The Use of Section 106 Legal Agreements by the Peak District National Park Authority

1. Purpose of the Report

1.1 This report examines the legislation behind section 106 legal agreements; summarises how the Authority uses legal agreements; looks in depth at those legal agreements that are used for developments that restrict occupancy (i.e. affordable local needs housing, agricultural/essential worker's dwellings, ancillary accommodation/'granny' annexes and holiday accommodation); and discusses the use of legal agreements in respect of commuted sums, in particular their use for off-site affordable housing provision.

2. Introduction to s106 Legal Agreements

2.1 Planning legal agreements, otherwise known as 'planning obligations', 'section 106 agreements', 's106 agreements', 'legal agreements' or 'unilateral undertakings' are private agreements that are negotiated between Local Planning Authorities and persons with an interest in a piece of land. They are intended to make unacceptable development acceptable in planning terms. They are usually used in addition to planning conditions (but should not duplicate these) and are a means of exercising an additional influence or control over a development or use of the land in any specified way.

2.2 Planning obligations/section 106 agreements are usually negotiated and signed after a development has been debated and is recommended for approval, where-as unilateral undertakings (UUs) are usually submitted upfront with the submission of an application or, more commonly, during the course of an appeal.

3. Legislation

Town & Country Planning Act 1990

3.1 Planning legal agreements are commonly known as 'section 106 agreements' as this is the relevant section of the Town & Country Planning Act 1990 where they are described. Section 106 of the Act states:

'1) Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation (referred to in this section and sections 106A to 106C as 'a planning obligation'), enforceable to the extent mentioned in subsection (3)—

(a) restricting the development or use of the land in any specified way;
(b) requiring specified operations or activities to be carried out in, on, under or over the land;
(c) requiring the land to be used in any specified way;

…

(2) A planning obligation may—

(a) be unconditional or subject to conditions;
(b) impose any restriction or requirement mentioned in subsection (1)(a) to (c) either indefinitely or for such period or periods as may be specified; and

...

(3) Subject to subsection (4) a planning obligation is enforceable by the authority identified in accordance with subsection (9)(d)—

(a) against the person entering into the obligation; and
(b) against any person deriving title from that person.

(4) The instrument by which a planning obligation is entered into may provide that a person shall not be bound by the obligation in respect of any period during which he no longer has an interest in the land.

(5) A restriction or requirement imposed under a planning obligation is enforceable by injunction.

(6) Without prejudice to subsection (5), if there is a breach of a requirement in a planning obligation to carry out any operations in, on, under or over the land to which the obligation relates, the authority by whom the obligation is enforceable may—

(a) enter the land and carry out the operations; and
(b) recover from the person or persons against whom the obligation is enforceable any expenses reasonably incurred by them in doing so.

…

(11) A planning obligation shall be a local land charge and for the purposes of the Local Land Charges Act 1975 the authority by whom the obligation is enforceable shall be treated as the originating authority as respects such a charge'.

<u>The Community Infrastructure Levy and Community Infrastructure Levy Regulations (2010)</u>

3.2 The Community Infrastructure Levy (CIL) is a planning charge, introduced by the Planning Act 2008 as a tool for Local Planning Authorities in England and Wales to help deliver infrastructure to support the development of their area (e.g. transport, flood defences, hospitals, health and social care facilities etc). It came into force on 6 April 2010 through the Community Infrastructure Levy (CIL) Regulations 2010.

3.3 Development may be liable for a charge under CIL, if a Local Planning Authority has chosen to set a charge in its area. Most new development (including developments undertaken as permitted development) which creates net additional floor space of 100 square metres or more, or creates a new dwelling, is potentially liable for the levy, however it is down to the individual Local Planning Authority to set its own criteria/thresholds through a charging schedule.

3.4 The Charging Authority (i.e. the Local Planning Authority) should set out a draft list of the projects or types of infrastructure that are to be funded in whole or in part by the levy. The Charging Authority should also set out any known site-specific matters for which section 106 contributions may continue to be sought. This is to provide

transparency about what the Charging Authority intends to fund through the levy and where it may continue to seek section 106 contributions.

3.5 Planning obligations continue to play an important role in making individual developments acceptable. Affordable housing will continue to be delivered through planning obligations rather than the levy and Local Planning Authorities can also continue to pool contributions for measures that cannot be funded through the levy. Therefore even if a Local Planning Authority has adopted CIL, it can still use s106 legal agreements to gain financial contributions or otherwise from a developer provided it doesn't result in a developer paying twice for the same infrastructure.

3.6 In 2013 the National Park Authority chose not to introduce CIL as the evidence gathered[1] suggested the view that the quantum of development is not strategically significant and would not generate a significant sum. It was therefore agreed that the Local Planning Authority would focus on s106 agreements rather than introduce CIL.

3.7 Whilst the CIL Regulations 2010 provides the detailed regulations for Local Planning Authorities to implement CIL in their area, the document is still important to the Authority as Part 11 of the document covers 'Planning Obligations' and outlines the statutory tests that a planning obligation must meet at section 122, namely:

'(2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is-
(a) Necessary to make the development acceptable in planning terms;
(b) Directly related to the development; and
(c) Fairly and reasonably related in scale and kind to the development'.

National Planning Policy Framework (2012) (NPPF)

3.8 National planning policy on planning obligations is set out in the NPPF at paragraphs 203-205, with paragraph 204 reiterating the statutory tests that are outlined in the Community Infrastructure Levy Regulations 2010:

- *'203. Local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations. Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition.*

- *204. Planning obligations should only be sought where they meet all of the following tests:*
  - *Necessary to make the development acceptable in planning terms;*
  - *Directly related to the development; and*
  - *Fairly and reasonably related in scale and kind to the development.*

- *205. Where obligations are being sought or revised, local planning authorities should take account of changes in market conditions over time and, wherever appropriate, be sufficiently flexible to prevent planned development being stalled.'*

3.9 It is important to note that the tests for planning obligations are different to those for planning conditions. Paragraph 206 of the NPPF states, *'planning conditions should only be imposed where they are necessary, relevant to planning and to the*

[1] http://www.peakdistrict.gov.uk/__data/assets/pdf_file/0011/381872/PPNP-CIL-final-report.pdf

development to be permitted, enforceable, precise and reasonable in all other respects'.

Planning Practice Guide (PPG)

3.10 The PPG supplements the NPPF with detailed guidance on specific subjects. One such subject is 'Planning Obligations' which was published on 19 May 2016. This guidance extends to several pages. It is not intended to regurgitate everything the PPG says on the subject here, however some key messages include:

- Paragraph 002: *'Developers may be asked to provide contributions for infrastructure in several ways. This may be by way of the Community Infrastructure Levy and planning obligations in the form of section 106 agreements and section 278 highway agreements. Developers will also have to comply with any conditions attached to their planning permission'.*
- Paragraph 003: *'Policies for seeking planning obligations should be set out in a Local Plan, neighbourhood plan and where applicable in the London Plan to enable fair and open testing of the policy at examination'.*
- Paragraph 004: *'In all cases, including where tariff style charges are sought, the Local Planning Authority must ensure that the obligation meets the relevant tests for planning obligations in that they are necessary to make the development acceptable in planning terms, directly related to the development, and fairly and reasonably related in scale and kind. Planning obligations should not be sought where they are clearly not necessary to make the development acceptable in planning terms. Planning obligations must be fully justified and evidenced. Where affordable housing contributions are being sought, planning obligations should not prevent development from going forward'.*
- Paragraph 008: *'Applicants do not have to agree to a proposed planning obligation. However, this may lead to a refusal of planning permission or non-determination of the application. An appeal may be made against the non-determination or refusal of planning permission'* [where the requirement or otherwise for a planning obligation can be debated].

4 Modification/Removal of Planning Obligations

4.1 You can apply to the Local Planning Authority to discharge (remove) or modify a s106 agreement under section 106A of the Town & Country Planning Act 1990 (as amended). The provisions were brought into force on 10 December 1992 via The Town & Country Planning (Modification and Discharge of Planning Conditions) Regulations 1992.

4.2 Applicants are able to apply to modify or discharge a planning obligation under section 106A of the Town & Country Planning Act 1990 (as amended) but only after the planning obligation has been in place for 5 years beginning with the date on which the obligation was entered into. However Case Law indicates that a Local Planning Authority has discretion to entertain such an application prior to the 5 years if failure to do so would be amenable to Judicial Review, or where both parties voluntarily agree to renegotiate. An application to modify or discharge a legal agreement should be dealt with by the Local Planning Authority within 8 weeks of receiving a valid application.

4.3 Legal agreements of any age may be subject to an application for variation or discharge, and will succeed where either they no longer serve a useful purpose, or the revised proposed terms would serve the original purpose just as effectively as the original deed. The test of *'no longer serving a useful planning purpose'* is in practice interpreted in a liberal way, which allows applications to be made where obligations are unworkable, are superseded by fresh planning guidance or alternatively fail to comply with the CIL regulations.

4.4 Applications made to Local Planning Authorities to modify a planning obligation, which pre dates April 2010 or is over 5 years old, may result in refusal or non-determination. If so, an appeal may be made to the Planning Inspectorate under section 106B of the Town and Country Planning Act (1990) within 6 months of a decision by the Local Authority not to amend the obligation, or within 6 months starting at the 8 weeks from the date of request to amend if no decision is issued.

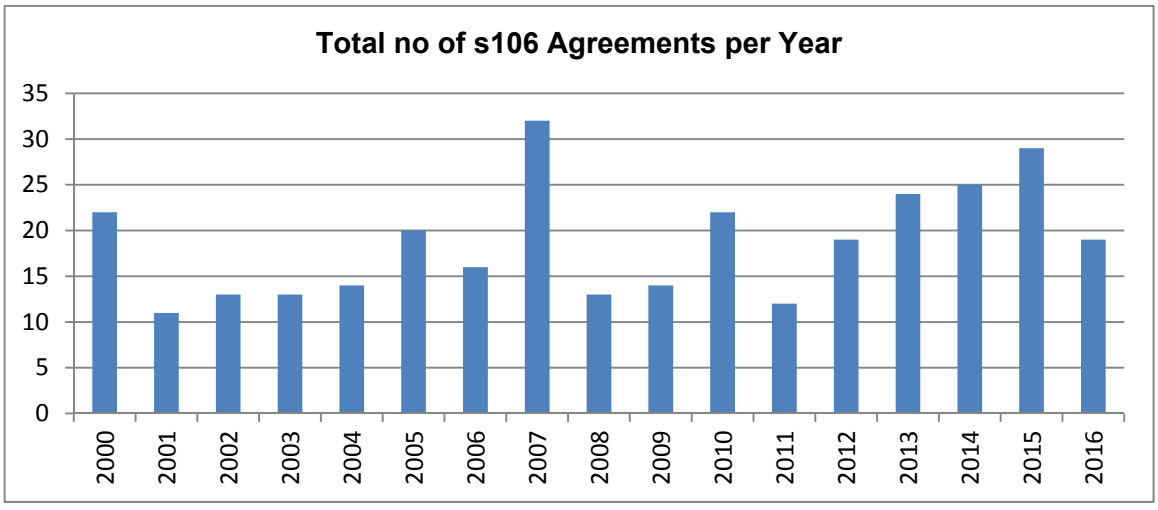
4.5 If an application is subject to a s52 agreement (the 'old' version of a s106 agreement) there is no power to modify or discharge the planning obligation by the Local Planning Authority. Jurisdiction for this falls with the Upper Tribunal under s84 of the Law of Property Act 1925 and therefore the applicant must submit an application to them rather than the Local Planning Authority.

4.6 Since 2001, the Authority has received 18 applications that have sought to either modify or discharge a legal agreement attached to a previous planning approval. The evidence therefore indicates that even though there is the ability to modify or discharge a planning obligation after it has been entered in to, very few applicants seek to use this provision.

5 The Use of s106 Legal Agreements by the Authority

5.1 Since 2001 (excluding 2017), the Authority has entered into 318 s106 agreements. This equates to an average of almost 19 s106 agreements per year out of a total of approximately 1,100 planning applications per year (or 1.7%). The total number of s106 agreements used by the Authority is therefore comparably low as a proportion of the total number of planning applications received each year.

5.2 The following graph shows the total number of s106 agreements that have been signed by the Authority each year since 2000.



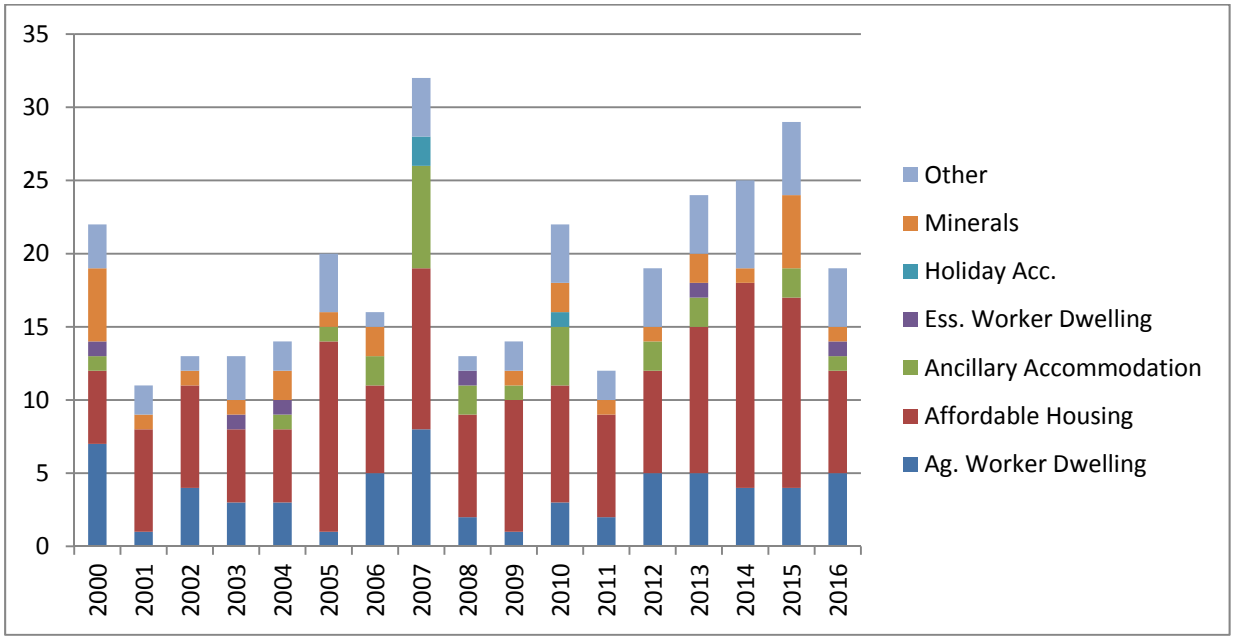
5.3 The main uses for s106 agreements by the Authority are:

- Affordable local needs housing (an average of 8 per year, or 0.8% per year).
- Agricultural worker's dwellings (an average of 4 per year, or 0.3% per year).
- Ancillary residential accommodation (an average of 2 per year, or 0.1% per year).
- Minerals developments (an average of 2 per year, or 0.1% per year).

5.4 Other less frequent uses of s106 agreements that have been used by the Authority include:

- Highway improvements.
- Holiday accommodation.
- Essential worker's dwellings (other than agricultural).
- To revoke previous planning consents.
- Landscaping/forestry requirements.
- The phasing of development.
- Commuted sums for highway works and off-site affordable housing.

5.5 The following graph indicates how many s106 agreements the Authority has completed each year since 2000, broken down into the main types of development. 'Other' describes those less frequent uses as outlined above, with the exception of 'holiday accommodation').



6 Occupancy Restrictions

6.1 The most frequent use of s106 agreements by the Authority is in respect of occupancy restrictions. This includes:

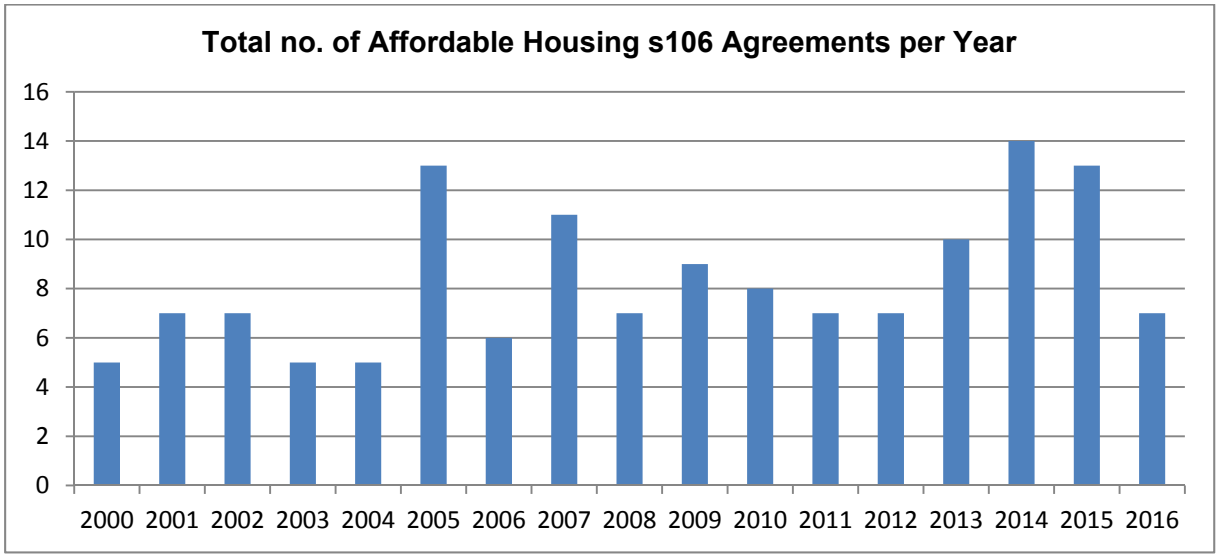
- Affordable local needs housing;
- Agricultural/essential worker's dwellings;
- Ancillary accommodation/'granny' annexes; and
- Holiday accommodation.

6.2 Since 2000 (excluding 2017), 239 legal agreements have been completed for these types of developments, compared with 79 legal agreements for all other developments/uses.

A. Affordable Local Needs Housing

Research

6.3 Since 2000, the Authority has completed 141 legal agreements in respect of affordable local needs housing. The breakdown of this by year can be seen in the following graph.



6.4 The Authority previously imposed affordable housing solely by condition and then began to use a s106 agreement around the early 1990s. However the obligations contained in the legal agreement were very basic. The wording used in both the condition and the legal agreement resulted in a number of affordable houses being 'lost' to the open market (6 since 2001 through a breach of condition/Lawful Development Certificate, 11 since 2000 through an application to remove the condition, and 1 through the discharge of a legal agreement).

6.5 In respect of those houses 'lost' through an application to remove the affordable housing condition or for the discharge of a legal agreement, the applications were approved by the Authority as the occupancy condition no longer served a useful purpose. The properties were larger than the greatest floorspace (87 sq m) permitted for an affordable dwelling in the adopted affordable housing SPG either when the building was first approved and/or due to subsequent extensions/alterations in the intervening years. The resulting effect was that the size and corresponding value of the property was so high that even with a 30% reduction in value (due to the occupancy restriction), the property was no longer deemed to be 'affordable' for local people.

6.6 With the adoption of Supplementary Planning Guidance, *'Meeting the Local Need for Affordable Housing in the Peak District National Park'* (July 2003) the policy requirements for affordable local needs housing were made more onerous in order to

ensure that affordable housing remained 'affordable' for the lifetime of the development. This led to the detail contained in the legal agreement significantly increasing and instead of a simple paragraph it now extends to a number of pages. The practicality of including such text within a decision notice would not be appropriate, nor would the lengthy requirements contained within the legal agreement.

6.7 No applications have been submitted to the Authority to modify or discharge the more rigorously worded legal agreement in respect of affordable housing and a Lawful Development Certificate cannot be used to justify a breach of a legal agreement. The 'new' more rigorous wording contained in affordable local needs housing legal agreements seems to have overcome the previous issues, with no loss of affordable houses to open market houses since it has been used.

Policy

6.8 The use of legal agreements to secure affordable housing is common amongst Local Planning Authorities, with the Planning Portal (when discussing CIL) stating *'Affordable housing will continue to be delivered through planning obligations rather than the levy'.*

6.9 In support of this approach, draft Policy DMH11 of the Development Management Policies DPD states at (A) that:

*'**In all cases** involving the provision of affordable housing, the applicant will be required to enter into a Section 106 legal agreement, that will:*

(i) Restrict the occupancy of all affordable properties in perpetuity in line with policies DMH1, DMH2 and DMH3; and

(ii) Prevent any subsequent development of the site and/or all affordable property(ies) where that would undermine the Authority's ability to restrict the occupancy of properties in perpetuity and for the properties to remain affordable in perpetuity by restricting overinvestment.'

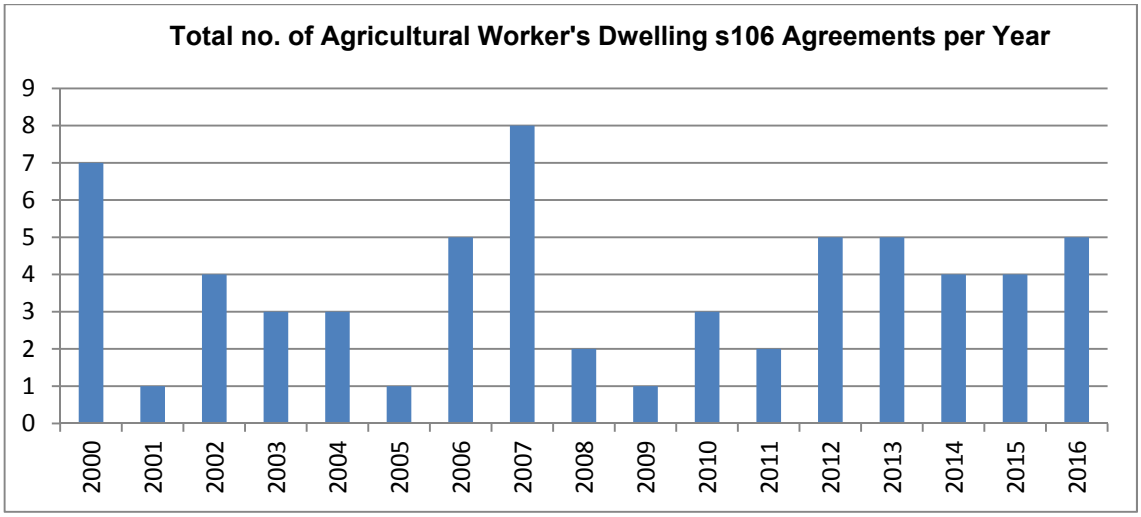
Conclusion

6.10 The requirement to make developers enter into a legal agreement for affordable local needs housing in all cases is justified and meets the statutory tests outlined in the Community Infrastructure Regulations 2010 and paragraph 204 of the NPPF. It is considered that the Authority should continue to adopt such an approach in respect of these developments.

B. Agricultural Worker's Dwellings

Research

6.11 Since 2000 (excluding 2017), the Authority has completed 63 legal agreements in respect of agricultural worker's dwellings. The breakdown of this by year can be seen in the following graph:



6.12 When approving an agricultural worker's dwelling, the Authority will tie the dwelling and the farmland (and sometimes existing dwellings/buildings on the farm) together through an anti-severance planning obligation. This is now done on all applications for agricultural worker's dwellings, although this was not always the case. Applications for agricultural worker's dwellings up to and including those approved in the 1990s, were only conditioned and did not tie the land to the farmhouse.

6.13 A legal agreement rather than a planning condition is now used by the Authority because of concern that if the justifying land is sold off, a strong case may then be made for the removal of an agricultural occupancy condition from a dwelling and arguments for a fresh dwelling to serve the land are difficult to resist. This would result in more dwellings in the open countryside impacting on the special qualities of the National Park. The use of a legal agreement controls this more effectively than a planning condition although it does not prevent a farmer/landowner from applying to the Authority to discharge or modify the legal agreement should they wish to sell off part of their land.

6.14 Since 2001, there have been 12 Certificates of Lawful Development involving the breach of an agricultural occupancy condition attached to a planning approval. All 12 certificates were granted as the applicants had proven on the balance of probability that they had breached the attached occupancy condition on a continuous basis in excess of 10 years. This cannot happen with a legal agreement, as a Certificate of Lawful Development cannot be used for such a purpose.

6.15 Since 2011 there have been 7 applications to remove an agricultural worker's occupancy condition; 6 were approved and 1 was refused. Of those that were approved the following examples highlight why the Authority now imposes an anti-severance legal agreement on all agricultural worker's dwellings:

- In the 1950s a bungalow was approved as an agricultural worker's dwelling. A planning condition was imposed restricting the dwelling to an agricultural worker. Due to the age of the permission, no legal agreement tied the land to the bungalow. An application was then submitted to remove the agricultural occupancy condition. The original bungalow was approved with only 8 hectares of land. Some of the land had been sold off and the holding was therefore smaller than when first approved and therefore no longer met a functional test. The property had been marketed extensively at a reduced price for 4 years without a buyer and the property could not be deemed to be affordable due to its size, extensive garden size and valuation. The application was therefore approved for the removal of the occupancy condition.

- A condition restricted a dwelling to an agricultural worker at [redacted]. The property was sold separately from the farm shortly after the dwelling was completed and occupied in breach of the agricultural occupancy condition. The owner of the dwelling successfully applied to the Authority for a Lawful Development Certificate as it was accepted that the dwelling had been occupied in breach of the condition for the required period of time. Subsequently, the farm required a new agricultural worker's dwelling and therefore submitted a planning application to the Authority. As the previous agricultural worker's dwelling was not 'available' to a farm worker as it was owned separately from the farm, its existence could not be taken into consideration. Permission to erect a new agricultural worker's dwelling at the farm was therefore approved in 2014.

6.16 Conversely, the Authority has only received two applications for the modification of an existing legal agreement that tied the land to an agricultural worker's dwelling, both of which were approved by the Authority. One was to split the two farmhouses and land equally between two brothers following the death of their father, and the other was to sell the farmworker's dwelling and associated poultry sheds separately from the farmhouse. The Authority has not received any applications to discharge (i.e. completely remove) a legal agreement that ties the farm worker's dwelling to the land.

Policy

6.17 The policy justification for imposing anti-severance legal agreements on agricultural worker's dwellings is contained in the following local planning policies:

- The supporting text to Local Plan Policy LC12 states at paragraph 3.51: *'Given the changing needs of any agricultural or forestry business for workers, it is reasonable to expect that workers' dwellings should not be disposed of separately to the business as a whole. Legal agreements such as planning obligations can provide appropriate assurance of this'.*
- Core Strategy Policy HC2: Housing for Key Workers in Agriculture, Forestry or Other Rural Enterprises states at (C) that *'it will be tied to the land holding or rural enterprise for which it is declared to be needed'.*
- The supporting text to Policy DMH4: Essential Worker Dwellings in the Draft Development Management Policies DPD states at paragraph 6.56: *'A prerequisite for a planning permission for worker dwellings is that the house is tied to the business by a legal agreement. The legal agreement will help ensure the house operates as permitted and helps to prevent the legal separation of the worker accommodation from the business.'* Paragraph 6.65 states: *'If occupancy conditions are lifted and a new need for further worker accommodation then re-appears, it places avoidable and unnecessary stress on national park landscapes. Therefore the Authority requires good evidence…before agreeing to the removal of occupancy conditions or legal agreements'.*

6.18 It should also be noted that this type of anti-severance legal agreement is not confined to the Peak District National Park Authority; other Local Planning Authorities use a legal agreement for the same purpose. For example, Derbyshire Dales District Council also ties the farmland to an agricultural worker's dwelling via a legal agreement. The requirement forms part of their 2005 Local Plan, whereby Policy H7 states: *'In all cases the Council will negotiate a section 106 obligation which will prevent the sale of the dwelling from the site itself or any part of it without the prior approval of the Council.'* This requirement has also been taken forward into their Local Plan via Policy HC13 which has just been through Examination whereby no issues

were raised by the Planning Inspector on this matter and was formally adopted on 7 December 2017.

6.19 *Planning Policy Guidance 7: Countryside* (PPG7) advised that in appropriate circumstances, Authorities could use planning obligations to tie a farmhouse to adjacent farm buildings or to the agricultural land of the unit, to prevent them being sold separately without further application to the Authority. However, this guidance was not repeated in subsequent national policy guidance or in the current NPPF/PPG. To add further confusion, the now revoked *Circular 11/95: Use of Conditions in Planning Permission* stated at paragraph 102 that conditions are an appropriate mechanism to control agricultural worker's dwellings:

> *'Despite planning policies which impose strict controls on new residential development in the open countryside, there may be circumstances where permission is granted to allow a house to be built to accommodate an agricultural or forestry worker on a site where residential development would not normally be permitted. In these circumstances, a condition should be imposed to ensure that the dwellings are kept available for meeting this need.'*

6.20 Appendix A of Circular 11/95 (the Appendix has been retained even though the Circular has since been revoked) then outlines a model condition for agricultural or forestry worker's dwellings that states:

> *'45. The occupation of the dwelling shall be limited to a person solely or mainly working, or last working, in the locality in agriculture or in forestry, or a widow or widower of such a person, and to any resident dependents'.*

Counsel Advice

6.21 Due to current national planning policy being silent on the use of anti-severance legal agreements and previous guidance advising the use of conditions for agricultural worker's dwellings, the Authority has questioned whether the practice of using legal agreements to tie the land and other buildings/dwellings to a farm worker's dwelling meets the statutory tests, as outlined in the Community Infrastructure Levy Regulations (2010) and paragraph 204 of the NPPF. The Authority has therefore sought Counsel advice on this matter.

6.22 Richard Kimblin QC was provided a copy of the Authority's standard legal agreement that is used to tie land to an agricultural worker's dwelling. He was instructed to advise: (a) whether planning conditions would suffice; (b) the ultra vires (beyond the powers) of controlling ownership of land; (c) the effectiveness of the obligations set out in the standard agreement; and (d) whether these could be drafted more robustly. Counsel advice was:

- *'5. Noting that conditions restricting occupation to agricultural workers are very common, I do not consider that the purpose sought to be achieved by the Council could be better achieved by way of a planning condition, and so my earlier advice remains applicable. Given that the aim is to restrict the use of the new dwelling to an agricultural worker (or to a former agricultural worker or their widow) for an indefinite period (terms that could arguably be imprecise and difficult to enforce, and therefore may not satisfy the tests for the imposition of a planning condition), a planning obligation is a more useful tool to achieve those aims than a planning condition'.*

- *'6. …The draft obligations would satisfy the three tests set out in paragraph 204 of the NPPF and regulation 122 of the Community Infrastructure Levy Regulations 2010'.*

- *'7. In relation to the control of ownership, as the draft planning obligation before me does not seek to control who owns the land (which is not generally a planning matter, although there are exceptions), there is nothing in principle that would render such an obligation unlawful'.*

- *'11. There is nothing unlawful in principle in securing the Council's aims as set out in my instructions, i.e. by way of planning obligation in relation to agricultural buildings/dwellings'.*

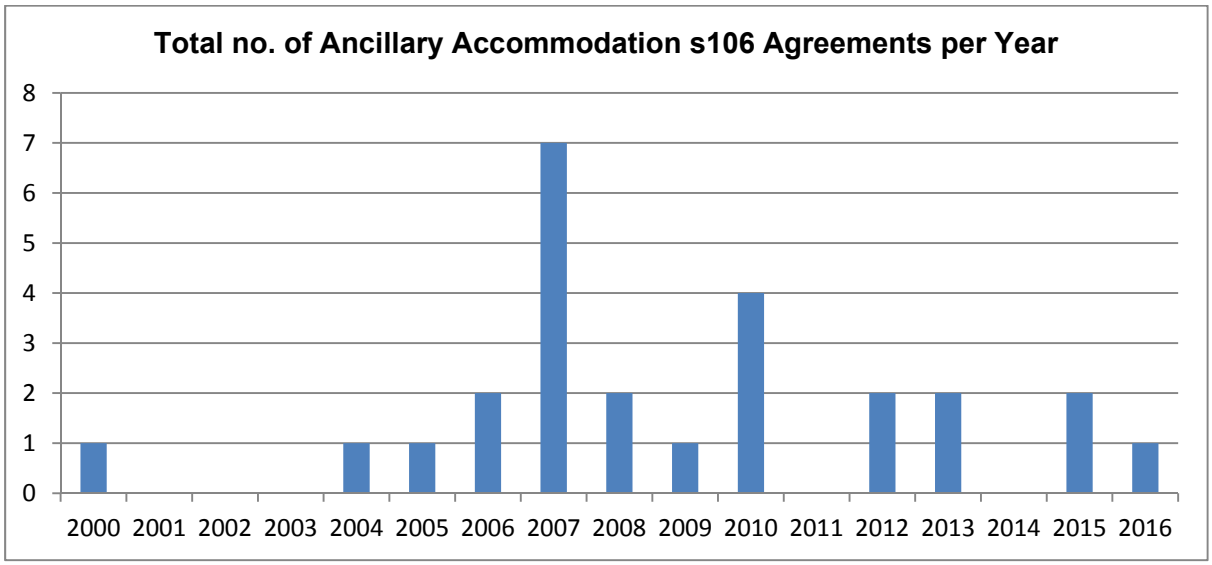
Conclusion

6.23 Counsel has concluded that the Authority's use of legal agreements to tie an agricultural worker's dwelling and the farmland (and sometimes existing dwellings/buildings on the farm) together through an anti-severance planning obligation is lawful and meets the statutory tests outlined in the CIL Regulations (2010) and the NPPF. Given the benefits this type of legal agreement provides over the use of a planning condition, it is considered that the Authority should continue to adopt such an approach. However, both Planning Officers and Members need to ensure that when a s106 agreement is used for such a purpose, a planning condition is not attached to the decision notice for the same issue, as legislation states that such duplications should be avoided.

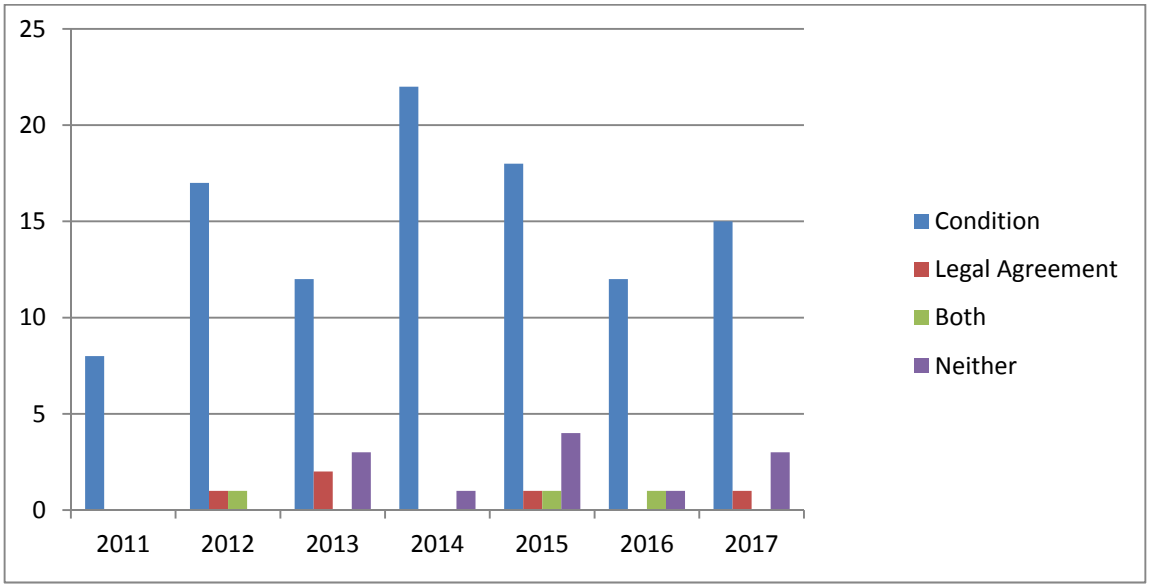
C. Ancillary Accommodation/'Granny' Annexes

Research

6.24 In respect of ancillary accommodation, the Authority uses very few legal agreements, preferring to tie the accommodation to the main dwelling by an appropriately worded planning condition. Since 2000 (excluding 2017), the Authority has completed 26 legal agreements for ancillary accommodation. The following graph shows the distribution of these legal agreements by year:



6.25 Taking a detailed look at planning applications relating to ancillary accommodation since 2011 (when the Core Strategy was adopted) there were 124 applications in total, with 104 of those having a planning condition attached, 5 having a legal agreement attached, 3 having both a legal agreement and a condition attached, and 12 having no condition or legal agreement. This is displayed on a yearly basis in the graph below:



6.26 Since 2001, 6 Lawful Development Certificates were submitted to the Authority in respect of a building being occupied in breach of its ancillary occupancy condition. All 6 Certificates were granted as the applicants had proven on the balance of probability that they had breached the attached occupancy condition on a continuous basis in excess of 10 years. The Authority has not approved the discharge of an ancillary occupancy restriction imposed by a s106 agreement.

6.27 Since 2011, there has been just one application for the removal of an ancillary occupancy condition that tied the building to the existing dwelling on the site. The application was refused and dismissed on appeal. The building comprised a detached two-storey garage/outbuilding located in the rear garden of a property. The applicant wished to change the outbuilding from being ancillary to the main dwelling to an independent open market house. Both the Planning Inspector and the Planning Officer considered that the building did not comprise a valued vernacular or listed building and as the building had already been converted, the development was not required for conservation or enhancement purposes. The application therefore did not comply with Core Strategy Policy HC1.

6.28 Undertaking a detailed assessment of Officer Reports and Decision Notices has highlighted that there are a number of inconsistencies in respect of ancillary accommodation/granny annexes in respect of how the relevant policies are applied and when a legal agreement should be sought rather than using a planning condition. Officers seem to agree that when the proposed accommodation is to be provided as an extension to an existing dwelling, this should be controlled by a planning condition. However there is no consistency of approach when the accommodation is to be provided within a detached outbuilding. Given the complexities surrounding this matter and the fact that it involves planning judgement to be applied to a number of factors, it is not surprising that different Officers are able to come to a different view.

6.29 A report to Planning Committee dated 18 November 2005 titled *'Domestic Annexes: A Review of Planning Policy and Case Law'* concluded that **all** proposals for annexes/ancillary accommodation should:

(1) 'Be linked to the original dwelling by a s106 agreement which prevents the separate sale and restricts the use to ancillary domestic accommodation and no other use without the prior consent of the NPA and prevents non-residential use of the original dwellinghouse without the prior consent of the NPA; and

(2) Be obviously subordinate and ideally not exceed adopted floorspace guidelines for affordable dwellings.'

6.30 Given the age of this report, the changes in personnel at the Authority and the continuing changes in interpretation (mainly through appeals) on this subject, this advice note is no longer used by the Authority. However, it does raise the question over whether an updated version of this advice note should be produced to help Officers and Members assess these types of developments in a more consistent manner. The training of Officers and possibly Members on the issues found in the assessment of ancillary accommodation may also be beneficial. This could bring about greater consistency in Officer recommendations and decisions by both Officers and Members.

6.31 Another issue identified when examining the Decision Notices associated with the approval of ancillary accommodation/granny annexes is the wide variety of wording that is used for an occupancy condition. In total, 22 differently worded conditions were found; all of different length and content. The now revoked Circular 11/95 recommended the use of a model condition that was quite succinct and Planning Inspectors also tend to use a very short and basically worded condition to control ancillary accommodation. It is recognised that the Authority approves ancillary accommodation to achieve different end results (i.e. for additional living accommodation, for an agricultural worker where there is no justified agricultural need etc.) and therefore it is not considered that one standard condition would suffice. However, in conjunction with the Authority's Legal Team, it is considered that a set of standard conditions should be drafted to cover all scenarios.

Policy

6.32 The conversion of outbuildings is currently controlled by either Local Plan Policy *LH6: Conversion of Outbuildings within the Curtilages of Existing Dwellings to Ancillary Residential Uses* or Local Plan Policy *LC8: Conversion of Buildings of Historic or Vernacular Merit*. Policy LC8 is silent on the control of any resulting ancillary accommodation, whilst Policy LH6 states at (iv) that *'the new accommodation provided would remain under the control of the occupier of the main dwelling'* but does not outline how this should be achieved. Local Plan Policy LH4 states that *'extensions and alterations to dwellings will be permitted provided that the proposal does not (iii) amount to the creation of a separate dwelling or an annexe that could be used as a separate dwelling'*, but again is silent on the use of conditions versus legal agreements.

6.33 The draft Development Management Policy DPD adopts a similar approach as the Local Plan with a policy in respect of the conversion of heritage assets (Policy DMC10) and a policy in respect of ancillary buildings in the curtilage of existing dwellings (Policy DMH5). Policy DMC10 is silent on the use of conditions and legal agreements but Policy DHM5 states *'where it is not possible to secure its ancillary status in perpetuity by planning conditions, the ancillary accommodation will be tied to the main dwelling by way of a section 106 agreement'*. In addition to these policies, Policy

DMH11: Section 106 Agreements has a section on ancillary accommodation and states:

'F. Where planning conditions cannot achieve the desired outcome of tying properties together, the ancillary accommodation, whether achieved by extension, conversion, or new build will be tied to the main property by legal agreement.

G. Variation to a section 106 agreement may be permitted if it can be demonstrated that the proposed new use of the ancillary accommodation is in accordance with other policies of this plan relating for example to holiday accommodation use or essential worker use.

H. Removal of a section 106 agreement to remove the ancillary status of accommodation will not be permitted.'

6.34 The draft Development Management Policies DPD therefore states that a legal agreement should not always be applied to an application for ancillary accommodation, and instead leaves the judgement over whether a legal agreement or a condition should be used down to the Planning Officer. This is supportive of how Planning Officers currently apply legal agreements for ancillary accommodation, albeit in a rather inconsistent manner.

Counsel Advice

6.35 Concern has been raised regarding the Authority's use of a legal agreement to tie ancillary accommodation/granny annexes to the existing dwelling and whether doing this meets the statutory tests, as outlined in the Community Infrastructure Levy Regulations (2010) and paragraph 204 of the NPPF. The Authority has therefore sought Counsel's advice on this matter, specifically using a current application at [redacted] as an example.

6.36 For context, [redacted] comprises a dwellinghouse. To the south of the dwellinghouse, separated by a number of fields, is a detached barn that has been converted to holiday accommodation and considered to be ancillary to the dwellinghouse. The barn is located approximately 74 metres away from the dwelling. A planning application has been submitted to change the use of the barn to a mixed use of holiday accommodation and ancillary residential use in connection with the main dwelling (in order to allow the occupation of the barn by the relatives of one of the applicants who live in [redacted] and therefore visit for long periods at a time, and in the longer term, the [redacted]). Given the physical separation of the barn from the dwelling, questions were raised as to whether the barn could be used as ancillary living accommodation, but also to the lawfulness of imposing a legal agreement with the following obligations as outlined in Schedule 2:

1. Not to cause or permit the ancillary accommodation to be used or occupied other than as ancillary to the use of the main dwelling and supplementary to the accommodation thereof.
2. Not to cause or permit either the main dwelling or the ancillary accommodation to be transferred or disposed of separately from the other.
3. The ancillary accommodation and main dwelling shall remain in common ownership and be treated as a single unit for planning purposes.

6.37 Richard Kimblin QC considered the proposal and provided the following advice:

- *'12. In principle I see no reason to doubt that the draft obligations in this specific case would satisfy the three tests set out in paragraph 204 of the NPPF (derived*

from regulation 122 of the Community Infrastructure Levy Regulations 2010). A planning obligation concerning the use of the site [meaning the whole of the owned land] *is clearly necessary to render the proposed development acceptable in planning terms, as the officer's report for the Planning Committee acknowledges a conflict with the development plan should the barn be used as an independent open market dwelling. As the officer's report correctly notes, "[i]t is therefore necessary to consider a mechanism to ensure that the building is only used for the intended purposes and its use does not alter in the future to one which would be clearly contrary to the Authority's housing policies." The "mechanism" is the planning obligation which restricts the use of the site. The planning obligation is also clearly directly and fairly and reasonably related in kind and scale to the development.'*

- *'13. As to whether the purpose sought could be better achieved by way of a planning condition…14. The officer's report correctly notes that a breach of a planning condition may become lawful due to the passage of time (s.171B of the 1990 Act), whereas there is no restriction on the period of time for which an agreement would endure (s.106(2)(b)), provided that an indefinite period serves a planning purpose (as it does here)… A planning obligation, however, does provide an additional means of enforcement. The means by which a breach of the s.106 would be enforced (as opposed to a breach of condition or enforcement notice)…Overall, given that the aim is to restrict the use of the new dwelling to "ancillary accommodation" for an indefinite period (terms that could arguably be imprecise and difficult to enforce), I consider that a planning obligation is a more useful tool to achieve those aims than a planning condition.'*
- *'24. To prevent the aforementioned principles from having any future relevance, I would suggest that the party subject to the obligations set out within the s.106 be specifically mentioned in Schedule 2 itself for the avoidance of doubt.'*
- *'25. I would also suggest that Schedule 2(1) be amended to read: "The Ancillary Accommodation shall only be occupied as either holiday accommodation and/or ancillary residential use in connection with the residential use of the Main Dwelling.""*
- *'26. I suggest Schedule 2(2) should read: "The Ancillary Accommodation shall not be transferred, sold, leased, tenanted, or otherwise disposed of as independent residential accommodation.""*
- *'27. As to Schedule 2(3), I see no problem with the express specification that the entire site* [i.e. the whole of the red and blue edged land] *will be treated as a single planning unit, as this provides ongoing certainty regarding the Council's approach to the site. However, whether a site is a separate planning unit is ultimately a matter of law based on the facts before the court, and will not be determined based on what is set out in the s.106 agreement. When considering whether a separate planning unit has been established the court will have regard to the well-known "Burdle test" (referring to Burdle v Secretary of State for the Environment [1972] 1 WLR 1207)…'*
- *'28. I have taken the Burdle test into account when suggesting the amendments to Schedule 2(1) above, and I would also suggest that Schedule 2(3) be amended to read "The Ancillary Accommodation and Main Dwelling shall remain in common ownership and will be treated as a single planning unit.""*
- *'29. The final issue concerns the control of ownership, where it is noted that on occasion planning obligations require the Council's consent to certain transfers, conveyances and leases of the property. A concern has been raised that any obligation that attempts to control who owns the land is ultra vires.'*

- *'30. Section 106(1)(a) is framed in extremely broad terms and permits restrictions on the development or use of the land in any specified way. Provided the planning obligation does not seek to control who owns the land, but only how the land is developed or used, this is permitted (s.106(1)(a)). There is nothing wrong in principle with such an obligation. It would not be ultra vires* [beyond the power of the legal agreement]*.'*
- *'31. Here, the restriction would in effect prevent the land from being sold independently of the main dwelling/planning unit, thereby ensuring it cannot be sold as independent market housing and will always remain subservient to the main dwelling/planning unit. Thus, restrictions which do not allow the land to be sold as independent accommodation would be necessary to make the development acceptable in planning terms and directly, fairly, and reasonably related in kind and scale to the proposed development.'*
- *'32. There is nothing unlawful in relation to the principle of securing the Council's aims by way of planning obligation.'*
- *'33. The Council's aims are best achieved by way of planning obligation rather than condition, as the terms of the latter could be argued to be imprecise and unenforceable.'*

Conclusion

6.38 Ancillary accommodation/granny annexes tend to be controlled by the Authority through an occupancy condition rather than a legal agreement. However a number of discrepancies have been found in terms of how ancillary accommodation is assessed against local planning policies, and the assessment that is undertaken to determine whether a condition or a legal agreement is required. In 2005 a guidance note entitled *'Domestic Annexes: A Review of Planning Policy and Case Law'* was produced for use by the Authority. This concluded that **all** proposals for annexes/ancillary accommodation should be linked to the original dwelling by a s106 agreement which prevents the separate sale and restricts the use to ancillary domestic accommodation. In practice, Officers and Members have made an assessment of which is the most appropriate means of control on a case by case basis. Whilst it is acknowledged that this involves planning judgement and therefore the results can be different depending on each site, it is considered that some common ground/best practice could be developed between all Officers and Members. It is therefore considered that a guidance note on this topic would be beneficial and could be accompanied by some training in order to improve this area of policy assessment.

6.39 Counsel has confirmed that Section 106 of the Town & Country Planning Act 1990 permits restrictions on the *'development or use of the land'* in any specified way, which differs from the wording in the tests as outlined in the CIL Regulations 2010 and the NPPF which solely makes reference to *'development'*. He considers that the use of a legal agreement to tie the ancillary accommodation to the main dwelling in not *ultra vires* (beyond the power of a legal agreement), is not unlawful, and is actually the best way of achieving the Authority's aims in respect of this matter when compared to a planning condition.

D. Holiday Accommodation

Research

6.40 In terms of holiday accommodation, the Authority usually seeks to attach a condition to control the occupancy of the building rather than a legal agreement. Since 2000 (excluding 2017), only 3 legal agreements have been signed in respect of holiday accommodation; 2 in 2007 and 1 in 2010.

6.41 When a condition is imposed on a planning approval for holiday accommodation it is usually worded in the following way:

> *'This permission relates solely to the use of the barn hereby approved for short-let holiday residential use, ancillary to XXX. The property shall not be occupied as a permanent dwelling and shall not be occupied by any one person for a period exceeding 28 days in any calendar year. The owner shall maintain a register of occupants for each calendar year which shall be made available for inspection by the National Park Authority on request.*

6.42 Since 2001, the Authority has received 2 Lawful Development Certificates for holiday accommodation, both of which were granted, as the applicants had proven on the balance of probability that they had breached the attached occupancy condition on a continuous basis in excess of 10 years.

6.43 Since 2011, there have been 16 applications for the removal of a holiday occupancy condition in order to allow the building to be used as an open market dwelling. None of these applications involved a legal agreement. 9 applications were refused and/or dismissed on appeal and 7 were approved by the Authority.

Refusals:

6.43.1 The 9 applications that were refused by the Authority sought permission for the removal of the holiday occupancy condition in order for the building to become an open market dwelling. The removal of the occupancy condition, even if the building was deemed to be a valued vernacular building or a curtilage listed building, would not result in the conservation or enhancement of the building as this had already been achieved when the building was first converted to holiday accommodation. The proposals were therefore contrary to Core Strategy Policy HC1(C) and were refused accordingly.

6.43.2 8 out of the 9 refusals were appealed to the Planning Inspectorate and in each case the Planning Inspector supported the approach taken by the Authority and dismissed the appeal.

Approvals:

6.43.3 One application had been granted permission for holiday accommodation but prior to starting the conversion works, the applicant decided to change the proposal to an open market dwelling. The building was considered to be a valued vernacular building and as the works had not commenced, the development would result in the conservation and enhancement of the existing building. The application therefore complied with Core Strategy Policy HC1(C) and the condition was removed.

6.43.4 One application failed to comply with Core Strategy Policy HC1(C) as the building had already been converted and therefore the proposal would not achieve the required conservation or enhancement. However the application

was approved as the applicant was happy for the occupancy condition to be varied to ancillary accommodation instead.

6.43.5 One application was recommended for refusal by the Planning Officer as it did not comply with Core Strategy Policy HC1(C) for the reasons as previously described. However the application was heard by the Planning Committee as the Parish Council supported the removal of the condition. Members overturned the Officer recommendation as had the planning application initially proposed an open market building instead of holiday accommodation, the application would have been approved as the building was a valued vernacular building and the works would have resulted in conservation and enhancement. The development would have complied with Core Strategy Policy HC1(C) and therefore the application was approved by Members.

6.43.6 In respect of the four applications that were approved (1 in 2012, 1 in 2013 and 2 in 2016) the Officer Report considered the development solely in relation to Local Plan Policy LR6 and did not consider Core Strategy Policy HC1. This seems to have been an oversight however the emerging Development Management Policies DPD should prevent this from occurring in the future as policy *DMR3: Holiday Occupancy of Self-Catering Accommodation* states at (B) that the removal of such a condition will only be acceptable if:

(i) There is no adverse impact on the valued characteristics of the area or residential amenity; and
(ii) The dwelling is tied by legal agreement to occupancy by those in housing need; and
(iii) The size of the dwelling is within that specified in housing policies to ensure the property remains affordable.

6.44 The Authority has approved one discharge of a holiday occupancy legal agreement (in 2017). As described above, the Officer Report only made reference to Local Plan Policy LR6 and did not consider the proposal against Core Strategy Policy HC1.

Policy

6.45 Draft Policy DMH11: Section 106 Agreements of the Development Management Policies DPD does not make reference to holiday accommodation being subject to a legal agreement. Draft Policy DMR3: Holiday Occupancy of Self-catering Accommodation of the Development Management Policies DPD makes reference at (A) that the use will be restricted to holiday accommodation, and at (C) that a holiday occupancy condition will be applied. This is reflected in the wording used in Local Plan Policy LR6. It is therefore the long standing practice of the Authority to restrict holiday accommodation via condition rather than via a legal agreement. This is reflected in the low number of legal agreements that have been applied to approvals for holiday accommodation (just 3 since 2000).

Conclusion

6.46 The use of a standard condition to restrict holiday accommodation is the approach that the Authority normally uses for this type of development.

6.47 There is a strong policy argument against the removal of holiday occupancy conditions in that the removal of such a condition should be viewed as allowing an open market dwelling and therefore should be assessed against Core Strategy Policy HC1. The Planning Inspectorate has supported the Authority's stance on this matter in respect of

Core Strategy Policy HC1(C) and has dismissed every appeal. The policy test for the removal of a holiday occupancy condition will be further strengthened by the wording in draft Policy DMR3 of the emerging Development Management Policies DPD.

6.48 The number of Lawful Development Certificates approved by the Authority in respect of a breach of the holiday occupancy condition has been relatively low.

6.49 It is for these reasons that it is considered that the Authority should continue to control holiday accommodation by planning condition rather than by a legal agreement, unless in exceptional circumstances a legal agreement is considered necessary.

7. Commuted Sums through Core Strategy Policy HC1

7.1 Core Strategy Policy HC1(C) states:

'Any scheme proposed under CI or CII that is able to accommodate more than one dwelling unit, must also address identified eligible local need and be affordable with occupation restricted to local people in perpetuity, unless:

> *IV. It would provide more affordable homes than are needed in the parish and the adjacent parishes, now and in the near future: in which case (also subject to viability considerations), a financial contribution will be required towards affordable housing needed elsewhere in the National Park.'*

7.2 The supporting text to the policy states at paragraph 12.18:

'In some cases there might be a mismatch between the short term need in the locality and the number of affordable homes that a viable scheme could provide. Where it could provide more affordable homes than are needed in the parish and its adjoining parishes, the potential benefit of affordable housing can be transferred to other parts of the National Park by use of a financial mechanism. Policy HC1(C) (IV) sets out the principle: the mechanics of which (for example whether such benefit should be used as locally as possible and scales of off-site developer contributions) will be set out in a subsequent development management policy document.'

7.3 Concern has been raised on two matters in respect of this policy: (1) That the Authority is still legally able to request commuted sums given the introduction of the Community Infrastructure Levy (CIL); and (2) that if a commuted sum is taken for housing then it should only be used to provide affordable homes in the adjoining Parishes from where the proposed housing is to be built, not the Park as a whole, as is currently suggested by the policy.

7.4 Firstly, it should be noted that the Authority very rarely uses a legal agreement to seek a commuted sum. Since 2000 (excluding 2017) only 4 commuted sums have been sought via a legal agreement; three (in 2004, 2006 and 2016) were for highway improvements and one (in 2015) related to a financial contribution gained from a housing development towards affordable housing in the area.

7.5 In respect of the first concern, the introduction of CIL does not prevent the Local Planning Authority from requesting a commuted sum, particularly as CIL has not been adopted by the National Park Authority. The Planning Practice Guidance states:

- Paragraph 93: '*Developers may be asked to provide contributions for infrastructure in several ways. This may be by way of the Community Infrastructure Levy* ***and*** *planning obligations in the form of section 106 agreements* ***and*** *section 278 highway agreements (under section 278 of the Highways Act 1980 as amended)'.*

7.6 An Authority, even if it has adopted CIL, can still use a mixture of CIL, s106 agreements and s278 agreements to gain financial contributions. And given the Peak District National Park Authority has not adopted CIL, a s106 agreement is the only mechanism the Authority has to seek a commuted sum. The use of s106 agreements for obtaining commuted sums is lawful and can be used by the Authority.

7.7 In respect of the second concern, the use of a commuted sum to provide off-site affordable housing has occurred once in the last 17 years. The sum was offered by the developer towards affordable housing in the area through a Unilateral Undertaking (at appeal) as an incentive to grant approval for the development and was therefore a material consideration in the determination of the appeal. Given the limited use of this area of policy, it has not been considered expedient at this time to bring forward additional policy or advice, but it could be something that is looked at in a future Supplementary Planning Document (SPD) or within a future review of the Local Plan.

8. Overall Conclusion

8.1 The use of legal agreements by the Authority is relatively low when compared to the total number of planning applications determined each year (an average of almost 19 s106 agreements per year, or 1.7%). The most frequent use of s106 agreements by the Authority is in respect of occupancy restrictions. Since 2000 (excluding 2017), 239 legal agreements have been completed for these types of developments, compared with 79 legal agreements for all other developments/uses.

Affordable Housing

8.2 The Authority uses legal agreements for all applications for affordable local needs housing. This approach meets the statutory tests, as outlined in the Community Infrastructure Levy Regulations (2010) and paragraph 204 of the NPPF and has been an effective way of preventing the loss of affordable housing to open market dwellings since its introduction. The continued use of legal agreements by the Authority for all affordable local needs housing should therefore be continued.

Agricultural Worker's Dwellings

8.3 The use of legal agreements to tie land and buildings to an agricultural worker's dwelling has been proved by Counsel to be acceptable and to meet the statutory tests, as outlined in the Community Infrastructure Levy Regulations (2010) and paragraph 204 of the NPPF. The use of legal agreements to tie agricultural land and buildings to a proposed agricultural worker's dwelling is a valuable tool to prevent the severance of the dwelling from the land that justified its approval in the first instance and to prevent future applications for further agricultural worker's dwellings to serve the same land, resulting in harm to the special qualities of the National Park. Therefore the Authority should continue to apply a s106 agreement to tie the land and buildings to all applications for agricultural worker's dwellings and where appropriate, other rural worker's dwellings.

Ancillary Accommodation/'Granny' Annexes

8.4 The use of legal agreements to tie an ancillary building to an existing dwelling has been proved by Counsel to be acceptable and to meet the statutory tests, as outlined in the Community Infrastructure Levy Regulations (2010) and paragraph 204 of the NPPF. The Authority currently uses a mixture of legal agreements and conditions for

this purpose, depending on the particular circumstances of each individual application. However it has been noted that there are inconsistencies with the application of the policies dealing with these developments and therefore a guidance note and training of Officers and/or Members should be considered. A set of standard conditions should be agreed with the Authority's Legal Team for ancillary accommodation and should be made available to Planning Officers in order to avoid the variety of differently worded conditions that are currently imposed.

Holiday Accommodation

8.5 Holiday accommodation is largely controlled by the Authority by planning condition rather than a legal agreement. Due to the strict policy background on this matter (which is to become stricter when the Development Management Policies DPD is adopted) and the Planning Inspectorate supporting the approach taken by the Authority on applications to remove a holiday occupancy condition, it is considered that in the majority of cases the use of a planning condition rather than a legal agreement for holiday accommodation should be maintained by the Authority.

Commuted Sums

8.6 Commuted sums via s106 can still be requested by an Authority, even with the introduction of CIL. Authorities can choose to use CIL (if adopted by the Authority), s106 agreements and s278 agreements to gain financial contributions from a development. In respect of the wording in Core Strategy Policy HC1 in respect of commuted sums for off-site affordable housing provision, a decision needs to be made by the Authority as to the need for additional guidance on this matter; and how this should be forthcoming (i.e. via an SPD or a future review of the Local Plan); and the timeframe for doing so.