes and procedures.[7] Narrowly focused case studies might not always produce easily 'generalisable' findings, although case study accounts of a phenomenon can often be valuable if the approach produces rich, varied and informative data about an important activity.[8] Examining the individual components of section 106 agreements and interactions relating to them means I can share new insights into the creation and use of these agreements. The detailed knowledge that this provides illuminates the underlying mechanisms driving planning decision-making and exposes tensions inherent to contemporary planning processes.

The article begins, in section two, by outlining the planning law and policy context for the use of these agreements and by introducing the two case study developments. In the third section, I then start to consider the 'development culture question'. I show how the section 106 agreement produced for my first case study development contains a complex framework of rights, duties, monitoring arrangements and sanctioning powers. This is an excellent case study for illustrating how a section 106 agreement appears to create a mechanism through which

[7] M Lee, 'The Importance of Taking English Planning Law Scholarship Seriously' in M Lee and C Abbot (eds), *Taking English Planning Law Scholarship Seriously* (UCL Press 2022), 7; S Vaughan and B Jessup, 'Backstreet's Back Alright: London's LGBT+ Nightlife Spaces and a Queering of Planning Law and Planning Practices' in M Lee and C Abbot (eds), *Taking English Planning Law Scholarship Seriously* (UCL Press 2022), 37.

[8] B Flyvbjerg, 'Five Misunderstandings About Case-Study Research' (2006) 12 Qual Inq 219; TA Schwandt and EF Gates, 'Case Study Methodology' in NK Denzin and YS Lincoln (eds), *The SAGE Handbook of Qualitative Research* (5th edn, SAGE 2018).

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public bodies can hold private developers to the performance of specific public policy objectives. But the key insight that my empirical data provides is that the agreement involves vague and one-sided obligations, haphazard monitoring arrangements and weak enforcement powers that assign decision-making capacity to the private sector. I question the 'bindingness' of the obligations in the agreement and argue that an important feature of this type of agreement is to reassure developers and their investors that public bodies will not disrupt private investment opportunities.

The fourth section then shifts the focus to my second case study and the public-facing work that section 106 agreements can do. I consider the 'regulatory decision-making question' and illustrate how a challenge arises when developer obligations provide a justification for the use of coercive compulsory purchase powers and address local affordable housing policies. My discussion here presents new findings showing how these agreements can have a powerful expressive force in signalling a commitment to public policy interests that 'de-risks' these contentious land acquisition and affordable housing issues for developers and local authorities.[9] But the crucial point in this section is that these agreements do this despite the emptiness of the commitments that they sometimes contain. These findings demonstrate how planning scholarship needs to look beyond the impression of binding force that a section 106 agreement creates to scrutinise the way that these agreements reinforce uneven outcomes and marginalise certain interests.

In the fifth section, I address the 'implementation and community relations question'. My second case study involves a section 106 agreement containing developer obligations designed to discharge a local authority's public sector equalities duty. This is an innovative and under-explored way of using a section 106 agreement, so this part of the article provides a rare insight into the more unusual obligations in these agreements and into the practical challenges local authorities can face when monitoring the implementation of novel planning devices. This case study also enables me to explain how equalities considerations created a site for resistance to the development proposals. I argue that this outcome highlights the need for greater transparency and more effective community participation in the negotiation and implementation of planning obligations.

The lessons learnt from these case studies are relevant to planning, public law and contract law scholars interested in understanding the

[9] C Legacy and others, 'Infrastructural Gaslighting and the Crisis of Participatory Planning' (2023) OnlineFirst Env & Plan A, 5.

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diverse roles section 106 agreements perform in planning processes. The article concludes by drawing these insights together and sketching an agenda for further research.

2. *Section 106 Agreements in Practice*

A. *The Gosbecks Development*

A landowner or a developer intending to carry out lawful property development on land in England must have planning permission.[10] In most circumstances, the landowner or developer can seek to obtain that planning permission by applying to a local planning authority (an LPA).[11] The grant of planning permission will usually increase the land's market value,[12] which provides an opportunity for an LPA to 'capture' a portion of that uplift to fund local infrastructure and other public service provision.[13] This is also a way to 'internalise' the social and environmental costs of property development.[14] New development might, for example, necessitate additional local healthcare and education provision. In those circumstances, an LPA might, before it will grant planning permission, seek a commitment in a section 106 agreement from the developer to contribute the funds required to meet those needs. Alternatively, development might have adverse effects on the natural environment, so a developer might agree, in a section 106 agreement, to contribute to mitigation measures.[15]

[10] TCPA 1990, section 57(1).

[11] ibid section 70(1). An LPA is the district, borough or county council or other authority responsible for a particular area's town and country planning (Department for Levelling Up, Housing & Communities (DLUHC), *National Planning Policy Framework* (2023), Annex 2).

[12] T Crook and others, 'Introduction' in T Crook and others (eds), *Planning Gain: Providing Infrastructure and Affordable Housing* (John Wiley 2016), 3.

[13] ibid. See also H Campbell and others, 'Planning Obligations, Planning Practice, and Land-Use Outcomes' (2000) 27 Env & Plan B 759.

[14] Layard (n 5), 216.

[15] This article does not discuss the Community Infrastructure Levy (CIL), which is an alternative means for LPAs to obtain developer contributions through a locally set fixed-rate tariff on new development projects. The article also does not discuss the government's proposed Infrastructure Levy that, if introduced, LPAs would have to implement and that would lead to a reduced role for section 106 agreements and the abolition of CIL outside London (Levelling-up and Regeneration Act 2023, section 137 and schedule 12). If introduced, the new Infrastructure Levy will be 'phased in' over many years, so section 106 agreements will shape public and private spaces in England for many years to come (DLUHC, *Technical consultation on the Infrastructure Levy* (2023) <https://www.gov.uk/government/consultations/technical-consultation-on-the-infrastructure-levy/technical-consultation-on-the-infrastructure-levy> accessed 1 September 2023).

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When deciding whether to grant planning permission, an LPA can take into account any planning obligations set out in a section 106 agreement if those obligations are necessary to make the proposed development acceptable in planning terms, are directly related to the development, and are fairly and reasonably related in scale and kind to the development.[16] Statutory authority and central government policy also require each LPA to produce a development plan stating its 'strategic policies … for the development and use of land in its area',[17] which should contain statements outlining the developer contributions that an LPA will expect developers to provide through a section 106 agreement.[18] Consequently, these agreements tend to establish a mechanism to secure the delivery of a predictable range of developer contributions.[19] The everydayness of these obligations means that LPAs and developers often construct these agreements using clauses and schedules that are the product of prior use elsewhere.[20]

There has been some academic debate as to whether we should conceptualise a section 106 agreement as a contract, a covenant relating to land, or as a gift.[21] Insufficient space exists to engage with that debate here, other than to state that I consider that clauses and schedules in these agreements have 'contractual' elements insofar as they are agreements designed to order 'private' bilateral relations that are intended to be enforceable by law.[22] Consequently, contract thinking can help us understand what developers and LPAs are doing with section 106 agreements. But these agreements are clearly more than just agreements

[16] Community Infrastructure Levy Regulations 2010, regulation 122(2)(a)-(c). See also DLUHC (n 11), paragraph 57.

[17] Planning and Compulsory Purchase Act 2004, sections 15(1)-(2), 17 and 19(1A–1C); DLUHC (n 11), paragraph 17.

[18] DLUHC (n 11), paragraph 34.

[19] T Crook, 'Planning Obligations Policy in England: De Facto Taxation of Development Value' in T Crook and others (eds), *Planning Gain: Providing Infrastructure and Affordable Housing* (John Wiley 2016), 69–72.

[20] Central government guidance advises LPAs to use standard forms and templates when making section 106 agreements (DLUHC, *Guidance: Planning Obligations* (2019), paragraph 016). This practice is commonplace in commercial contracting (MC Suchman, 'The Contract as Social Artifact' (2003) 37 L & Soc'y Rev 91, 121–122; MJ Radin, 'Boilerplate Today: The Rise of Modularity and the Waning of Consent' (2006) 104 Mich L Rev 1223, 1225).

[21] M Loughlin, 'Planning Gain: Law, Policy, and Practice' (1981) 1 OJLS 61; M Grant, 'Planning by Agreement' (1975) JPEL 501.

[22] Loughlin (n 21), 78. Tola Amodu refers similarly to 'the quasi-contractual form' of section 106 agreements (T Amodu, '"For the Record": Understanding Regulatory Processes through Archival Materials: The Example of Planning Agreements' (2008) 35 JLS 183).

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designed to order bilateral relations between developer and LPA. They have a broader 'public' function as an instrument for an LPA to regulate the use and development of land. Both features of section 106 agreements run through my analysis in this article.

The public-facing nature of these agreements means that scholarship examining public contracting can unlock insights into contemporary practices relating to these agreements. A critical view of some public contract regimes is that they exist for procedural purposes rather than to maximise the attainment of public benefits,[23] and section 106 agreements have a similarly administrative, technical, and bureaucratic nature.[24] My first case study typifies this. It involves the construction of 144 residential dwellings on the site of Gosbecks Farm, on the edge of the Colchester urban area in the east of England (hereafter 'the Gosbecks development'). Bloor Homes (hereafter 'Bloor') is carrying out the development and construction is ongoing at the time of writing. Before it applied for planning permission, Bloor had an option agreement with the owners of the freehold title to the land that would enable Bloor to purchase the land if it obtained planning permission.[25] Bloor received planning permission from Colchester Council for the development in July 2020,[26] and, on the same day, signed a section 106 agreement with Colchester Council, Essex County Council and the landowners of the development site (hereafter 'the Gosbecks Agreement').[27] The Gosbecks Agreement contains a series of obligations in eight self-contained schedules appended to the main part of the agreement. The agreement states that these are obligations that 'the owners' of the development site should perform. The reference here to 'the owners' reflects a 'property

[23] P Vincent-Jones, The New Public Contracting: Regulation, Responsiveness, Relationality (OUP 2006), 23.

[24] M van der Veen, *Contracting for Better Places: A Relational Analysis of Development Agreements in Urban Development Projects* (IOS Press 2009), 254.

[25] See the recitals to the Gosbecks section 106 agreement. Residential developers often use an option agreement to build 'banks' of developable land (G Burgess and others, *The Nature of Planning Constraints: Report to the House of Commons Communities and Local Government Committee* (2014). <https://www.parliament.uk/globalassets/documents/commons-committees/communities-and-local-government/Report-on-nature-of-planning-constraints-v3-0.pdf> accessed 24 August 2023).

[26] See the planning decision notice for planning application 190522. I downloaded documents relating to the Gosbecks development from Colchester City Council's planning database on 28 June 2021.

[27] Colchester City Council (hereafter 'Colchester Council') and Essex County Council share the responsibility for public service provision in the Colchester area. For example, Colchester Council conducts town and country planning functions and Essex County Council administers state education provision (see <www.colchester.gov.uk/info/cbc-article/?catid=our-services&id=KA-02065> (accessed 23 August 2023).

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aspect' of section 106 agreements that complements the aforementioned 'contractual aspect'.[28] These agreements can create obligations that bind future landowners as well as the landowner at the time of the agreement if the current landowner enters into the agreement.[29] This is why the original landowners entered into the Gosbecks Agreement. But the two councils also agreed that the obligations would only be enforceable against the original landowners for as long as they held an interest in the burdened land, as permitted by section 106(4) TCPA 1990. The obligations contained in the eight schedules appended to the Gosbecks Agreement are, for practical purposes, thus the obligations designed to secure Bloor's developer contributions. They oblige Bloor to make index-linked financial contributions to:

- Essex County Council's provision of local education facilities and services (a payment of around £1,208,750.10), and
- Colchester Council for the expansion, relocation and/or improvement of local healthcare facilities (£53,623), the replacement, improvement or provision of community buildings (£266,400), the installation of archaeological information boards and recordkeeping relating to the Gosbecks historic site[30] (£5,533), improvements to car park and visitor facilities at the Gosbecks Archaeological Park (£55,962.50), and 'ecological mitigation' works at nearby Special Protection Areas (£17,611.20).

The schedules to the agreement also oblige Bloor to provide 43 affordable housing units and specified public amenity areas, children's play equipment, notice boards and open space at designated locations on the development site.

Examining the Gosbecks development highlights how a section 106 agreement can create ostensibly binding contractual rights and duties, alongside property rights and obligations, which an LPA can enforce against current and future owners of that land. Studying this particular agreement will also provide an opportunity to examine the

[28] Loughlin (n 21), 78.

[29] Section 106(3) TCPA 1990. See also A Mills and others, *Butterworths Planning Law Service* (LNUK 2023), Division C: Obtaining planning permission, Section 13: Planning obligations and infrastructure funding, paragraph 1237.

[30] The development site neighbours the Gosbecks Archaeological Park (See Colchester Council, *Gosbecks Archaeological Park* (undated) <www.colchester.gov.uk/info/cbc-article/?catid=country-parks-and-local-nature-reserves&id=KA-01605> accessed 23 August 2023.

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administrative and highly bureaucratic clauses that Bloor, Colchester Council and Essex County Council made for the delivery of the developer's obligations. But I will also show how the provisions running through the Gosbecks Agreement might be considered emblematic of a development culture in which public bodies struggle to hold private developers to the performance of their public policy obligations. This is an important step in thinking about how effectively planning law deals with the role of section 106 agreements in planning processes.

B. *The Wards Corner Development*

My second case study involves development proposals for a site in Seven Sisters, in north London. This site, known as 'Wards Corner', consisted of the former Wards Department Store, some council-owned properties, and various private retail and residential premises. Unlike the Gosbecks development, where two individuals owned the development site and had agreed to transfer ownership to the developer, a range of different individuals, businesses and other organisations separately owned the land that constituted the Wards Corner site. The ground floor of the Wards Department Store also houses the Seven Sisters market. Most traders at the market are from Latin America or are Spanish speaking,[31] and the predominantly Latin American nature of the market has led it to be known also as *El Pueblito Paisa*.[32] The multicultural nature of the market, and its importance for the local community, had a significant effect in shaping the land acquisition and planning processes for the Wards Corner development.

The LPA responsible for the area is the London Borough of Haringey (hereafter 'Haringey'),[33] which appointed Grainger plc as its development partner for the regeneration of the site. In 2007, Grainger and Haringey entered into a conditional development agreement in which Haringey agreed to use its compulsory purchase powers to assemble the disparate land interests on the development site and to transfer that

[31] AECOM, *Wards Corner Regeneration Compulsory Purchase Order (CPO): Equality Impact Assessment 2017 Update* (June 2017), paragraph 7.3.12. I downloaded documents submitted to the Wards Corner CPO inquiry from the inquiry website on 21 December 2018. That website has closed. I have the documents mentioned in this article on file.

[32] *Statement of Case on Behalf of Seven Sisters Market Traders submitted to the public inquiry considering confirmation of The London Borough of Haringey (Wards Corner Regeneration Project) Compulsory Purchase Order 2016*, paragraph 1.

[33] London Councils, *The Essential Guide to London Local Government* (undated) <https://www.londoncouncils.gov.uk/who-runs-london/essential-guide-london-local-government> accessed 31 August 2023).

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land to Grainger. In return, Grainger agreed to carry out the development, subject to various pre-conditions including its ability to forecast a commercially suitable profit.[34] This development agreement was, therefore, a type of land acquisition agreement, entered into by the property-owning department of Haringey's Regeneration, Planning and Development section, rather than a section 106 agreement created for town planning purposes entered into by its planning department. The Wards Corner development provides a valuable counterpoint to the Gosbecks development precisely because this land acquisition process ran alongside the planning process for the development. The section 106 agreement created for the Wards Corner development played an important role in both processes.

In 2008, Haringey's planning department granted Grainger planning permission but, in *R (Harris) v Haringey LBC*, the Court of Appeal quashed that decision.[35] This was because Haringey had failed, when it granted planning permission, to discharge its statutory duty under section 71(1)(b) of the Race Relations Act 1976 to pay due regard to the effect of its decision upon equality of opportunity and good relations amongst persons of different racial groups. By the time Grainger submitted a new planning application for the Wards Corner development in May 2012, section 149(1) of the Equality Act 2010 had replaced section 71(1)(b) of the Race Relations Act 1976 and imposed a new duty (known as the public sector equality duty) on public bodies to have due regard, when making decisions, to the need to eliminate discrimination, to promote equality of opportunity, and to encourage good community relations. To discharge this duty when considering Grainger's application, Haringey commissioned an independent equalities impact assessment. This assessment noted that measures in a draft section 106 agreement that Haringey and Grainger had negotiated relating to the temporary relocation of the market would be 'extremely important' in mitigating adverse equalities impacts from the proposed development. The assessment also noted the importance of other measures in the draft agreement, including support for local traders, community engagement and participation mechanisms, and improved public realm and open

[34] At time of writing, this development agreement (and accompanying deed of variation) is available at <www.haringey.gov.uk/sites/haringeygovuk/files/wards_corner_da_-_online_document.pdf>. For a discussion of this type of development agreement, see E Mitchell, 'Compulsory Purchase and the State Redistribution of Land: A Study of Local Authority-Private Developer Contractual Behaviour' (2021) 13 JPPEL 1.

[35] [2010] EWCA Civ 703.

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spaces.[36] These aspects of the Wards Corner development show how a section 106 agreement is more than an instrument for ordering bilateral contractual relations between a developer and an LPA or for regulating land use. The section 106 agreement negotiated for the Wards Corner development was also a vehicle for the performance of Haringey's public sector equality duty.

Haringey granted Grainger a new planning permission in July 2012 for the demolition of existing buildings and the construction of 196 apartments, a new market hall, and other retail units on the site.[37] Haringey and Grainger signed their section 106 agreement (hereafter 'the Wards Corner Agreement') on the same day. By July 2017, Grainger had either acquired or entered into agreements to acquire almost all the land that constituted the development site.[38] To enable Grainger to acquire those interests that remained outside its control, Haringey had made a Compulsory Purchase Order (hereafter a 'CPO') in September 2016 to force those landowners to give up their land, in exchange for the payment of compensation. A local authority can do this if it deems that 'development, redevelopment or improvement' of the land to be acquired is 'likely to contribute' social, economic or environmental benefits to the area.[39]

A local authority that has made a CPO cannot exercise these powers unless the relevant Secretary of State (the 'Confirming Minister') has 'confirmed' the CPO.[40] To receive confirmation, the local authority needs to demonstrate a 'compelling case in the public interest' for the exercise of these powers.[41] If affected landowners or occupiers object, the Confirming Minister will appoint a Planning Inspector to chair a public inquiry to consider the proposals.[42] At the conclusion of an inquiry,

[36] URS, *Seven Sisters Regeneration at Wards Corner: Equality Impact Assessment* (June 2012), part 8; Haringey Council, *Report for Consideration at Planning Subcommittee* (25 June 2012), appendix 6. I downloaded Wards Corner planning documents from Haringey's planning database on 16 February 2023.

[37] Planning decision notice for planning application number HGY-2012-0915. See also ASP, *Planning Statement Submitted on Behalf of Grainger to Support Planning Application Number HGY-2012-0915* (May 2012), paragraph 15.

[38] Haringey Council, *Acquiring Authority's Statement of Case submitted to the public inquiry considering confirmation of The London Borough of Haringey (Wards Corner Regeneration Project) Compulsory Purchase Order 2016* (2017), paragraph 10.

[39] TCPA 1990, section 226(1)(a) and (1A).

[40] Acquisition of Land Act (ALA) 1981, section 2.

[41] DLUHC, *Guidance on Compulsory Purchase Process and The Crichel Down Rules* (2019), paragraph 2.

[42] ALA 1981, section 13A.

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the Inspector reports to the Confirming Minister, who can confirm or refuse to confirm the CPO.[43]

Some landowners whose interests Haringey would acquire objected to the Wards Corner CPO. Similarly, while Haringey was not proposing to use its compulsory purchase powers to dispossess the traders operating in the Seven Sisters market,[44] a group of traders and their supporters objected to the CPO because the proposals would lead to the closure of the market. These objections triggered a public inquiry into Haringey's proposed use of its powers, which took place in July 2017.[45] Haringey sought to secure confirmation for the Wards Corner CPO by highlighting the benefits theoretically secured in the Wards Corner section 106 agreement.[46] It is common for local authorities to do this, although this way of justifying the use of compulsory purchase powers has proved 'contentious' when it relies upon 'a disputed conception of "trickle down" economics and a reliance on the marginal gains associated with planning obligations'.[47]

Studying the Wards Corner development means that I can discuss the way that the provisions in section 106 agreements governing the delivery of planning obligations extend beyond the ostensibly 'private' relationship between a developer and an LPA to encompass a more public-facing function. The interplay between the Wards Corner Agreement and both the compulsory purchase process and Haringey's public sector equality

[43] ibid section 13A(5).

[44] The owner of the department store building had leased the ground floor to a market operator, which granted the stallholder licences to the traders in the existing market. These licences entitled the market operator to terminate the stallholder licences on seven days' notice. The department store owner had agreed to transfer its freehold estate to Grainger, and Grainger intended to grant a new lease of the department store's ground floor to the market hall operator once it acquired the freehold title to the building. The market operator would then presumably terminate the stallholder licences after the inquiry in accordance with Grainger's development timetable (Haringey (n 38), paragraph 10.11; J Felgate, *CPO Report to the Secretary of State for Communities and Local Government* (9 January 2018) (APP/NPCU/CPO/Y5420/77066 (ENV/3166341)), paragraphs 72, 109, 120 and 355).

[45] Felgate (n 44), paragraphs 3–4.

[46] See, for example, various references to the Wards Corner Agreement in Haringey (n 38), AECOM, *Wards Corner Compulsory Purchase Order (CPO): Equality Impact Assessment* (October 2015) and AECOM (n 31).

[47] D Maxwell, 'Article 1 of the First Protocol: a paper tiger in the face of compulsory purchase orders for private profit?' (2017) 12 JPEL 1337, 1339. These 'marginal gains' are also not always achieved. For example, Kevin Gray notes that various 'ancillary benefits' proposed in Arsenal football club's application for planning permission for the construction of its new stadium were not realised following the CPO that facilitated that development (K Gray, 'Recreational Property' in Susan Bright (ed), *Modern Studies in Property Law: Volume 6* (Hart 2011), 26).

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duty illustrates the type of 'public' work that that these agreements can do. However, this article will explain how the Wards Corner Agreement had only a limited capacity to operate as a vehicle for securing these public interest objectives. Scrutinising this agreement also allows me to demonstrate that, despite its weaknesses as an instrument for either private ordering or minimising negative equalities impacts, it carried a powerful expressive force that legitimised Haringey and Grainger's development agenda and enabled pro-growth regulatory decision-making.

3. *The Development Culture Question: How Do Section 106 Agreements Contribute to a Development Culture in Which Private Developers Do Not Always Perform Their Public Policy Obligations?*

An argument advanced in this article is that section 106 agreements often involve imprecise and unbalanced obligations alongside weak monitoring and enforcement powers despite the presence in these agreements of ostensibly strict behavioural rules. Ian Macneil's relational contract theory helps my examination of these agreements by providing a framework of ideas for analysing behaviour that has a broadly 'contractual' form. For Macneil, contractual exchange involves an interplay of 'discrete' and 'relational' behavioural norms.[48] More discrete norms, such as planning and consenting to the limitation of one's future choices, are necessary to structure contractual relations and provide agreed reference points for future conduct.[49] The concept of 'presentiation' flows from this and is 'the self-conscious attempt, through planning, to bring the future into the present'.[50] But these discrete behavioural norms co-exist, in Macneil's behavioural framework, with more relational norms such as an open-minded commitment to preservation of the relations and conflict resolution outside formal legal processes.[51] In an exchange, discrete and relational norms constantly interact and have an effect on each other, although Macneil explains that any given exchange might involve either the intensification or the quietening of certain norms.[52] Insights

[48] IR Macneil, 'Relational Contract Theory: Challenges and Queries' (2000) 94 Nw U L Rev 877.
[49] IR Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (Yale University Press 1980), 60.
[50] Vincent-Jones (n 23), 4.
[51] Macneil (n 49), 64–70.
[52] ibid 39.

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from Macneil's relational contract theory help me to analyse the policy context for this area of practice and the obligations contained in section 106 agreements.

Bloor's obligations in the Gosbecks Agreement, as set out earlier, are exactly the type of mundane contributions that LPAs seek to secure from residential property developers throughout England. The clauses designed to deliver these obligations are partly the product of central government guidance to LPAs on the use of planning obligations. For example, where a section 106 agreement contains obligations that require a developer to pay a sum of money to an LPA for specific purposes such as local healthcare needs, guidance states that the agreement 'should include clauses stating when the [LPA] should be notified of the completion of units within the development and when the funds should be paid'.[53] This guidance therefore recommends detailed clauses that appear to require an intensification of contractual norms relating to planning and a desire to create strict rules to govern the bilateral relations between LPA and developer.

The minutiae of the Gosbecks Agreement reveal a correspondingly complex and prescriptive framework of duties, although the agreement arguably contains details that go beyond those recommended in government guidance. For example, the Gosbecks Agreement initially requires Bloor to provide notice of its intention to commence development no later than 20 working days before actual commencement.[54] Alongside this, Bloor agrees to pay the ecological mitigation contribution,[55] and provide various documents (such as the plans for the public amenity areas and the on-site open space) prior to commencement of development.[56] Next, Bloor states that it will give Colchester Council and Essex County Council at least 10 working days' notice of the expected occupation of the first new dwelling.[57] After that, Bloor states that it will not allow the occupation of any dwellings constructed on the site until Colchester Council has approved the plans referred to above,[58] and until Colchester Council and Essex County Council have respectively received the full healthcare contribution[59] and half the education contribution.[60] Bloor

[53] DLUHC (n 20), paragraph 025.
[54] Gosbecks Agreement, clause 4.2.
[55] ibid schedule 8, paragraph 2.
[56] ibid schedule 7, paragraph 2.
[57] ibid clause 4.3.
[58] ibid schedule 7, paragraph 4.
[59] ibid schedule 3, paragraph 6.
[60] ibid schedule 1, paragraph 2.1.

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next agrees not to allow the occupation of the eleventh dwelling until Colchester Council has received the Archaeological Park[61] and the community buildings contributions.[62] Then, Bloor agrees not to permit the occupation of the thirty-seventh dwelling until Colchester Council has received the archaeological information and recordkeeping contributions.[63] Alongside these requirements, Bloor also agrees to provide Essex County Council with two weeks' notice of the expected occupation of the fiftieth dwelling,[64] and to pay the County Council the remainder of the education contribution before the occupation of that dwelling.[65] Thereafter, Bloor promises to inform Colchester Council of the first occupation of 60% of the market dwellings (60 of these units) within 14 days of reaching that occupancy level,[66] but not to allow the occupation of more than 70% of the market dwellings (70 of these units) unless the affordable housing has been made ready for occupation and transferred to an approved affordable housing provider.[67] Next, Bloor will not allow the occupation of more than half of the total number of dwellings (72 units) until it has provided the agreed open space,[68] or more than 90% of the dwellings (130 units) until it has provided the agreed public amenity areas.[69]

The obligations outlined above are set out in complex clauses that create the impression of highly discrete and 'complete' contractual arrangements. A complete contract is one that a third party, who is unfamiliar with the relationship between the counterparties, can read to establish the precise actions required in every possible eventuality.[70] While transaction costs economics suggests that counterparties will probably never be able to create a fully complete contract because of the inherently uncertain and complex nature of human interactions,[71] the Gosbecks Agreement looks like a use of contractual mechanisms to create a

[61] ibid schedule 6, paragraph 2.
[62] ibid schedule 4, paragraph 2.
[63] ibid schedule 5, paragraph 2.
[64] ibid schedule 1, paragraph 2.5.2.
[65] ibid schedule 1, paragraph 2.2.
[66] ibid schedule 2, paragraph 7.
[67] ibid schedule 2, paragraph 4.
[68] ibid schedule 7, paragraph 6.
[69] ibid schedule 7, paragraph 7.
[70] ZX Tan, 'Disrupting Doctrine? Revisiting the Doctrinal Impact of Relational Contract Theory' (2019) 39 LS 98, 108.
[71] OE Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (Free Press 1985); M Motiar Rahman and MM Kumaraswamy, 'Joint Risk Management Through Transactionally Efficient Relational Contracting' (2002) 20 Const Manag Econ 45, 46.

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prescriptive constitution or a set of rules to guide the parties through a specific sequence of procedural actions.

A. *Monitoring and Enforcement in the Gosbecks Agreement*

While acknowledging that contractual arrangements can perform important 'planning' functions, relational contract thinking and transaction costs economics have shown that counterparties cannot plan their relations fully because of imperfect information and inherent uncertainty at the negotiation stage.[72] Attempting complete prior planning of a contractual relation can produce agreements of 'extreme detail' and create enormous drafting, negotiation, implementation and performance monitoring costs.[73] Oliver Williamson notes that most contracting parties are aware that they will be unable to plan an exchange in full so attempt to create 'safeguards' against opportunistic behaviour by their counterparts.[74] From my perspective, this focus on contractual safeguards is important when thinking about the 'bindingness' of each part of a section 106 agreement.[75] If a section 106 agreement is intended to function as a coordinating tool or as a prescriptive constitution, we need to consider what the monitoring and enforcement arrangements in these agreements show us about the use of section 106 agreements to secure the performance of planning obligations.

Information asymmetries relating to a transaction often make monitoring and enforcement more complex.[76] Property development is also an unpredictable activity requiring behavioural adaptability in response to cyclic fluctuations in property markets.[77] One interpretation of the intricate framework of rights and duties in the Gosbecks Agreement is thus that it is an attempt to correct information asymmetries and to make sense of property development's inherent uncertainty. Critical scholarship studying planning decision-making in the context of 'variegated neoliberalism' might provide a complement to this line of thinking. Variegated neoliberalism involves the idea that market-oriented decision-making pervades

[72] Williamson (n 71); Rahman and Kumaraswamy (n 71).

[73] T Prosser, 'Contractual Provision of Public Services, Commitment, and Trust' (2021) 48 JLS 434.

[74] Williamson (n 71).

[75] Vincent-Jones (n 23), 351.

[76] Williamson (n 71).

[77] C de Magalhães and N Karadimitriou, 'Planning for the Regeneration of Towns and Cities' in J Ferm and J Tomaney (eds), *Planning Practice: Critical Perspectives from the UK* (Routledge 2018), 274–275; see also P Canelas, 'Challenges and Emerging Practices in Development Value Capture' in J Ferm and J Tomaney (eds), *Planning Practice: Critical Perspectives from the UK* (Routledge 2018), 78.

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regulatory practices but does so 'unevenly' because of tensions inherent to neoliberal policy formation and implementation that materialise in different ways at different places, scales and times.[78] These tensions might typically arise in planning practice when central government tasks local authorities with implementing 'market-enabling' development policies to promote a pro-growth agenda alongside 'market-constraining' policies designed to mitigate the adverse effects of that agenda.[79] For example, LPAs are required to facilitate market-oriented developments while also paying careful attention to negative environmental or social externalities that development can cause.[80] Phil Allmendinger and Graham Haughton point out how LPAs tend to adopt 'experimental' practices in these circumstances to adapt to prevailing neoliberal paradigms and the tensions that these paradigms produce.[81]

The sequencing of actions in the Gosbecks Agreement might, in that light, be interpreted as a mechanism enabling Colchester Council and Essex County Council to gain information about Bloor's activities, and to monitor and enforce the achievement of public policy objectives, while also transferring decision-making powers about performance of those objectives to the private sector. Perhaps the parties agreed, for example, that Bloor would pay the community buildings contribution mandated in the Gosbecks Agreement before occupation of the eleventh dwelling and the archaeological information contribution before the occupation of the thirty-seventh dwelling to give Colchester Council a series of procedural safeguards and reference points against which to monitor Bloor's behaviour. Rather than conceiving of the Gosbecks Agreement as a prescriptive constitution, therefore, perhaps an alternative image for understanding the agreement might evoke the sense that the parties have designed a detailed itinerary for the development process. Section 106(5) of the TCPA 1990 enables an LPA to enforce a requirement in a planning obligation by injunction so either council could seek a court order pausing the development if it had not received an overdue developer contribution.[82] The Gosbecks Agreement thus appears to empower

[78] J Peck and N Theodore, 'Variegated Capitalism' (2007) 31 Prog Hum Geo 731; N Brenner and others, 'Variegated Neoliberalization: Geographies, Modalities, Pathways' (2010) 10 Global Networks 182.

[79] Brenner and others (n 78), 189.

[80] P Allmendinger and G Haughton, 'The Evolution and Trajectories of English Spatial Governance: "Neoliberal" Episodes in Planning' (2013) 28 Plan Pract Res 6.

[81] ibid 23.

[82] Section 106(6) TCPA 1990 also permits an LPA to enter onto land to complete a planning obligation, and to recover the attendant costs from the person against whom the obligation is enforceable.

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the councils to erect roadblocks at pre-agreed milestones to halt progress on the development unless Bloor satisfies certain commitments. But while this looks like an attempt to create a sufficiently firm basis for the councils to secure the developer contributions, it is also a mechanism that creates flexibility and allows Bloor to control the pace at which the development moves from one milestone to the next.

Using a journey-based metaphor to understand the Gosbecks Agreement suggests that a section 106 agreement can facilitate a measured and carefully planned process. However, there is a haphazardness to the way that the parties have 'cobbled together' parts of the agreement.[83] For example, it expresses the milestones for some obligations by reference to whole numbers of dwellings to be built. By comparison, the milestones for other obligations refer to proportions of the overall dwellings to be constructed. Similarly, the agreement's main body obliges Bloor to provide Colchester Council and Essex County Council with 10 working days' notice of the expected occupation of the first new dwelling,[84] whereas the schedule setting out the rules relating to the education contribution requires Bloor to provide the County Council with two weeks' notice of this.[85] Of course, 10 working days and two weeks are not necessarily the same thing. While these differences may seem minor, they suggest that this agreement is perhaps not as rigorously planned and carefully drafted as it at first appears.

This raises an important question about what the provisions in the Gosbecks Agreement are doing. The agreement purports to empower the councils to secure delivery of Bloor's developer contributions. Gemma Burgess and Sarah Monk discuss LPA monitoring practices relating to section 106 agreements and note that closer LPA monitoring of developer performance tends to correlate to fuller delivery of planning obligations. But they also note that the effectiveness of LPA monitoring practices is highly variable, with particular challenges evident in rural locations with geographically dispersed section 106 agreements and in settings where LPAs deal with high numbers of agreements.[86] Moreover, acquiring and processing contractual information is an expensive exercise.[87] Do LPAs have the resources to gather all the information

[83] Radin (n 20), 1225.
[84] Gosbecks Agreement, clause 4.3.
[85] ibid schedule 1, paragraph 2.5.1.
[86] Burgess and Monk (n 6), 207.
[87] Rahman and Kumaraswamy (n 71); Vincent-Jones (n 23), 185. Monitoring performance of obligations in section 106 agreements is particularly 'time and resource intensive' (Burgess and Monk (n 6), 207).

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envisaged in an agreement like the Gosbecks Agreement? Similarly, if an LPA does gather that sort of information, does it have the resources to do anything meaningful with it? More research is needed, therefore, to enable us to understand if, when and how planners and lawyers gather and then use the detailed monitoring information theoretically made accessible through the milestones in a section 106 agreement.

Further research might also investigate the enforcement powers these milestones create. Recent scholarship has emphasised that mechanisms used in planning processes do not always facilitate wider public involvement in the monitoring and enforcement of contractual duties.[88] In the Gosbecks Agreement, monitoring and enforcement are matters for Colchester Council and Essex County Council to consider. While either council can seek an injunction if Bloor fails to provide a developer contribution, our knowledge about how often and how successfully LPAs do this is patchy.[89] LPAs seem to have become more accustomed in recent years to pursuing late payments,[90] and LPAs do seek, or at least threaten to seek, injunctive relief to compel developers to perform their obligations in section 106 agreements, with evidence indicating that these enforcement actions can encourage more complete performance.[91] But it seems unlikely that Colchester Council would have sought this form of relief if Bloor had failed to make the smaller archaeological information or ecological mitigation contributions at the precisely prescribed moments or if Bloor failed to provide the requisite number of days' notice of the expected first occupation of any given dwelling.

It is important to ask about the cultural effects of this absence of realistic enforcement powers. David Feldman posits that legislation that contains declaratory, promissory, aspirational or rhetorical statements, rather than legally binding rules, can 'weaken respect for legislation and so damage its psychological power'.[92] Further research might examine the reasons for and the consequences of apparently unenforceable provisions in section 106 agreements. Any such research might also

[88] T Taşan-Kok and others, 'Hybrid Contractual Landscapes of Governance: Generation of Fragmented Regimes of Public Accountability Through Urban Regeneration' (2021) 39 Env & Plan C 371.

[89] Burgess and Monk (n 6).

[90] ibid.

[91] ibid 216. See also S Dedman and A Trigg, 'Builders Pledge Sport Pitches and Shops After Legal Threat' *BBC News Online* (25 October 2023) <https://www.bbc.co.uk/news/articles/c19ryx9jmx4o> accessed 24 November 2023 and C Hume, 'Barry Housebuilders Face Legal Threat Over Green Spaces' *BBC News Online* (11 August 2023) <https://www.bbc.co.uk/news/uk-wales-66466386> accessed 20 November 2023.

[92] D Feldman, 'Legislation Which Bears No Law' (2016) 37 Statute L Rev 212, 224.

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consider Stewart Macaulay's well-known contract scholarship, which suggests that the absence of enforceable legal remedies may not matter when counterparties have recourse to 'effective non-legal sanctions', such as withholding future exchange opportunities.[93] I am not aware of research pinpointing specific non-legal sanctions available to LPAs to secure performance of the full range of obligations in a section 106 agreement. This is another area where further thinking around the content and implementation of planning powers, and their interface with these agreements, might establish how LPAs do, or at least might, deploy effective non-legal sanctions for non-performance of planning obligations.

Of course, a developer might argue that haphazard and weak monitoring and enforcement powers do not matter when it bears the primary financial exposure in a development process. As Tuna Taşan-Kok and Martijn van den Hurk point out, private actors tend to seek 'long-term certainty provided by a technocratic bureaucracy to secure risk-free investments'.[94] Todd Rakoff and Margaret Radin point to the role of institutionally-acceptable drafting in written contracts as a mechanism enabling investors to evaluate commercial agreements.[95] Alexander Lord and Mark Tewdwr-Jones highlight the 'normalization of market logics' in planning decision-making and a preoccupation within LPAs with giving businesses 'certainty'.[96] A section 106 agreement like the Gosbecks Agreement fits within these trends by providing developers with tools to control the delivery of obligations attached to a development site and reassurance about how the LPA theoretically empowered to enforce those obligations will behave during the development process. Looseness in the drafting of a section 106 agreement and vague monitoring and enforcement powers may, therefore, not concern a developer that might be keen to show that public policy obligations and an LPA's powers do not threaten a good investment opportunity. These outcomes might also

[93] S Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 Am Soc Rev 55, 63.

[94] T Taşan-Kok and M van den Hurk, 'Plurality of Expert Knowledge: Public Planners' Experience with Urban Contractualism in Amsterdam' in M Raco and F Savini (eds), *Planning and Knowledge: How New Forms of Technocracy Are Shaping Contemporary Cities* (Policy Press 2019), 50. See also Prosser (n 73), 443 and A Layard, 'Shopping in the Public Realm: A Law of Place' (2010) 37 JLS 412, 425.

[95] Radin (n 20); TD Rakoff, 'The Law and Sociology of Boilerplate' (2006) 104 Mich L Rev 1235.

[96] A Lord and M Tewdwr-Jones, 'Is Planning "Under Attack"? Chronicling the Deregulation of Urban and Environmental Planning in England' (2014) 22 Eur Plan Stud 345, 357.

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suit those LPAs wishing to facilitate property development and push a pro-growth agenda. This matters because these agreements often look like a detailed set of rules empowering public bodies to hold a private actor to the public bodies' vision of the public interest. Examination of that detail, however, shows how these agreements might also function to provide both reassurance and flexibility for the private actor rather than a complete set of strictly enforceable rules.

This case study thus provides valuable insights into the development culture that shapes section 106 agreements and that these agreements reproduce. The Gosbecks Agreement is extremely detailed, but the bindingness of the developer obligations is questionable. This is an important insight for planning law, public law and contract scholarship. Attending to the complexities of the Gosbecks Agreement reveals provisions that are not as carefully drafted as initial appearances suggest. Ostensibly strict bilateral rules in these agreements also seem ill-equipped to do what planning process appears to require them to do, suggesting that a different approach is needed if developers are to provide the on-site and off-site community contributions deemed necessary to make development acceptable.

4. *The Regulatory Decision-Making Question: How Does the Presence of Ostensibly Binding Promises in Section 106 Agreements Facilitate the Exercise of Regulatory Decision-Making in Planning and Property Development Processes?*

My second key observation in this article is that section 106 agreements can do important 'public' work notwithstanding their weaknesses as an instrument for ordering 'private' bilateral relations. However, I argue that this public work reinforces the normalization of market logics in planning decision-making while bearing the hallmarks of conflictual and contradictory decision-making inherent to neoliberal planning. I base this argument on an analysis of the section 106 agreement made between Haringey Council and Grainger for the Wards Corner development.

Haringey granted Grainger planning permission in July 2012 for the demolition of existing buildings, including the Seven Sisters market, and the construction of 196 new apartments, a new market hall, and 14 retail units. On the same day, Haringey and Grainger signed a section 106 agreement that, among other things, contained provisions obliging Grainger to provide retail units aimed at local traders, a temporary

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market during the development process, and financial assistance for traders relocating from the existing market to the new market. In 2017, Haringey and Grainger then sought to use a modified version of this agreement to support the council's use of a CPO to secure the land that Grainger required for the development.

By using its compulsory purchase powers, Haringey was acting as a 'land broker' assembling a diverse range of land uses into a neat and potentially profitable package.[97] While this way of using compulsory purchase powers has been controversial, it represents established practice.[98] To secure confirmation for the CPO, Haringey argued that the development would be traffic-free, provide well-designed open space and amenity areas, upgrade housing and retail offerings in Seven Sisters, contribute to the overall character and significance of local historic buildings, reduce unemployment, 'catalyse' economic growth and guarantee the provision of a 'better' market hall for the area.[99] Many of these purported benefits were also the developer contributions theoretically secured in the Wards Corner Agreement.[100] Haringey presented these benefits at the public inquiry to justify its proposed use of compulsory purchase powers.[101] This points to a feature of section 106 agreements that is not often discussed and relates directly to the 'regulatory decision-making question' posed earlier. To function as a helpful artefact at the CPO inquiry, the Wards Corner Agreement needed to be 'robust enough' to travel to the inquiry to assure the Planning Inspector and the Confirming Minister about the appropriateness of the development proposals.[102]

Haringey and Grainger appear to have been aware that the Wards Corner Agreement, as originally drafted, may not have been sufficient to do this. A local authority seeking to obtain confirmation for a CPO will usually propose to relocate landowners and other occupiers who stand to be dispossessed by that CPO.[103] To that end, Haringey and Grainger

[97] M Levien, 'Special Economic Zones and Accumulation by Dispossession in India' (2011) 11 J Agrar Change 454; K Gray, 'There's No Place Like Home!' (2007) 11 JSPL 73; Layard (n 94).

[98] EJL Waring, 'Private-To-Private Takings and the Stability of Property' (2013) 24 KLJ 237; Maxwell (n 47). Section 226(4) TCPA 1990 provides the statutory basis for using compulsory purchase powers in this way.

[99] Haringey (n 38), paragraphs 8.15–8.48.

[100] See schedule 4, Wards Corner Agreement.

[101] See Haringey (n 38), AECOM (n 46) and AECOM (n 31).

[102] The quoted term comes from SL Star and JR Griesemer, 'Institutional Ecology, "Translations" and Boundary Objects: Amateurs and Professionals in Berkeley's Museum of Vertebrate Zoology, 1907-39' (1989) 19 Soc Stud Sci 387, 393.

[103] P Winter and R Lloyd, 'Regeneration, Compulsory Purchase Orders and Practical Related Issues' (2006) Jun JPEL 781, 795.

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agreed various changes to the Wards Corner Agreement while the public inquiry was in progress.[104] The agreed modifications added new developer obligations to supplement Grainger's existing obligations.[105] I refer to these combined obligations as 'the Modified Agreement' in the remainder of this article. The Modified Agreement now obliged Grainger, in respect of its duty to provide a new market, to:

- Keep the existing market open until the temporary market is available for occupation,
- Provide a temporary market at a site in its ownership close to the existing market,
- Procure support from a specifically appointed market facilitator for the existing traders in their move to the temporary market and then to the new market, and
- Consult with existing traders about the new market's layout.[106]

It also contained a detailed scheme for discounted rents for the five years following the existing market's closure and rules relating to the minimum size of stalls to be offered to the existing traders.[107] Haringey and Grainger were, therefore, seeking to use their section 106 agreement to indicate that they were safeguarding the traders' interests.[108]

However, the agreement did not impose an absolute duty upon Grainger to provide a new market. It stated that Grainger could not 'permanently' close the existing market until the temporary market was 'ready for occupation'.[109] It then also stated that the developer could not 'permanently' close the temporary market until the new market was ready.[110] But it only obliged Grainger to use reasonable endeavours to lease the new market to a market operator, who would be responsible for the day-to-day management of it. If Grainger had not received an offer to run the market from a market operator that it deemed suitable, or if it had not entered into an agreement to grant the lease, Grainger would

[104] Felgate (n 44), paragraphs 39–40. See also C Abbot, 'Planning Inquiries and Legal Expertise: A Fair Crack of the Whip?' in M Lee and C Abbot (eds), *Taking English Planning Law Scholarship Seriously* (UCL Press 2022), 144. Section 106A(1) TCPA 1990 allows modifications to a section 106 agreement if the LPA and the person against whom the obligations are enforceable agree to those modifications.

[105] Downloaded from Haringey Council's planning database (planning application reference HGY-2017-1551).

[106] Modified Agreement, schedule 3.

[107] ibid schedule 3.

[108] As highlighted in AECOM (n 31).

[109] Modified Agreement, schedule 3, paragraph 2.2.

[110] ibid schedule 3, paragraph 7.6.

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not be required to provide the new market.[111] The intended effect of these provisions is thus somewhat unclear, although the agreement does appear to suggest that it was Grainger who could decide if Seven Sisters would have a new market, and the agreement allowed Grainger to weigh its responsibility to meet community needs against its own pursuit of private profit. If Grainger felt it was unable to provide the new market, it could have used that space for alternative retail purposes.

Publicly held adversarial proceedings such as the Wards Corner CPO inquiry might be seen as a 'neoliberal setback' in that the inquiry process delayed the implementation of a pro-growth development process.[112] On the other hand, Allmendinger and Haughton suggest that neoliberal planning constantly needs to demonstrate its legitimacy,[113] and these public proceedings did grant Haringey and Grainger an opportunity to justify their policy choices. However, Chiara Armeni has highlighted how this type of justificatory action often amounts to a mere attempt to 'publicly validate … choices that have already been made, rather than [to facilitate] a consensus-based public dialogue'.[114] In making this point, Armeni revisits Patrick McAuslan's well-known work on the ideologies underpinning planning law in which McAuslan observes that planning law tends to emphasise the LPA's role as the arbiter and defender of the public interest, rather than enabling public participation mechanisms that allow communities to influence decision-making.[115] As Armeni sees it, this is 'a vision of planning law as persuasion',[116] and a version of public participation that affords some voices prominence while others are sidelined.

While the Modified Agreement presented to the Wards Corner CPO inquiry represented part of Haringey's attempt to demonstrate that it had protected the market traders' interests, other research has considered the traders' opposition to Grainger's proposals and discussed how traders, other businesspeople and local residents formulated alternative development ideas.[117] There is insufficient space to examine this

[111] ibid schedule 3, paragraph 3.3.
[112] Allmendinger and Haughton (n 80), 10.
[113] ibid 10.
[114] C Armeni, 'Participation in Environmental Decision-Making: Reflecting on Planning and Community Benefits for Major Wind Farms' (2016) 28 JEL 415, 422. See also C Abbot, 'Losing the Local? Public Participation and Legal Expertise in Planning Law' (2020) 40 LS 269 and Legacy and others (n 9).
[115] P McAuslan, *The Ideologies of Planning Law* (Pergamon Press 1980), 265.
[116] Armeni (n 114), 436.
[117] M Taylor, 'The Role of Traders and Small Businesses in Urban Social Movements: The Case of London's Workspace Struggles' (2020) 44 Int J Urban Regional 1041; B Russell and others, 'Strategies for a New Municipalism: Public-Common Partnerships Against the New Enclosures' (2023) 60 Urban Stud 2133.

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opposition or these proposals here, other than to note that the traders had protested, throughout the planning and compulsory purchase process, that Haringey could not make Grainger comply with the rental scheme set out in the Modified Agreement and that, even if Haringey could enforce the delivery of it, the rental scheme would be unaffordable for the traders.[118] The traders also highlighted the apparent emptiness of parts of the Modified Agreement, such as Grainger's obligation to promote 'local independent traders' in the new development. As the traders observed, this obligation 'could embrace more up-market retail units (particularly as the area gentrifies), who would be capable of paying much higher rents'.[119] From the traders' perspective, these arrangements indicated that Haringey's commitment to protect their interests was not credible.[120]

The Inspector chairing the public inquiry nonetheless concluded that the developer obligations in the Modified Agreement adequately secured the market's future and provided sufficient assurance that adverse equalities impacts would be minimised,[121] notwithstanding the absence of any 'cast-iron guarantee' that Grainger would provide a new market if it completed the development.[122] The Confirming Minister reached similar conclusions when he confirmed the CPO.[123] The Inspector's report and the Confirming Minister's decision letter are notable for the way in which they express confidence that Haringey would use the powers in the Modified Agreement to perform a 'safeguarding' function for the local community. The commitments in the section 106 agreement were thus substantial enough to persuade the Planning Inspector and the Confirming Minister that Haringey and Grainger would minimise the adverse equalities impacts of their proposals and ease the transition for the traders away from the existing market. At the same time, these obligations remained 'plastic enough' to be adapted in accordance with Grainger's preferences.[124] This reflects the way that these agreements can

[118] *Closing Submissions for the Seven Sisters Market Traders Submitted to the Public Inquiry Considering Confirmation of The London Borough of Haringey (Wards Corner Regeneration Project) Compulsory Purchase Order 2016.*

[119] ibid paragraph 26(1)(a).

[120] ibid paragraph 9.

[121] Felgate (n 44), paragraph 361.

[122] ibid paragraph 302. Vaughan and Jessup (n 7) give another example of a section 106 agreement legitimising planning decision-making by creating an 'impression' that a new development will preserve an existing use.

[123] Letter from the Senior Planning Manager (Ministry of Housing, Communities & Local Government (MHCLG)) to the senior solicitor (Haringey Council) (23 January 2019).

[124] The quoted term comes from Star and Griesemer (n 102), 393.

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be designed to enable LPAs and developers to navigate potential legal challenges and reassure third-party regulatory decision-makers about the manner in which they are conducting a development process while reserving substantial flexibility for private sector priorities.

But why did the Planning Inspector and the Confirming Minister interpret the commitments in the Modified Agreement in this way? Why do decision-makers treat conditional obligations as robust enough for the confirmation of a CPO, and how frequently do developers then perform these obligations? These are important questions for further research. In the meantime, there is also a valuable lesson here for planning, public law and contract scholarship. The impression that an agreement creates enforceable rules can provide a justification for regulatory decision-making. But we need to look beyond this impression of binding force to recognise the extensive flexibility that these provisions afford to developers in relation to the performance of public policy objectives and the way that they constrain the capacity of alternative interests to influence regulatory decision-making.

A. *Section 106 Agreements, Private Profit and Affordable Housing*

A further tension running through section 106 agreements relates to the provision of affordable housing. Extensive central government guidance shapes this area of planning practice. Planning scholarship has long suggested that the role of LPAs in planning practice is often to do little more than to find ways to implement central government policy.[125] The concept of variegated neoliberalism points, however, to the complicated and uneven ways that market-oriented regulatory processes take shape across and even within different regulatory scales.[126] It is important, therefore, to consider how central government seeks to prescribe the decision-making options available to LPAs, and to examine how LPAs use their decision-making powers both in setting local planning policies and in implementing those policies at a site-by-site level.[127] I have already explained how the complex clauses in the Gosbecks Agreement were partly a product of central and local planning policies, but I now

[125] M Tewdwr-Jones, 'Discretion, Flexibility, and Certainty in British Planning: Emerging Ideological Conflicts and Inherent Political Tensions' (1999) 18 J Plan Educ Res 244, 251; P Booth, 'The Control of Discretion: Planning and the Common-Law Tradition' (2007) 6 Planning Theory 127, 131.

[126] Peck and Theodore (n 78); Brenner and others (n 78).

[127] R Atkinson and others, 'Governing Urban Regeneration in the UK: A Case of "Variegated Neoliberalism" in Action?' (2019) 27 Eur Plan Stud 1083.

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turn my attention to how these policies affect clauses relating to affordable housing.

When Haringey and Grainger signed the Modified Agreement in July 2017, government guidance on planning obligations instructed LPAs to prioritise private sector profitability when they made their development plan policies. LPAs needed to pay 'careful attention' to viability and ensure that their development plans did not 'threaten' the prospect of viable development projects coming forward.[128] Viability in this context entailed a 'competitive return' from a development to a developer.[129] Alongside this, government guidance instructed LPAs to promote private sector profitability when applying their development plan policies to individual applications for planning permission. For example, LPAs needed to be 'flexible' to ensure that they did not seek to impose affordable housing requirements on a developer that would 'prevent' that developer completing a project.[130] Where a developer proposed to carry out development on brownfield land, LPAs needed again to 'take a flexible approach in seeking levels of planning obligations' that would not impede the pursuit of private profit.[131] On the other hand, a developer could submit evidence to an LPA relating to project viability when negotiating planning obligations,[132] meaning that developers could attempt to avoid planning obligations that they felt would undermine the prospect of them achieving a commercially suitable profit.[133]

The central government policy context within which Haringey and Grainger brought forward the Wards Corner development thus required Haringey to be creative and entrepreneurial, while also casting Haringey as a potential impediment to market-oriented development. This juxtaposition of the LPA as an agent of market boosterism and a source of potential market constraints arose because, while being flexible and creative, LPAs need also to set policies for meeting objectively assessed

[128] Department for Communities and Local Government (DCLG), *National Planning Policy Framework* (2012), paragraph 173; MHCLG, *Guidance: Planning Obligations* (2016), paragraph 002.

[129] DCLG (n 128), paragraph 173; MHCLG, *Guidance: Viability* (2014), paragraph 015.

[130] MHCLG (n 128), paragraph 004; MHCLG (n 129), paragraph 019.

[131] MHCLG (n 129), paragraph 026.

[132] MHCLG (n 128), paragraph 007.

[133] Layard (n 5). Government guidance in the current National Planning Policy Framework (DLUHC (n 11)) and Planning Obligations Guidance (DLUHC (n 20)) places less explicit demands on LPAs to support developers to achieve competitive returns. There is, at least superficially, greater focus on maximising compliance with local planning policies.

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needs for affordable housing in their areas.[134] Like other LPAs, Haringey sought to navigate these competing priorities in its development plan documents. Its policies on affordable housing indicated that Grainger should have provided 78 affordable housing units in the Wards Corner development, subject to the effect of this on the development's profitability.[135] However, the Wards Corner Agreement contained no obligations related to affordable housing provision. In its planning application, Grainger explained that this was because providing or funding any affordable housing would destroy the development proposal's financial viability and so prevent Grainger achieving a 'competitive return'.[136]

Despite that financial viability context, Grainger and Haringey revisited their affordable housing negotiations when they created the Modified Agreement during the CPO inquiry. Schedule 3 to this agreement obliged Grainger to conduct a viability appraisal three months after completing development to assess the development's capacity, at that moment, to fund a financial contribution to Haringey for it to allocate towards the provision of affordable housing elsewhere in the area. Central government guidance now recommends that LPAs and developers agree review mechanisms whenever an LPA has initially approved affordable housing provision at a level below its established policy requirement.[137] This type of review mechanism illuminates how, as Elen Stokes puts it, 'planning law imagines and regularises certain futures and future possibilities'.[138] When Haringey and Grainger entered into the Wards Corner Agreement, the planning process required a snapshot of the development's likely future profitability so that the parties could settle Grainger's affordable housing obligations. The Modified Agreement, on the other hand, arose from a type of 'recursive practice' that involved revisiting obligations that the parties settled when they made the original agreement.[139] The Modified Agreement then itself mandated a further revisiting of the development's affordable housing contribution at the culmination of the development process. In doing

[134] DCLG (n 128), paragraph 47–50; DLUHC (n 11), paragraph 20.

[135] Haringey, *Local Plan: Strategic Policies 2013–2026 (with Alterations 2017)*, policy SP2 <https://www.haringey.gov.uk/sites/haringeygovuk/files/final_haringey_local_plan_2017_online.pdf> accessed 3 September 2023.

[136] ASP (n 37), paragraph 69. Haringey (n 36), paragraph 8.14.1.

[137] DLUHC, *Guidance: Viability* (2024), paragraph 009.

[138] E Stokes, 'Futurescapes of Planning Law: Some Preliminary Thoughts on a Timely Encounter' in M Lee and C Abbot (eds), *Taking English Planning Law Scholarship Seriously* (UCL Press 2022), 158.

[139] S Mouzas and D Ford, 'Managing Relationships in Showery Weather: The Role of Umbrella Agreements' (2006) 59 J Bus Res 1248, 1254.

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so, the agreement blended an ostensibly relational willingness to be flexible and adaptive with discrete requirements specifying the deadlines and procedure for the affordable housing review. This type of review mechanism is arguably a form of innovative response to tensions that are a feature of variegated neoliberal planning.[140] But planning research shows that viability-based renegotiations of this type have not always been harmonious.[141] Moreover, the use of this review mechanism contained its own internal contradictions. Haringey and Grainger agreed to it despite Grainger's appraisal, at the time of both its planning application and the CPO inquiry, and Haringey's subsequent affirmation of those appraisals, that the development proposal could not support a financial contribution for off-site affordable housing provision.[142]

We should ask, therefore, why this type of review mechanism is in a section 106 agreement. Haringey and Grainger's statements during the development process indicated that a contribution to affordable housing provision was always unlikely. Consequently, the review mechanism might start to look like a symbolic artefact. Its existence meant that Haringey and Grainger could show the Planning Inspector and the Confirming Minister that they had once again put their minds to a public policy objective. In doing so, they could reassure these decision-makers that the CPO would facilitate a development in which the developer was doing its best to comply with relevant planning policies and to address negative equalities impacts from the development.[143] But they could also show the Inspector and the Confirming Minister that this commitment to public policy objectives would not prevent development taking place on the land being acquired.[144] This links to the 'regulatory decision-making question' posed earlier because a local authority seeking confirmation for a CPO at a public inquiry needs to establish that the development is likely to be completed.[145] It is arguable that the affordable housing review mechanism in the Modified Agreement existed because it reduced the risk of the development proposal being rejected rather than because of any realistic prospect of a

[140] Allmendinger and Haughton (n 80).

[141] Layard (n 5), 217; Canelas (n 77), 75. Addressing what Layard calls this 'duel of the spreadsheets' is a particular focus of the government's Infrastructure Levy proposals (see DLUHC (n 15)).

[142] ASP (n 37), paragraph 69; Haringey (n 38), paragraph 18.9–18.10.

[143] The equalities impact assessment Haringey commissioned prior to the CPO inquiry highlighted that the addition of this review mechanism was a 'positive' step in addressing potential equalities issues (AECOM (n 31), 51).

[144] Felgate (n 44), paragraph 326.

[145] DLUHC (n 41), paragraphs 13–15.

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contribution to affordable housing delivery. This seems like another product of tensions inherent to neoliberal planning, which are visible both at national and local policy levels as well as at the scale of individual decision-making. At this micro-level, the ostensible neatness of the binding form of a section 106 agreement can appear to offer a means for managing those contradictions. But the seemingly symbolic nature of this particular viability review mechanism should cause us to reflect on the way that these agreements purport to secure developer contributions to key public policy objectives while providing reassurance for private actors and enabling regulatory decision-making to go ahead.

5. *The Implementation and Community Relations Question: How Do Local Authorities Manage the Implementation of Novel Developer Obligations Designed to Shape Broader Community Relations?*

In the final section of this article, I draw together my argument by discussing the relationship between the Wards Corner section 106 agreement and Haringey Council's public sector equality duty. I will also further examine the dynamics of a regulatory model that promotes a pro-growth agenda while also seeking to achieve other public policy objectives. Whilst I have focused my discussion so far on the flawed nature of these agreements as either a device for ordering private bilateral relations or a vehicle for public interest objectives, I now turn my attention to the ways LPAs manage the implementation of these agreements, and how this can shape broader community relations. This area of practice has not been studied, so my findings offer an important contribution to planning, public law and contract scholarship.

When Haringey granted Grainger planning permission for the Wards Corner development, the report that Haringey's planning officer presented to the council's planning committee recommending the grant of planning permission noted that the Wards Corner Agreement would only enable the council to minimise negative equalities impacts if 'all the measures set out in the s106 agreement are honoured in full and in a timely manner'.[146] This is a statement, therefore, about the community safeguarding potential of these agreements. But the connection between planning obligations and duties such as the public sector equality duty

[146] Haringey (n 36), paragraphs 10.6–10.7.

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is rarely discussed. How did Haringey and Grainger implement the equalities safeguarding measures in the Wards Corner Agreement? How did those measures affect community relations? The answers to these questions illustrate the challenge LPAs face when using novel planning devices and the complicated interface between 'private' obligations and public duties.

A function of the Wards Corner Agreement, from the perspective of Haringey and Grainger, appears to have been as an instrument to 'de-risk' potentially problematic equalities, land acquisition and affordable housing issues. However, the analysis I have offered of the Wards Corner Agreement so far has highlighted obligations that are loosely worded and that involve somewhat empty commitments. It is important to ask, therefore, if this form of agreement is an appropriate mechanism for safeguarding community interests. Vincent-Jones has argued that contractual regimes created to secure public policy objectives should facilitate active accountability and monitoring arrangements,[147] and will fail to do this if more discrete rules are insufficiently robust to structure relationships and establish reference points against which to assess future conduct.[148] But Vincent-Jones also shows that implementing accountability and monitoring mechanisms in public contracts is often costly, time-consuming and difficult.[149] The Wards Corner case study provides a striking example of these problems.

In 2019, Haringey conducted an internal review of its monitoring and enforcement of Grainger's planning obligations,[150] which found that 'evidence suggests' that Grainger had breached obligations in the section 106 agreement in both its original and its modified form.[151] The first apparent breach involved an obligation in the original agreement requiring Grainger to report to Haringey, biannually, on efforts to identify a location for the temporary market and to promote the existing traders' interests.[152] The review established that neither party had any

[147] Vincent-Jones (n 23), 133.

[148] ibid 165.

[149] ibid 343.

[150] Haringey's planning department commissioned this investigation following a review that the council's Overview and Scrutiny Committee conducted (Haringey Council, *Scrutiny Review on Wards Corner* (25 November 2019). Downloaded on 17 August 2023 from Haringey's committee meetings database).

[151] F Gumbo, *Report into the review of the section 106 clause on the Market Facilitator* (undated), appendix 1, paragraph 11.2. Downloaded from <https://www.haringey.gov.uk/planning-and-building-control/planning/major-projects-and-regeneration/seven-sisters-regeneration> on 17 August 2023.

[152] Wards Corner Agreement, schedule 4, paragraph 24.5.

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record of these reports being written or received, although it did note that they had discussed the location of a temporary market during this time, albeit apparently not in accordance with the strict rules for doing so set out in the section 106 agreement.[153] The second apparent breach involved the provision in the Modified Agreement obliging Grainger to procure that the market facilitator provided, amongst other things, 'appropriate business support and advice' to all market traders and persons working at the existing market.[154] Haringey's review found that 'the relationship between [the market facilitator] and the traders had broken down', with the effect that the market facilitator was unable to promote the traders' interests, meaning that Grainger's obligation 'was not complied with once [it] became aware'.[155]

Neither of these apparent breaches of Grainger's obligations were ongoing at the time of Haringey's review.[156] Nonetheless, there was seemingly some form of problem with the performance of these obligations, which may partly have come from uncertainty within the council about when these obligations took effect. According to Haringey's Overview and Scrutiny Committee, the council's legal department had initially told the market traders' legal representatives that some obligations relating to the market facilitator only took effect when the developer started building.[157] It appears that Haringey later changed its position and agreed that those provisions took effect from the date that the parties signed the agreement.[158] Alongside this, Haringey's Assistant Director for Planning had, according to the Overview and Scrutiny Committee, felt that the council's regeneration department had not 'alerted' her to the apparent breach of these obligations.[159] But the Assistant Director had also not investigated this because, the report explained, she had felt 'it had been necessary for her to keep separate from the CPO inquiry'.[160] This need for 'separation' arose, presumably, because close involvement by the planning department in the regeneration department's land acquisition process might have led to an allegation that the planning department's decision-making on planning matters was no longer impartial. But the

[153] Gumbo (n 151), appendix 1, paragraphs 10.14 and 11.6.
[154] Modified Agreement, schedule 3, paragraph 2.1.
[155] Gumbo (n 151), appendix 1, paragraph 7.7.
[156] ibid paragraph 2.2.
[157] Haringey (n 150), paragraphs 10.1–10.8.
[158] ibid paragraph 10.5–10.6.
[159] ibid paragraph 8.35.
[160] ibid paragraph 8.35.

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section 106 agreement was a planning agreement, with obligations that the planning department could theoretically monitor and enforce.

Haringey has separately stated that it does not consider 'that there was a failure to monitor the s106 agreement'.[161] Nonetheless, we can learn more about these agreements from looking at this aspect of the Wards Corner development. In particular, the apparent breach of the market facilitator obligations in the Modified Agreement reveals more about how a section 106 agreement acts outside the bilateral relationship between LPA and developer. Neither the market facilitator nor the existing traders were parties to the Modified Agreement, although Haringey and Grainger attempted to use that agreement to define the relationship between the facilitator and the traders. Haringey's own planning officers had noted that these provisions were 'key' to the minimisation of negative equalities impacts from the proposed development.[162] Councillors in Haringey's Overview and Scrutiny Committee felt that the obligations relating to the market facilitator were 'innovative and should have been the means by which community cohesion was improved'.[163] But Haringey's reports on these provisions also suggest that its officers misunderstood the scope of the provisions or the monitoring and enforcement powers available to them. This points to the challenge local authorities can face in ensuring that developers meet their obligations. Scholarship considering neoliberal planning highlights failed experimentation at all levels of planning practice, and the market facilitator clause in the Modified Agreement looks like another example.[164] In the circumstances of the Wards Corner development, it is easy to see how Haringey's flawed decision-making may have further eroded the fragile trust between the traders and both Haringey and Grainger.

In August 2021, Grainger announced that it was abandoning its development proposals for the Wards Corner site because of 'the drawn-out nature of implementing the scheme owing to numerous legal challenges from a small but vocal minority'.[165] Part of this 'small but vocal

[161] Haringey Council, *Report for Cabinet – 21 January 2020: Wards Corner – Response to the Overview and Scrutiny and the Housing and Regeneration Scrutiny Panel Recommendations*, appendix 2. Downloaded on 17 August 2023 from Haringey's committee meetings database.

[162] Haringey (n 36), paragraph 8.6.10–8.6.11.

[163] Haringey (n 150), Chair's Foreword.

[164] Allmendinger and Haughton (n 80); Atkinson and others (n 127).

[165] Grainger plc, *Update: Seven Sisters Regeneration Scheme – 05.08.21*. Currently accessible from <https://web.archive.org/web/20220815123557/https://www.seven-sisters-regeneration.co.uk/> last accessed 14 December 2023. In *Burgos v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 2792 (Admin) the High Court dismissed a challenge to confirmation of the CPO.

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minority' had been arguing, of course, that Grainger's proposals would be likely to have negative equalities implications because of their effect on the Seven Sisters market. Haringey and Grainger had attempted to use a section 106 agreement to smooth away these issues. Disputes about property development proposals often disappear behind the neatly ordered technical documents ostensibly formulated in the public interest to move a development process along.[166] The market traders and their supporters subverted this tendency in the Wards Corner development by opposing Grainger's proposals in a sustained and coordinated manner. This case study thus illustrates how the contradictions and tensions inherent to variegated neoliberalism also create sites for resistance to market-oriented decision-making.[167] But, as recent scholarship shows, it is unusual for civil society campaigns to influence planning outcomes in this way.[168] It thus seems probable that similar practices are overlooked in other instances where community concerns are not as effectively represented. The point, therefore, is that we need to think carefully about how and why LPAs exercise their decision-making powers in pursuit of their definition of the public interest. Planning practice and scholarship should also consider the scope for greater transparency and public involvement in setting and implementing planning obligations. This need is particularly acute when local authority departments seek to use the impression of strict and complex community safeguards in a section 106 agreement to justify planning decision-making and the use of coercive compulsory purchase powers with potentially adverse equalities implications.

6. *Conclusion*

In the introduction to this article, I posed three questions relating to the way that local authorities seek to compel property developers to mitigate the adverse effects of property development. How do section 106 agreements contribute to a development culture in which private developers do not always perform their public policy obligations? How does the presence of ostensibly binding promises in section 106 agreements

[166] For a similar the observation about how '[u]ncertainty and disagreement are simply folded into the reasoning' in the documents created for planning processes, see Lee and others (n 3), 452.

[167] Peck and Theodore (n 78); Brenner and others (n 78).

[168] Armeni (n 114); Abbot (n 104); Legacy and others (n 9).

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facilitate the exercise of regulatory decision-making in planning and property development processes? How do local authorities manage the implementation of novel developer obligations designed to shape broader community relations?

In answering these questions, I analysed two different types of section 106 agreement. My findings show how these agreements consist of administrative clauses that appear to create an intricate framework of rights, responsibilities, duties and powers relating to the performance of planning obligations. But I also showed how the detail, complexity and apparent rigidity of the obligations in the agreements belies the one-sidedness and the haphazardness of some of these arrangements. This is important, and suggests that these agreements are ill-equipped to serve as effective instruments for ordering the 'private' relations between an LPA and a developer.

A further crucial finding relates to the 'public' work these agreements do. In the Wards Corner development, a modified section 106 agreement contained loose and vague obligations that were still substantial enough to justify a local authority's coercive use of compulsory purchase powers and to demonstrate that it had discharged its public sector equality duty. This reflects the potentially diverse and multi-layered roles of these agreements in shaping regulatory processes and wider community relations. Again, this is important: an intricate framework of rights, responsibilities, powers, and duties, which have a powerful expressive force, can enable an LPA to signal an attempt to protect the public interest despite the emptiness of certain obligations and the weaknesses of LPA monitoring and enforcement powers.

Looking inside these section 106 agreements should cause planning scholars to think about how the English town planning system empowers different actors to take decisions in the public interest. It is already well-known that relying upon private developers to deliver public policy objectives produces uneven outcomes and marginalises certain interests. But this article raises important additional questions about section 106 agreements and the way that planning practitioners use them. Planning scholarship needs to examine how planners and lawyers gather and use the monitoring information about developer behaviour theoretically made accessible through the type of agreement studied here. Planning scholarship should also scrutinise both the circumstances and the ways in which LPAs seek to enforce developer obligations. Other questions that I have highlighted that warrant further research relate to the way LPAs and developers create these agreements, and to the

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scope for greater transparency and public involvement in setting and implementing planning obligations. Answers to these questions might then provide solutions to the problem I posed at the start of this article: how can local authorities most effectively compel property developers to mitigate the impact of property development on local communities and on local infrastructure needs?

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