Section 106 Obligations and the Community Infrastructure Levy

An advice note

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Context

1 The introduction of the Community Infrastructure Levy (CIL) has significant implications for the use of S106 Planning Obligations. This note is intended to provide helpful and constructive advice to Local Planning Authorities on the changing legal and policy context, when S106 Obligations can and should be used both now and in the future, and the potential for CIL to provide for infrastructure funding.

Legal framework

2 Part 11 of the Planning Act 2008 provided for the introduction of the Community Infrastructure Levy (CIL). The detail of how the CIL will work is set out in the Community Infrastructure Regulations 2010, which came into force in April 2010. CIL is intended to be used for general infrastructure contributions whilst S106 obligations will be for site-specific mitigation. The regulations have three important repercussions for S106 obligations:

- making the test for the use of S106 obligations statutory (R122)
- ensuring that there is no overlap in the use of CIL and S106 (R123)
- limiting the use of 'pooled' S106 obligations post April 2014 (R123)

3 The then Government's intention was to ensure that the CIL and S106 are used to complement one another as methods of securing infrastructure and community benefits. The regulations seek to define the circumstances where each can be used and where they are not appropriate.

4 The current Government has now decided to allow the CIL to proceed, with limited changes. It announced amendments to the CIL regulations which were laid before Parliament in February 2011 and are due to take effect on the 6th April. Further changes, including the as yet undefined requirement for a 'meaningful proportion' of CIL revenues to be passed on to the local community, require primary legislation and must await the enactment of the Localism Bill. The Bill also makes provision to allow CIL monies to be spent on the ongoing costs of infrastructure as well as its initial provision.

Background

5 The introduction of the CIL was the previous Government's response to continuing concerns about the use of S106 obligations - that they were not transparent, were ineffective in providing for major infrastructure and the needs arising from cumulative impact; had a disproportionate effect on major developments, and most development did not pay. The set scale of charges and the legal obligation to pay

the CIL are intended to bring much greater certainty and it will capture a much broader range of development.

6 The CIL is discretionary for the Local Planning Authority. However, scaling back the use of S106 obligations is not discretionary and will have significant implications for those LPAs electing not to adopt it. It will have a particular impact on the potential use of tariff payments secured through S106 obligations. These already have to meet the new statutory tests, and post 2014 will be restricted by the limitations on pooling**. CIL is now the preferred method for collecting pooled contributions to fund infrastructure and the continuing use of S106 based tariffs will become problematic. Authorities with tariffs, or which are considering adopting tariffs, should be looking to move to CIL as a priority.**

7 Previously S106 of the 1990 Town and Country Planning Act provided for the use of planning obligations, and Circular 05/05 set out the Government's policy for their usage, including the tests which obligations should meet to be acceptable. The original five tests were set out in para B5 of annex B to Circular 05/05. The Circular made it clear that this was only an interim response to ongoing criticisms and concerns about the use of planning obligations, and that the Government intended to bring forward a more permanent solution including a planning gain supplement (the predecessor of the CIL) and scaling back of S106 obligations.

8 **Current and future arrangements continue on the principle that there is clear need for S106 obligations, but they should be restricted to the regulation of development and in particular site-specific mitigation. They should not be used for generic payments to the LPA.** Obligations should be seen as complementary to other regimes, particularly the CIL, but also potential funding through mainstream programmes, the New Homes Bonus and Tax Increment Funding. This menu of measures and mechanisms should be used together to support sustainable development.

9 While the CIL remains discretionary, the scaling back of S106 does not, and LPAs need to be aware of the implications in their decision-making**. However, S106 will continue to be the primary mechanism for securing affordable housing through the planning system (subject to any change brought about through amendments to the Localism Bill).**

Use of CIL Funds

10 **CIL differs fundamentally from S106 in that the funds collected are not tied to a specific development or the provision of specific infrastructure**. Whereas infrastructure provision necessary to mitigate the impact of a particular development secured through S106 should be used only for that specific purpose and the developer (or any other party to the S106) can enforce the provision legally; CIL funds can be used flexibly by the LPA to fund any infrastructure as defined within the regulations. They should be seen as a contribution to assisting with the provision of overall infrastructure priorities, which may well change over time. **There is no direct link between a development's requirements for infrastructure provision and the spending of the CIL the development generates.**

The Statutory Tests for the Use of S106

11 R122(2) of the CIL regulations 2010 introduced into law three tests for planning obligations in respect of development that is capable of being charged CIL. This includes most buildings. Obligations should be:-

- necessary to make the development acceptable in planning terms
- directly related to the development
- fairly and reasonably related in scale and kind to the development

12 For other non-CIL development eg Golf Courses, wind turbines, and quarries, the statutory tests do not apply – any S106 for such development remains subject to the policy tests set out in Circular 05/05.

13 If an obligation does not meet all of these tests it cannot in law be taken into account in granting planning permission. While these tests are a consolidation of the 05/05 advice, they are now a legal requirement giving them much greater force. Whereas previously there was a view among LPAs and developers that if a S106 had been signed voluntarily (or if a unilateral undertaking had been freely offered) it would not be scrutinised too closely, the statutory status of the tests brings a much greater need to demonstrate that the terms are lawful. There is clear evidence that the Planning Inspectorate and the Secretary of State are taking a much more forensic interest in S106 agreements to ensure the statutory tests are met.

S106 Financial Contributions failing to meet the statutory tests – recent examples from Secretary of State decisions

Mersea Homes CBRE, Land at Westerfield Rd: The Secretary of State gave no weight to a number of financial contributions, for education, playing fields and a Country park on the grounds that they did not meet the statutory tests. The site was considered to already make a good contribution to open space, the country park was not directly related to the development and there was sufficient capacity within existing schools. The Contributions were not fair and reasonable.

Doepark Ltd, American Wharf Southampton: The Secretary of State gave no weight to financial contributions for public open space, play space, sports pitches and transport infrastructure on the basis that there was insufficient information to decide whether they met the tests of being necessary to make the development acceptable in planning terms, directly related to the development and reasonable in scale and kind.

Tesco Springfields Retail Park, Stoke on Trent: The Secretary of State found that contributions to environmental improvements related to off-site work not directly related to the development and employment contributions were not necessary in planning terms to make the development acceptable

14 For the LPA to take account of a S106 in granting a permission it needs to be convinced that without the obligation permission should be refused**. It is not sufficient to rely on a generic LDF policy or adopted SPD.** This is particularly

relevant where there is an authority wide tariff scheme. The LPA should be able to provide evidence of the specific impact of the particular development, the proposals in place to mitigate that impact and the mechanisms for implementation.

15 **This has been the position since the CIL regulations came into force in April 2010 and applies irrespective of whether an authority has or intends to adopt CIL.**

Example

An authority has a S106 based tariff system in place to require payments for school places from residential development. To receive monies under the tariff for a specific planning application, it should be able to demonstrate that there is a deficit of school places within the local catchment area which make the application unacceptable in planning terms and that the Education Authority has measures in place to remedy that deficit, to be funded in whole or in part from S106 contributions. If this is not the case and the reality is that contributions are being sought as a fund to support school places generally across the LPA area, there is the risk that a decision to grant permission could be taken unlawfully, as the contribution should not have been taken into account.

In the current financial climate LPAs will also need to be aware of the possible difficulties of justifying accepting tariff contributions for new facilities where existing facilities are coming under pressure for closure as a result of budget cuts.

Ensuring there is no overlap in the use of CIL and S106

16 The purpose of these provisions in the regulations is to avoid the situation where a developer pays CIL and is then asked to provide infrastructure through a S106 agreement for which the Authority is collecting CIL payments, resulting in the developer paying twice. To avoid this, authorities adopting CIL are required under R123 of the CIL Regs to prepare and publish a list of those items or types of infrastructure it intends to fund through CIL. This will be key to the operation of their S106 obligations.

17 To avoid any double charging to developers, the planning authority cannot then seek the provision of or contributions towards those items included in their statement through S106 obligations**, even where they could be justified as site-specific remediation**

18 Once an authority has a charging schedule in place the default position is that all chargeable developments will pay CIL. However there may be certain sites where the on-site requirement for the provision of infrastructure (which for very large sites could include for example education, health and flood prevention works,)

Example

An authority has a large urban extension planned. The number of children generated would be sufficient to justify an on site primary school, which the developer is willing to provide in line with the phasing of development. It is likely that the CIL liability would be less than the cost of the primary school and the authority has not accumulated sufficient CIL to pay for this and meet other commitments elsewhere. It would therefore be in the interests of the authority (and future residents) to exclude this development from CIL liability by specifying it as an exception in the R123 List.

19 To clarify the position LPAs will need to:-

- get a Charging Schedule in place
- understand that for the majority of developments infrastructure requirements will be funded through CIL and other funding streams and can no longer be the subject of S106 obligations.
- identify whether there are any sites which have particular on-site infrastructure requirements which are either going to be difficult to fund through CIL within required timescales (eg not enough funds available or too expensive) or better provided through S106 (eg provided on site by the developer) or where the CIL generated is likely to be less than the value of the S106 obligations.
- include such sites in the R123 List as exceptions and therefore not liable for CIL.

20 This is much more likely to be the case for large-scale developments. There is no prescribed process for compiling or amending the List, so changes can be made at short notice where circumstances dictate. This allows considerable flexibility for authorities to deal with changing or unforeseen circumstances. Careful planning of how the R123 List is compiled will save problems of omission or possible challenge. If a CIL authority does not publish a R123 List all infrastructure is deemed to be covered from CIL funding. This would restrict the scope of all S106 obligations to non-infrastructure items.

Limiting the Use of 'Pooled' S106 Contributions post April 2014 (or on local adoption of CIL)

21 After 6 April 2014 the use of pooled contributions collected through S106 obligations (tariffs) will be limited for all authorities. For those adopting the CIL before April 2014 the restrictions will come into place on its adoption. This is consistent with the principle that the vehicle for future collection of pooled contributions for infrastructure should be CIL.

22 The impact of this provision is that authorities will only be able to accept a maximum of five contributions towards infrastructure projects or types of infrastructure that could otherwise be funded from the CIL**. If they have agreements in place for**

more than five S106 contributions after April 2010 for a project or type of infrastructure (such as a school extension or public realm improvements), from April 2014 or the date they adopt CIL if earlier, they will not be able to collect any more contributions for that purpose. (Always bearing in mind that any such contributions should first meet the three statutory tests). The five contributions include any from unimplemented consents.

23 For development which cannot be funded by CIL, including affordable housing, there are no pooling restrictions, and non-infrastructure items such as training for example are not subject to these provisions. All these items should still however meet the Circular 05/05 policy tests for planning obligations.

Recent and Future Changes

24 **Amendments to the CIL Regs, operable from 6th April 2011**

- Clarification that development affecting only the interior of a building is not subject to CIL
- Enabling Charging Authorities to charge by instalments
- Clarifying that the pooling provisions apply retrospectively to planning obligations made from 6th April 2010
- Removal of the minimum threshold of £50000 for payments in kind
- Minor procedural and administrative streamlining

25 **Further changes through the Localism Bill**

- Ensuring that a 'meaningful proportion' of funds goes directly to local communities
- Restricting the binding nature of examiners reports to ensuring that Charging Schedules comply with CIL legislation
- These changes require primary legislation through the Localism Bill and further regulation and will therefore not be in force before April 2012. If there are any further changes to the regulations, such as including affordable housing as CIL infrastructure, this would also be implemented from April 2012.

Key Messages

A **Decisions on whether to adopt CIL should be taken in full awareness of the scaling back of S106 obligations and the potential income streams for funding infrastructure. Local authorities should assess how these factors are likely to impact on their particular circumstances.**

B **If an authority has a S106 based tariff system it should be thinking about working towards CIL as a priority**

C **S106 obligations are intended to make unacceptable development acceptable. If a development is acceptable without the obligation, it should be approved.**

D **If an authority has signed agreements for five or more pooled contributions through S106 obligations, it cannot legally accept any more after April 2014 or the date that it adopts CIL if earlier.**

E **Each individual case should be looked at carefully before seeking S106 tariff payments. If there is not sufficient evidence to meet the statutory tests the authority may risk challenge that the decision has been taken unlawfully. It will also be vulnerable at any planning appeal.**

F **To make optimum use of the CIL and S106 requires pro-active infrastructure planning and funding. Effective infrastructure planning requires a co-ordinated and systematic approach involving a wide range of partners.**

G **The increased scrutiny and testing of S106 obligations should move the negotiation from behind closed doors to a more open and transparent approach, including community involvement.**

H **S106 obligations should be used for:**

- **regulating development**
- **on site mitigation**
- **affordable housing**
- **securing benefits from non-CIL developments**

I **They should not be used for:**

- **general contributions to infrastructure funding**

J **The R123 Statement will become very important in the implementation of CIL once authorities have a charging schedule in place. However, there is no requirement to publish the statement in advance of adoption of the charging schedule.**

K **APRIL 2014 ISN'T FAR AWAY – Authorities need to be taking action now**