

Community Infrastructure Levy (CIL): A Practical Update

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Landmark Chambers

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Community Infrastructure Levy



- Origins & Aims of CIL & Review of CIL
 - Implementation
 - Particular issues
 - The Peace Review of CIL
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Origins and Aims of the Levy



- Came into force on 6 April 2010: Part 11 of the Planning Act 2008 & CIL Regs. 2010, applying to England & Wales
- It sought to provide a faster, fairer, more certain and transparent means of collecting developer contributions to infrastructure than individually negotiated S. 106 planning obligations.



CIL: What is it?



- Described in the PPG as: *“a tool for local authorities in England and Wales to help deliver infrastructure to support the development of the area”*
- Applies to developments of 100 sq.m. net additional floorspace, or any new house or flat which is not covered by an exemption (e.g. self-build)
- Other exemptions apply e.g. for charities in certain circumstances

Current Review



- Peace review set up in November 2015 – ongoing
 - Westminster Briefing “Defining Contributions” (with developers, LPAs and solicitors) held on 17 August 2016:
 - (i) Progress on CIL so far
 - (ii) Effectiveness of CIL
 - (iii) Problems
 - (iv) Progress on the review of CIL
 - Outcome of review expected “later this year”
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Source materials



- Planning Act 2008
 - The Community Infrastructure Levy Regulations 2010, as amended
 - Planning Practice Guidance “chapter” on CIL in England but in Wales also PPW, 8 Ed. 2016 and earlier advice
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“Infrastructure:



S.216(2) of the Planning Act 2008 provides that Infrastructure includes:

- (a) Roads and other transport facilities,
- (b) Flood defences,
- (c) Schools and other educational facilities,
- (d) Medical facilities,
- (e) Sporting and recreational facilities, and
- (f) Open spaces.



Implementation

- (1) **Regulation 123 List:** the infrastructure must be on the list to secure the funding of it.
- (2) **Charging Schedule:** a table of levy charges so that each developer can calculate up front how much it must pay for its development.
- (3) **Examination:** The Charging Schedule has to go through Examination by an independent inspector before adoption.
- (4) **Charge:** calculated as a £ per sq. m. rate on net additional (internal) floor space. The rates adopted can vary by geographic area or use or size.
- (5) **Payment:** Due when the development starts – the authority can allow it to be paid by instalments. Paid to authority – landowner responsible for paying it.



Setting the CIL



- CIL – A guide to the Production of a Charging Schedule (6 September 2011), Wales specific guidance on preparing a Charging Schedule (pp.25-7)
 - Requires detailed consideration of the infrastructure needs of the area
 - Assessment of infrastructure needs as part of the local plan process
 - Evidence must address issues of viability as well as need
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CIL & Planning Obligations



- Purpose of CIL is to provide infrastructure to support the development of an area
 - It is not to make individual planning applications acceptable in planning terms
 - Therefore it is considered that there is still a legitimate role for development specific planning obligations to enable a lpa to be confident that the specific consequences of a particular development can be mitigated (PPG: ID25-094 20140612)
 - Thus obligations are intended to play a complementary role to the Levy - CIL Reg. 123
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Regulations 122 and 123 (pp.8-10)



- Reg. 122(2) means that a s.106 obligation must meet 3 legal tests:
 - (i) necessary to make the development acceptable in planning terms
 - (ii) directly related to the development
 - (iii) fairly and reasonably related in scale and kind to the development.
- Reg.123 –
 - (i) Excludes use of obligations where for relevant infrastructure
 - (ii) Excludes conditions relating to highway agreements (p.14)



Regulation 123(3) (p.10)



- (3) Other than through requiring a highway agreement to be entered into, 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 provides for the funding or provision of a 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 provide for the funding or provision of that type of infrastructure,*
- have been entered into on or after 6th April 2010.*



Consequence of Pooling: Adopting a CIL Schedule without a Local Plan



- Stimulus of reg. 123 for LPAs to bring forward Charging Schedules
- What about authorities struggling to bring forward Local Plans?
- PPG states that “*Charging Schedules should be consistent with, and support the implementation of, up-to-date relevant Plans*” (ID 25-010-20140612)
- However, nothing in the legislation requires a Schedule to come forward alongside a Local Plan or which requires one to be in place already
- It goes however to the evidence needed to justify the Charging Schedule
- However, it has been done by Tandridge (basing it on a 2008 Core Strategy), Southend and Birmingham



Regulation 123 and Pooling (1)



- In an area with no CIL Charging Schedule
- Where a proposed development would have significant impacts
- If there are already 5 or more obligations since 6 April 2010 – in relation to the type of infrastructure needed to mitigate the impact (POOLING)
- Then LPA can give no weight to that planning obligation in favour of the grant of planning permission (Reg. 123(3))
- As a planning obligation can only be required where otherwise development would not be acceptable in planning terms (Reg. 122(2)), the impact of the development must be unacceptable
- **Thus the effect of Reg. 123(3) is that planning permission would have to be refused**



Regulation 123 and Pooling (2)



- The Regulations restrict the use of generic section 106 tariffs for items that are capable of being funded by the levy
 - Authorities who refer to generic types of infrastructure (e.g. education) rather than specific projects, in their s.106 agreements, will be unable to collect more than 5 contributions towards those generic funding pots
 - Care required in drafting Reg. 123 list
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Is it possible to avoid the Pooling Obligations?



- Seeking to approve applications for sustainable development (NPPF para. 187)
 - Conditions requiring an obligation to be entered into e.g.
 - (i) No development until obligation agreed and executed; or
 - (ii) No development until a scheme providing for the payment of an (education) contribution etc.
 - Section 38 of the Highways Act 1980 (p.13) – but is it a payment in kind?
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Specific Issues



(1) Calculation of CIL: in use buildings

(2) The local authority's discretion



In-use buildings (1)



Regulation 40 – calculation of the chargeable amount

The formula in regulation 40(7) applies (p.4)

KR (which is deducted) includes the gross internal area of “in-use buildings”



In-use buildings (2)



Reg 40(11) (p.5):

“in-use building” means a building which—

- (i) is a relevant building, and
- (ii) contains a part that has been in lawful use for a continuous period of at least six months within the period of three years ending on the day planning permission first permits the chargeable development;



In-use buildings (3)



Regulation 40(11):

“relevant building” means a building which is situated on the relevant land on the day planning permission first permits the chargeable development;



In-use buildings (4)



R (Hourhope) v Shropshire Council [2015] EWHC 518 (Admin)

Hourhope had purchased a former public house. In March 2014, it obtained planning permission to demolish the pub and replace it with residential units.

Hourhope adduced evidence that the pub had ceased trading in May 2011, but the furniture and fittings remained on site. The pub's company director remained living at the site, as he hoped to re-open the business. The property was repossessed on August 22, 2011 and sold.

HELD:

- Mere existence of a lawful use is not sufficient
- Actual use is required (para. 23)

The Local Authority's Discretion



Local Authority's Discretion (2)



R (oao Orbital Shopping Park Swindon) v Swindon BC [2016]
EWHC 448 (Admin)

1. The landowner applied for and was granted two separate PPs
 - a. to insert a mezzanine floor in retail unit
 - b. External alterations.
2. A retail mezzanine is not to be treated as development for the purposes of CIL as planning permission is required by section 55(2A) TCPA 1990 and Article 44 of the DMPO (p.19): regulation 6(1)(c) of the CIL Regulations (p.3).

Local Authority's Discretion (3)



3. The external alterations did not give rise to a CIL liability as no new floorspace was created.
4. If the two applications had been made as one, the development would not have fallen within the regulation 6(1)(c) exemption and CIL would have been payable.
5. The Council treated the two applications as one and issued a liability notice and demand notice.
6. The notices were quashed.
7. The LA had no discretion to treat two applications as one.
8. The cases relating to tax avoidance did not assist the Council.

Review: Progress on CIL



- 127 LPAs charging CIL
 - A further 88 LPAs have “*taken steps towards adopting CIL*” (although some of these have decided not to at present)
 - CIL is further advanced in the south and east of the country
 - There is almost complete CIL coverage in London
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Effectiveness of CIL



- CIL was only ever intended to produce a contribution to infrastructure costs
 - CIL is yielding between 5-20% of the funding required
 - Viability testing means that only residential and retail developments are attracting a significant CIL charge with other developments having generally a low or zero rate
 - Mayoral CIL has worked well
 - CIL has produced certainty in terms of rates and transparency
 - CIL works better when it has been in place for a few years and has thus “bedded down”
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Problems



- Relationship with section 106 obligations
- Huge variation in rates across the country
- Administrative burden: too many forms
- Complexity of the regulations
- Statutory environmental mitigation (e.g. SANGS)
- Exemptions & reliefs: confusion & reduction in moneys available
- Paying CIL alongside affordable housing contributions is making development unviable
- Practicability of using payments in kind
- The requirement to pass on a “meaningful proportion” of CIL to the local communities that receive development can be problematic



The Peace Review (1)



Role was confirmed in Nov 2015

PURPOSE:

To assess the extent to which CIL does or can provide an effective mechanism for funding infrastructure, and to recommend changes that would improve its operation in support of the Government’s wider housing and growth objectives.



The Peace Review (2)



Output

“9. By the end of March 2016, the Group will prepare a report for the Minister for Housing and Planning to consider. The report will include:

- an assessment of whether CIL is meeting its objectives and any recommendations for future change;
- an assessment of the relationship between CIL and Section 106, and how this is working in practice;
- an analysis of the operation of the CIL system and specific recommendations of how it could be improved;
- an assessment of how CIL is deployed by local authorities both to deliver infrastructure and to support community engagement.”

PlanningResource

22 April 2016



CIL review chair: levy has failed to meet policy objectives:

The chair of an independent panel set up by the government to review the Community Infrastructure Levy (CIL) has said that the levy is 'not providing a huge amount of funding for infrastructure' and has failed to provide a 'faster, simpler, more transparent system' than section 106.

"We don't actually think it's providing a huge amount of funding for infrastructure, and it most certainly hasn't provided a faster, simpler, more transparent system," Peace said. Peace told delegates that the panel which issues a call for evidence last November had approach its task with "an incredibly open mind" with "all options on the table".