THE MISSING CONSEQUENCE

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The affordable homes were promised at consent, in the same act that made the land valuable. What was never built was the consequence for not delivering them. A right to buy the land back at close to its old value, when the deadline passes and the homes have not come, is that missing consequence.

A charge on holding land makes waiting expensive. It cannot make the homes. An annual cost on undeveloped consented land changes the price of delay, not its destination. The owner can pay the charge out of an asset still appreciating faster than the bill bites, or sell to another owner who runs the same arithmetic and waits in turn. Nothing in an annual bill routes the land toward the houses it was zoned for.

The value being held is a gift. When permission is granted, the state manufactures a leap in the land's value and hands it, unbilled, to whoever owns the ground. No one has dug a trench or laid a pipe; the value appears because the state's signature appears, and it lands in a private account. The principle is old and has a name, betterment: the uplift is made by the public decision to permit, not earned by the person who happens to own the land.[1] Holding a gift that keeps appreciating is the rational thing to do, and a charge on its own does not change that. The land needs somewhere to go.

The promise already made

Every major housing site already carries a promise. In exchange for the consent that creates the gift, the developer takes on an obligation: a share of the homes, at least a quarter on market sites, must be affordable, with the tenure split set against local need.[2] The vehicle is the Section 75 agreement, a planning obligation that runs with the land and binds whoever owns it next.[3] The affordable housing is not a favour the developer might confer. It is a condition of the permission, accepted at the moment the field's value multiplied.

What the developer accepts at consent and what gets built are not the same thing. Viability sets the obligation once, legitimately: at the outset the affordable share is negotiated against what the site can bear, and a developer who takes on the obligation pays less for the land to carry it. That number is the bargain, struck before a brick is laid.

[1] The principle that planning gain is publicly created value rather than something earned by the landowner is old. John Stuart Mill put it plainly in 1848: landowners "grow richer, as it were in their sleep, without working, risking, or economizing", and he proposed to tax the future "spontaneous increase" of rent while leaving the land's present value untouched (*Principles of Political Economy*, Book V, Chapter II, section 5). Crook traces the modern land value capture debate and finds planning obligations recovering roughly 30% of development value on greenfield sites in England, and a far smaller share in Scotland (A D H Crook, *Local authority land acquisition in Germany and the Netherlands: are there lessons for Scotland?*, Scottish Land Commission Land Lines, 2018). Wightman sets the same point in Scotland's land history (*The Poor Had No Lawyers*, 2011).

[2] National Planning Framework 4 (adopted February 2023), Policy 16(e): proposals for market homes are supported where the affordable housing contribution is at least 25% of the total number of homes, unless the local development plan justifies a higher figure on evidence of need. The same policy allows a lower contribution where viability, scale, or the need to diversify supply justifies it.

[3] Town and Country Planning (Scotland) Act 1997, ss 75 and following: planning obligations run with the land, bind successors in title, and are enforceable by the planning authority or the obligation's beneficiary.

The trouble is the second bite. Viability is also grounds to modify a Section 75 obligation after it is agreed, once consent has been granted and the land's value has already jumped, and the planning authority is not required to commission its own assessment of the developer's case; the guidance leaves the independent check optional.[4] The agreed obligation is firm when it buys the permission and soft when it falls due, and the softening is not rare. When English developers challenged affordable-housing obligations on viability grounds after the financial crisis, almost all of those challenges led to a change.[5] The promise that helped win consent is renegotiated down by the party that owes it, after the value it helped unlock is banked, on a case the public side often cannot afford to test.

So the obligation exists; the consequence does not. Miss the affordable homes and what follows is, at worst, more negotiation. The duty was written to be enforceable and left without the one thing that would enforce it: a cost to the developer of not delivering that is larger than the gain from holding out.

The consequence

The site carries a delivery deadline, a published date, set in advance, not invented after the fact. The natural one is the end of the local plan period under which the land was allocated: the window the system itself set for the homes to appear. If that deadline passes and the affordable houses have not been built, the land returns to public hands, bought at its existing use value plus a premium. The developer chose every step of that outcome. They accepted the obligation at consent, held the land past the date the plan set, and declined to build.

Pre-emption is closer to enforcing a bargain than to seizing an asset. The developer agreed to deliver affordable housing in return for permission; the legislation states what happens when they do not. The whole design exists to make compulsory purchase unnecessary, and it is milder than compulsory purchase. A compulsory purchase order strips the owner's choice entirely, grinds through the Lands Tribunal for years, and pays full market value for land taken against the owner's will. Pre-emption does none of that. The owner who builds never meets it. The owner who sells a finished site never meets it. Only the owner who holds past the deadline meets it, and that owner was handed the date at the start, with a transition window for land already allocated before the rules began. The machinery never touches the developer who does what they said they would.

[4] Scottish Government, *Planning Circular 4/2025: planning obligations and good neighbour agreements* (December 2025): viability is grounds to modify a Section 75 obligation under s.75A, and independent assessment of a viability case is optional rather than mandatory. Paragraph 37 states that known obligations should be priced into the land purchase, which is the basis for treating the obligation as a cost the developer accepted at consent.

[5] Foye and Shepherd, *Why have the volume housebuilders been so profitable?* (CaCHE, 2023), reporting McAllister and others (2014): in the years after the financial crisis almost all requests to vary a Section 106 agreement led to a change, with adjustments to the affordable-housing element among the most common reasons for renegotiation. Section 106 is the English equivalent of the Scottish Section 75; the mechanism by which an accepted affordable-housing obligation is renegotiated downward is the same.

The objection that buried it before

Acquisition at existing use value has been tried in Britain, and abandoned. Under the post-war settlement public bodies bought land at its value in existing use and captured the development value when building happened; the New Towns were built on that basis. Within a decade the power to acquire at existing use value was surrendered, and the reason is the objection pre-emption still has to answer.[6] When land is taken at existing use value, the owner who is compelled receives the worth of a field while the neighbour who develops privately keeps the full value in the new use. The same land, two owners, different outcomes, decided by who was made to sell and who was not. That inequity, not a flaw in the principle, is what ended it.

A premium closes part of that gap. The land does not return at its raw existing use value; it returns at that value plus a share of what the consent created. This is not a new idea: it has been set out as an option for Scotland in an independent review of how Germany and the Netherlands acquire development land.[7] The premium narrows the distance between the owner who is compelled and the one who is not. It is not the owner's due but the price of foreclosing most challenges in court, the toll the property regime charges to hand the gift back to the public that made it. The gift is partly returned, the rest kept for the homes it was meant to make.

The prize from doing this is real but modest and unevenly spread, concentrated in the pressured city regions and thin across much of the country, so the case for pre-emption cannot lead on the money it raises.[8] It leads on what it does: it routes land to the homes that were promised.

The legal questions are drafting questions

Two legal objections will come, and both are real. Taking land below its market value invites challenge under the property protections of the European Convention; taking the whole site for one missed obligation invites the argument that the remedy is a penalty out of proportion to the breach. Both sit nearer the settled end of their questions than the open one, because

[6] Crook, *Local authority land acquisition in Germany and the Netherlands*, as cited above: under the Town and Country Planning Act 1947 a 100% development charge applied and public bodies acquired land at existing use value, capturing development value when development occurred; the charge was abolished in the 1950s and compensation reverted to full market value. The fairness problem, that a compulsorily acquired owner received existing use value while a private developer kept full market value, is the standing objection to existing-use-value acquisition.

[7] Crook, *Local authority land acquisition in Germany and the Netherlands*, as cited above. Crook records the Town and Country Planning Association's 2018 proposal to acquire land by compulsory purchase without speculative hope value, paying instead existing use value plus a percentage of consented use value; the IPPR and the Centre for Progressive Policy (both 2018) urged acquisition "at a fair value" more broadly. Crook's rationale for paying above pure existing use value is that landowners still need a sufficient return, an incentive to bring their land forward.

[8] Brett Associates estimated for the Scottish Government (2016) that acquiring all development land at existing use value might generate at best about £230 million a year across all Scottish housing sites, of which roughly £130 million is already captured through existing obligations; the report found the value available was insufficient in many parts of Scotland to fund much. A separate BEFS estimate (2017) for the Edinburgh city region alone reached far higher figures, reflecting that market's intensity and a stimulus assumption, and is not comparable with the national estimate. Both via Crook, *Local authority land acquisition in Germany and the Netherlands*, as cited above.

the owner took this obligation on at the moment consent was granted. An interference that is foreseeable, compensated, and tied to a duty the owner agreed to is the kind the Convention is most willing to allow: it has never required full market value where the public aim is clear and the basis for compensation is rational, and the premium is the design choice that keeps the compensation defensible, narrowing the gap it has to justify.[9] The penalty argument meets the same answer in another key: pre-emption is a consequence Parliament attaches to a failure, not a clause a developer can be held to, and the doctrine polices clauses, not statutes.[10]

This is the easy end of land reform's encounter with property law, not the hard one. Counsel's job is to find the words that make the instrument clear the law, not to rule on whether the policy may be attempted. The aim is plain: enforce the obligation the owner accepted at consent, at a price that returns part of the gift rather than the whole of it. The drafting follows the aim, not the other way round.

Where the land goes

Taking the land back is pointless if the land then sits. Dutch municipalities ran an active version of public land assembly for decades, buying land, servicing it, selling it on for housing and banking the difference for affordable homes; they pulled back after the financial risk of holding land through a downturn caught them with sites on the books and no buyers.[11] A public body that takes land at the deadline and holds it has rebuilt the problem it was meant to dissolve, this time on the public balance sheet.

The land moves on a schedule, not into storage. The site is re-tendered for delivery, and the terms can let a builder pay for the plot as the homes go up rather than in a single sum at the front, against a binding completion schedule. That opens the work to firms without the capital to buy a serviced site outright, the smaller builders a hope-value land market shuts out, and it does so without exempting anyone from the holding cost that made the land move in the first place. The land returns to public hands only to leave them again, pointed at the houses.

[9] James and Others v United Kingdom (1986) 8 EHRR 123 and Lithgow and Others v United Kingdom (1986) 8 EHRR 329: compensation below full market value is compatible with Article 1 of the First Protocol where the public interest is legitimate and the basis for compensation is rational, with a wide margin of appreciation on valuation method. Pairc Crofters Ltd v The Scottish Ministers [2012] CSIH 96 affirmed that wide margin for the Scottish Parliament on land reform. The established reading, drawn from Denyer-Green's analysis of compulsory purchase and discussed in Crook (*Local authority land acquisition in Germany and the Netherlands*, as cited above), is that the larger the gap between market value and the price paid, the stronger the public-interest justification required; the premium is what narrows that gap.

[10] Cavendish Square Holding BV v Makdessi; ParkingEye Ltd v Beavis [2015] UKSC 67: the penalty doctrine tests whether a secondary obligation imposes a detriment out of all proportion to a legitimate interest, and applies in Scotland (per Lord Hodge). The doctrine constrains contractual terms, not statutory remedies, which is the basis for treating statutory pre-emption as distinct from a contractual penalty.

[11] Crook, *Local authority land acquisition in Germany and the Netherlands*, as cited above: Dutch municipalities were historically very active in acquiring land at prices reflecting planned use, servicing it, and selling it on for housing, banking the difference for affordable homes, but became less active because of the financial risks of holding land, having been caught holding sites through the downturn.

The pair

A charge on holding makes the wait expensive; the deadline and the pre-emption give the land somewhere to go when the wait runs out. Neither works alone. A cost with no destination shuffles the land between owners who each wait in turn, the bill changing hands with the title. A destination with no cost is a power the state holds and is never pressed to use, a deadline that arrives to find the owner content to let it pass. Together they do the thing a location-bound land market will not do for itself: they move the land toward the homes the consent was granted for, by making delay cost money and giving the delayed site a way out.

What neither can do is build. Pre-emption puts the land in public hands at a price close to what it was worth before the gift; it lays no brick and raises no loan. The land has to pass to something that can hold it, finance it, and build at a pace the market never chose, and pay for the homes without handing the gift straight back at the point of purchase. That institution is the other half of the machinery, and the land is now ready for it.