Section 106 Obligations and the Community Infrastructure Levy

An advice note

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An advice note

Context

1 POS originally produced an advice note in March 2011. This note supersedes the 2011 version, bringing the advice up to date both in respect of the changes in the regulations and experience of authorities in implementing CIL.

2 The Community Infrastructure Levy (CIL) Regulations have significant implications for the use of S106 Planning Obligations, both for authorities who have or are intending to introduce CIL and for those who are not. CIL and S106 are both tools available to LPAs to fund and deliver infrastructure. To achieve maximum effectiveness authorities should treat them as complementary mechanisms. This note is intended to provide helpful and constructive advice to Local Planning Authorities on how this can be achieved.

Legal framework

3 Part 11 of the Planning Act 2008 provided for the introduction of the Community Infrastructure Levy (CIL). The detail of how CIL works is set out in the Community Infrastructure Regulations 2010 as subsequently amended in 2011,2012 and 2013. CIL is intended to be used for general infrastructure contributions whilst S106 obligations are for site specific mitigation. The regulations have three important repercussions for S106 obligations:

- Making the test for the use of S106 obligations statutory (S122)
- Ensuring that there is no overlap in the use of CIL and S106 (S123)
- Limiting the use of 'pooled' S106 obligations post April 2014 (S123)

4 The 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 2010 regulations defined the circumstances where each can be used and where they are not appropriate. Subsequent changes in the regulations and experience in setting and using CIL have led to a clearer picture of how they can be best utilised.

Background

5 The introduction of the CIL was the then 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 didn't pay. The set scale of charges and the legal obligation to pay the CIL were intended to bring much greater certainty and to capture a much broader range of development.

6 CIL remains 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 April 2015 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 S106 based tariffs should be reviewing their procedures as a matter of urgency and considering moving to CIL.**

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. (This has now been superseded by the CIL regulations and the NPPF). 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 a more permanent solution including a planning gain supplement (the predecessor of the CIL) and scaling back of S106 was the firm intention.

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, LEP 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**.**

10 **S106 obligations continue to be the primary mechanism for securing affordable housing through the planning system.** This note does not address affordable housing in any detail. However it is important for LPAs to recognise the financial relationship between CIL, affordable housing and other S106 obligations. They should be looked at together to ensure that the authority takes a balanced and equitable approach to delivering development which meets its planning and community objectives.

Use of CIL Funds

11 **CIL differs fundamentally from S106 in that the funds collected are not tied to a specific development or the provision of specific infrastructure**. Unlike infrastructure provided through S106 planning obligations, which must be necessary to mitigate the impact of a particular development and used only for that specific purpose, CIL funds can be used flexibly by the LPA to fund any infrastructure as defined within the regulations. They can be pooled freely (unlike S106) to fund infrastructure priorities and collectively between authorities towards larger strategic investments. They should be seen as a contribution to assisting with the provision of overall infrastructure priorities which may well change over time**.**

12 **There is no direct link between a development's requirement for infrastructure provision and the spending of the CIL the development generates.** Whilst this can be of significant benefit to the LPA in providing flexibility to fund infrastructure priorities it can also lead to uncertainty about infrastructure delivery, particularly in the short term after CIL adoption when funds tend to build up only slowly. **To help remove uncertainty authorities should highlight their priorities for expenditure through their Infrastructure Delivery Plans, S123 list and capital programmes. When introducing CIL LPAs should also prepare SPD setting out how they intend CIL and S106 obligations to work together to deliver infrastructure and support development.**

Use of the Neighbourhood Portion

13 At least 15% of CIL receipts must now be allocated for spending in agreement with the local community in the area where the development id taking place. Where there are neighbourhood plans this increases to 25%. This is to enable local communities to spend an element of CIL receipts on local priorities. To coordinate infrastructure spending from all

sources it is therefore important to engage with the local communities to ensure that the neighbourhood portion, mainstream CIL spend and s106 are utilised in a complementary way.

The Statutory Tests for the Use of S106

14 S122(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

15 Non-CIL developments such as golf courses, wind turbines and quarries are not covered by the CIL regulations, but are subject to the same 3 tests as set out in para 204 of the NPPF.

16 If an obligation does not meet all of the 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 - examples from Secretary of State and PINS decisions

Mersea Homes CBRE, Land at Westerfield Rd, Ipswich: 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

Scott Bailey, Raglan Rd, Plymouth: City wide formula based standard charges were not supported by any specific evidence on the needs arising directly as a result of the development. Found to fail all three of the statutory tests, and inspector awarded costs against the authority

Yap, Knoll Drive, Barnet: Inspector found insufficient evidence to substantiate the local need for contributions or the specific use to which they would be put to mitigate impact of the development and awarded costs against the authority

Shahidi, Queens Avenue, Barnet: The Inspector found that the tariffs were not directly related to the local and particular circumstances of the appeal and awarded costs against the authority

17 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.

18 PINS advises Inspectors that for obligations in the form of financial contributions to meet the Reg 122 tests (now also set out in the NPPF para 204) evidence will be needed in respect of:

- The relevant development plan policy or policies, and the relevant section of any SPD or SPG
- Quantified evidence of the additional demand on facilities or infrastructure which are likely to arise from the proposed development
- Details of existing facilities or infrastructure, and up to date, quantified evidence of the extent to which they are able or unable to meet those additional demands
- The methodology for calculating any financial contribution which is shown to be necessary to improve existing facilities or infrastructure, or provide new facilities or infrastructure, to meet additional demand
- Details of the facilities or infrastructure on which any financial contribution will be spent

19 **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 generic 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 or standards are being reduced as a result of budget cuts.

Ensuring there is no overlap in the use of CIL and S106: The S123 List

20 Authorities adopting CIL are required under S123 of the CIL Regs to prepare and publish a statement of those items or types of infrastructure it intends to fund through CIL. This will be key to the operation of their S106 obligations. To avoid any perception of double charging to developers, the planning authority cannot then seek contributions towards those items

included in their statement through S106 obligations, even where they could be justified as site specific remediation.

> **Example**
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> The published S123 List statement could include community facilities as infrastructure to be funded through CIL. For large scale developments it may be possible to justify a specific on-site requirement for a community centre as a S106 obligation. However, were an authority to seek this the developers could claim that having paid the CIL, some of which is identified in the statement to fund community facilities, they should not have to make another contribution for the same purpose through a planning obligation.

21 To avoid such situations arising LPAs will need to consider carefully at an early stage what could be justifiable site specific mitigation requirements, what their priorities for CIL expenditure are likely to be and whether there are specific sites where they are likely to require major infrastructure to be provided through S106 obligations. The amendments to the regulations now require Authorities to publish a draft of their S123 list in advance of a CIL examination, which provides the examiner and objectors and third parties with an indication of its likely priorities.

22 The content of the list will vary between authorities according to their circumstances and their requirements. For some authorities, where there are specific large scale pieces of infrastructure necessary to unlock development across the area, the S123 list could be very limited and focussed. In other areas where infrastructure requirements result from incremental increases in demand across the board, their list is likely to be more general in nature, enabling them to respond flexibly.

23 Authorities will want to pay particular attention to how they deal with large strategic sites. These can have major and expensive infrastructure demands which need to be delivered early to enable development to proceed. Where this is the case (and the statutory tests can be met) it is more likely that S106 obligations will be the appropriate delivery mechanism, and care needs to be taken that the R123 list is prepared accordingly and that the CIL rates take account of the likely S106 costs.

24 Changes in the guidance to allow more flexibility in setting differential CIL rates can be helpful in this respect. Differential rates can be set in relation to geographical zones, types of development or scale of development provided that they can be justified in terms of viability. Setting low or zero rates for specific strategic sites can provide scope for funding major infrastructure through S106.

25 There is no prescribed process for compiling or amending the S123 List, so making changes to reflect changes in priorities and circumstances is a straightforward task for the Local Authority. Careful planning of how the statement is compiled will save problems of omission or possible challenge. If a CIL authority does not publish a S123 Statement 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 2015 (or on local adoption of CIL)

26 After 6 April 2015 the use of pooled financial contributions collected through S106 obligations will be limited for all authorities. For those adopting the CIL before April 2015 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.

27 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 put 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 2015 or the date they adopt CIL if earlier, they will not be able to collect any more contributions for that purpose.** They would also need to bear in mind that any such contributions should first meet the three statutory tests. The five contributions include any from unimplemented consents.

28 There has been debate about the exact meaning of 'infrastructure projects or types of infrastructure' and legal advice has been sought by some authorities. There are as yet no case law or appeal decisions which give guidance on the subject. The CIL guidance section of NPPG gives the example of five separate planning obligations for a specific item of infrastructure (eg a local school). Generic contributions towards 'education' or 'transport' would be 'totted up' in the same way. LPAs, particularly those who have not adopted CIL, should be reviewing their historic S106 obligations post 2010 as a matter of urgency to ensure that they do not take any unlawful contributions after April 2015, and to consider how best to enable them to continue taking contributions in the future.

29 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 NPPF policy tests for planning obligations.

RECENT CHANGES

Changes to the threshold for S106 Obligations

30 On 28 November 2014 the Minister of State for Housing and Planning issued a written statement on 'Support for small scale developers, custom and self-builders'. This followed a consultation on Planning Contributions (S106 Planning Obligations). The statement announced changes to national policy with regard to S106 planning obligations and has been mirrored in amendments to the NPPG which now states that affordable housing and tariff style planning obligations should not be sought from small scale and self-build development ie developments of 10 units or less and which have a maximum combined gross floorspace of no more than 1000 sqm. In designated rural areas LPAs may choose to apply a lower threshold of 5 units or less.

31 As national policy this overrides any tariff style contributions sought for developments below the 10 threshold. These will be outside the scope of S106 obligations in the future. CIL will still be payable on such developments where they are CIL liable.

KEY MESSAGES

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.

If an authority has a S106 based tariff system it is very likely that it will be severely restricted in taking further contributions post April 2015 because of the Pooling Restrictions. Authorities not pursuing CIL should review their policies and procedures.

CIL authorities, and those pursuing CIL, should review how CIL and S106 obligations can and should work in a complementary way to achieve infrastructure delivery. This should include the S123 List, differential rates and SPD.

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.

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.

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.

S106 obligations should be used for:

- **Regulating development**
- **On site mitigation**
- **Affordable housing**
- **Securing benefits from non-CIL developments**

If a development is acceptable without the obligation it should not be sought

They should not be used for general contributions to infrastructure funding

POOLING RESTRICTIONS START APRIL 2015 – Authorities need to take action to ensure they comply with the regulations

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