

Community Infrastructure Levy:
The future of Section 106 Agreements

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Topics

- Introduction and context
- CIL overview
- Limitations on use of s.106 agreements
- Future Changes
- Final Thoughts

Introduction and context

Why is it important?

- Regulations have adjusted how councils need to plan for and implement the use of CIL alongside s.106
- Impacts on viability, evidence, infrastructure evidence and Regulation 123 list
- April 2015 s.106's can only be pooled on very limited basis, if CIL is not in place there is a risk of significantly reducing income from developer contributions



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CIL Overview

Nick Boles: -

"We want local authorities to move away from the tariff-based approach of section 106 agreements. Developments should not be regularly charged for infrastructure requirements based on standard calculations."



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CIL Overview

BUT

- CIL regulations restrict rather than outlaw tariff based approach to funding infrastructure
- PPG still refers to the possible use of "tariffs style charges"



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CIL Overview

- Is a mechanism for developer contributions
- Purpose is to contribute towards infrastructure needed to support an area
- Applies to planning permission for development that involves net increase to floor space (exceptions)



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CIL Overview

- Emphasis is on using CIL rather than s.106 as primary mechanism to contribute to wider infrastructure requirements
- BUT "... some site specific impact mitigation may still be necessary in order for a development to be granted planning permission.. the Government considers there is still a legitimate role for development specific planning obligations to enable a local planning authority to be confident that the specific consequences of a particular development can be mitigated". (PPG – CIL para 93)

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Limitations on Use of s.106 Agreements

Regs 122 and 123 place limits on the use of planning obligations in three respects:

- Government's policy tests on the use of planning obligations put on a statutory basis, for developments that are capable of being charged the levy;
- Ensuring the local use of the levy and planning obligations does not overlap; and
- Limit on pooled contributions from planning obligations towards infrastructure that may be funded by the levy.

(PPG – CIL para 94)

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Section 106 obligations and the Reg 122 tests

Oxfordshire CC v Secretary of State for Communities and Local Government [2015] EWHC 186

- High Court
- C sought to quash decision of S of S on the basis that administration fees claimed by LPA did not comply with CIL Regulation 122
- Reg 122 is a statutory requirement not a policy – it must be adhered to and cannot be departed from
- The test in reg 122(2)(a) imposes a high threshold because the obligation has to be "necessary" not merely desirable
- Challenge dismissed
- "No nice round numbers" – Need to consider particular development when charging for admin / monitoring

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Section 106 obligations and the Reg 122 tests

R(on application of Tesco Stores Limited) v Forest of Dean District Council and others [2015]

- Recent Court of Appeal decision where Eversheds LLP acted for Windmill Limited
- Highlighted the fact that planning decisions can be finely balanced
- Considered what the decision-taker needs to do to comply with Reg 122
- The question was whether the s106 obligations had done enough and met the tests in Reg 122



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CIL/ S.106 – No Overlap

PPG

- Charging authorities should work **proactively with developers** to ensure they are clear about the authorities' infrastructure needs and what developers will be expected to pay for through which route.
- There should be no **actual or perceived 'double dipping'** with developers paying twice for the same item of infrastructure.

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Relocation of s.106 obligations to setting CIL

- CA should take **development costs** into account when setting CIL, particularly those likely to be incurred on strategic sites or brownfield land
- Development costs include:-
 - **Costs arising from policies on planning obligations** (e.g. policies on affordable housing)
 - **identified site-specific requirements for strategic sites**



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5 obligation limit – Reg 123

- 3) A planning obligation ("obligation A") **may not constitute a reason for granting planning permission to the extent that—**
 - (a) obligation A provides for the **funding or provision of an infrastructure project or type of infrastructure**; and
 - (b) **five or more separate planning obligations** that—
 - (i) relate to planning permissions granted for development within the area of the charging authority; and
 - (ii) which provide for the funding or provision of **that project, or type of infrastructure**, have been entered into **on or after 6th April 2010**

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Pooling Restrictions – 1st April 2015

- Prevents councils from collecting more than five separate planning obligations for a project or type of infrastructure
- Means that where there is no mitigation against the impact of development, it can prevent LPA's from granting planning permission
- Applies retrospectively from April 2010 meaning LPA's without a CIL Charging Schedule may find they have exceeded or are close to exceeding their limit for a particular infrastructure project

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'Relevant Infrastructure' – Reg 123 List

- (4)“relevant infrastructure” means—**
 - (a) where a charging authority has published on its website a list of infrastructure projects or types of infrastructure that it intends will be, or may be, wholly or partly funded by CIL those infrastructure projects or types of infrastructure, or
 - (b) where no such list has been published, any infrastructure.
 - (c) in relation to any planning obligation requiring a highway agreement to be entered into or condition falling within paragraph 2(A) where no such list has been published, no infrastructure”

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Importance of getting 123 list right

2014 CIL Guidance

- CAs **should not** remove an item from reg 123 list just so that they can fund this item through a new section 106 agreement
- CAs may amend reg 123 list without revising their charging schedule, **subject to appropriate consultation**
- BUT** where a change to the reg 123 list would have a **very significant impact** on the visibility evidence that supported examination of the charging schedule, this should be made as part of a **review of the charging schedule.**

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Project Splitting

- Possible to identify **site specific infrastructure** which is **not to be funded through CIL** by excluding it from 'relevant infrastructure'
- Tight definitions of infrastructure projects** may assist in avoiding falling foul of the 5 obligation limit
- Local planning policies** should support approach



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Concluding thoughts - CIL v s.106

Pros	Cons
Certainty	No procedure to ensure the provision of particular infrastructure
Transparency	More expensive
Wider range of infrastructure projects	Lack of uniformity

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Concluding thoughts - Future changes to planning obligations

The Government's pledge to deliver a faster planning system

- The Autumn Statement 2014 included a commitment to consult on measures to speed up planning obligations
- In HM Treasury's July 2015 Productivity Plan the Government announced its intention to introduce a dispute resolution mechanism for section 106 agreements in order to "speed up negotiations and allow housing starts to proceed more quickly"




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Concluding thoughts

- S106 will continue to have a key role for **site specific requirements**
- LPAs are likely to want to continue to **maximise scope** for funding infrastructure through s.106
- LPAs will need to take care when setting CIL rates to factor in 106 'asks' - ability to switch to 106 funding **has been limited** by recent amendments to CIL regs
- Corresponding need to **clearly articulate 106 'asks'** through local policy Provides developers with more upfront certainty about how much money they will be expected to contribute.

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