















Round-up of recent changes to the CIL Regulations

Andrew Byass
Paul Brown QC

CIL: A work in progress?

- Since the introduction of CIL in 2010, the Regulations have been amended by the government repeatedly.
- The latest amendments are contained in the Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019/1103.

<input type="checkbox"/> Select all	1 - 10	    
<input type="checkbox"/>	> 1. Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019/1103 	
<input type="checkbox"/>	> 2. Community Infrastructure Levy (Amendment) (England) Regulations 2019/966 	
<input type="checkbox"/>	> 3. Community Infrastructure Levy (Amendment) Regulations 2018/172 	
<input type="checkbox"/>	> 4. Community Infrastructure Levy (Amendment) Regulations 2015/836 	
<input type="checkbox"/>	> 5. Community Infrastructure Levy (Amendment) Regulations 2014/385 	
<input type="checkbox"/>	> 6. Community Infrastructure Levy (Amendment) Regulations 2013/982 	
<input type="checkbox"/>	> 7. Community Infrastructure Levy (Amendment) Regulations 2012/2975 	
<input type="checkbox"/>	> 8. Local Authorities (Contracting Out of Community Infrastructure Levy Functions) Order 2011/2918 	
<input type="checkbox"/>	> 9. Community Infrastructure Levy (Amendment) Regulations 2011/987 	
<input type="checkbox"/>	> 10. Community Infrastructure Levy Regulations 2010/948 	

The Amendments

- The new amendments come into effect as of **1 September 2019.**
- They only apply in England.



The amendments

Key changes:

- Preparation of charging schedules
- Rules relating to section 73 permissions
 - Calculation of chargeable amount
 - Carry over of relief
- Commencement notices
- Distress
- Infrastructure funding statements
- Monitoring fees
- Pooling restrictions on s. 106 agreements

Charging schedules

- **Regulation 3** relaxes the requirements for charging authorities to consult on CIL charging schedules.
 - Previously, local authorities were required to consult on a preliminary draft charging schedule (**reg 15**) and then a draft charging schedule (**reg 16**)
 - **Reg 15** stage now removed; details of parties to be consulted etc now transferred into **reg 16**
 - Charging authorities will now be required to conduct only one round of consultation, with any further consultation "at the authority's discretion"
- Query the implications in terms of the robustness of the resulting charging schedules ...

Section 73 permissions: Calculation of chargeable amount

- Effect of section 73 is that a new permission for the entire development
- Previously, when a s.73 permission resulted in an increased CIL liability, the total floorspace was calculated with reference to the CIL rate in existence at the time of the new permission
 - Result: potential unfairness to developers as it meant that the entire development was subject to indexation rather than additional floor area.
- New regulations: the previously permitted floor area will be charged at the rate *that was in force at the time it was permitted.*

Calculation of chargeable amount: Further changes

- Charging authorities should apply an index of inflation "to keep the levy responsive to market conditions."
 - This figure will be published by the Royal Institution of Chartered Surveyors and will come into effect from 2020.
 - See further para 2, Sch 1 of the Regs: see also PPG Paragraph: 099 Reference ID: 25-099-20190901.

Section 73 Permissions: Carry over of relief

- There is now more CIL continuity between old permissions and new s.73 permissions in terms of carry over of relief, and continuation of payment by instalments
- Under amendment reg 7(1), a new **regulation 58ZA** allows certain reliefs to be carried forward to the new section 73 permission. These are:
 - (a) an exemption for residential annexes or extensions;
 - (b) an exemption for self-build housing;
 - (c) charitable relief;
 - (d) social housing relief.

Section 73 Permissions: Carry over of payment by instalments

- Amendment reg 7(2) inserts a new provision to reg 70:
 - "(9) Where—
 - (a) the amount of CIL in respect of a chargeable development which is granted planning permission is payable in accordance with an instalment policy; and
 - (b) a new planning permission (B) is later granted in relation to the development under section 73 of TCPA 1990,then the amount of CIL in respect of the development granted by B is payable in accordance with that instalment policy."
- Similarly to the other provisions relating to s.73, this provides that a developer is not “worse off” in terms of CIL if they are successful in obtaining a s.73 amended permission.

Commencement Notices: Changes to the Penalties for Jumping the Gun

- Certain kinds of development are entitled to relief from CIL or exempt entirely.
- In most cases, developers must submit a commencement notice to the charging authority before work starts or the exemption/relief is lost and the full CIL amount has to be paid.
- Previously, failure to serve a commencement notice on the local planning authority before commencement resulted in the developer losing the benefit of their CIL exemptions.



Commencement notices

- The new regulations reduce the penalties for non-compliance with commencement notices.
- Now a developer will only be charged a surcharge for failing to meet this requirement:
 - New **reg 83(1A)**: “the collecting authority must impose a surcharge equal to 20 per cent of the notional chargeable amount or £2,500, whichever is the lower amount.”

Distress

- Previous procedure under **reg 98**: the local authority could seize goods following the grant of a liability order by magistrates under **reg 97**:
 - “(1) Where a liability order has been made the authority concerned may levy the appropriate amount by distress and sale of goods of the debtor against whom the liability order was made.”
- Local authorities can no longer seize goods by distress following the grant of a liability order for CIL.
- Instead, can apply the new standard procedure in *Schedule 12 to the Tribunals, Courts and Enforcement Act 2007* to take control of goods and sell them to recover CIL debts.

Infrastructure funding statements (1)

- Regulation 123 lists have now been replaced with a requirement for local authorities (including those who have not implemented CIL) to provide an annual **infrastructure funding statement** by 31 December each year.
- Previously:
 - Regulation 123(4) of the CIL Regulations provided for charging authorities to set out a list of projects or types of infrastructure intended to be funded by CIL.
 - Charging authorities were required to report annually on how much CIL has been received, and how it has been spent.
 - There was significant variation in the detail of the information provided by authorities.

Infrastructure funding statements (2)

- Regulation 121A and new Schedule 2:
 - important new obligation requiring production of an annual infrastructure funding statement
- Statement must set out
 - Statement of the projects which the authority intends to be funded by CIL (the new “infrastructure list”)
 - Details required under Schedule 2 (how much CIL is collected, how much is spent, what it is spent on, how much passed to parish councils etc)
- NB reg 121A(1)(c) makes similar provision in relation to section 106 obligations under section 106 of the Town and Country Planning Act 1990 (c. 8))

Infrastructure Funding Statements (3)

- From 31 December 2020, “infrastructure list” is that contained in the infrastructure funding statement, not the old reg 123 list (**reg 2(1)**), as amended)
- Regulation 121B: similar obligation on parish councils which receive CIL receipts.
- New regulation 121C requires charging authorities to publish an annual CIL rate summary showing the rates of CIL in its area adjusted for inflation.

PPG on Infrastructure Funding Statements (1)

“How does the levy charge relate to infrastructure planning?

[...]

From December 2020, local authorities must publish an infrastructure funding statement, and information should be drawn from this. The infrastructure funding statement should identify infrastructure needs, the total cost of this infrastructure, anticipated funding from developer contributions, and the choices the authority has made about how these contributions will be used.

When preparing infrastructure funding statements, authorities should consider known and expected infrastructure costs taking into account other possible sources of funding to meet those costs. This process will help the charging authority to identify the infrastructure funding gap and a levy funding target.”

PPG on Infrastructure Funding Statements (2)

“It is recognised that there will be uncertainty in pinpointing other infrastructure funding sources, particularly beyond the short-term. Charging authorities should focus on providing evidence of an aggregate funding gap that demonstrates the need to put in place the levy. Any significant funding gap should be considered sufficient evidence of the desirability of CIL funding, where other funding sources are not confirmed.

The Community Infrastructure Levy examination should not re-open infrastructure planning issues that have already been considered in putting in place a sound relevant plan.

*Authorities may have existing ‘regulation 123 lists’ dating from before the Community Infrastructure Levy regulations were amended in September 2019. **These lists remain useful as important evidence to inform plan making and the preparation of charging schedules. By no later than 31 December 2020, authorities will replace these lists with infrastructure funding statements.**”*

Paragraph: 017 Reference ID: 25-017-20190901 Revision date: 01 09 2019

PPG on Infrastructure Funding Statements (3)

*“For the financial year 2019/2020 onwards, any local authority that has received developer contributions (section 106 planning obligations or Community Infrastructure Levy) **must publish online an infrastructure funding statement by 31 December 2020 and by the 31 December each year thereafter. Infrastructure funding statements must cover the previous financial year from 1 April to 31 March (note this is different to the tax year which runs from 6 April to 5 April).***

Local authorities can publish updated data and infrastructure funding statements more frequently if they wish. More frequent reporting would help to further increase transparency and accountability and improve the quality of data available. Infrastructure funding statements can be a useful tool for wider engagement, for example with infrastructure providers, and can inform Statements of Common Ground.

Local authorities can also report this information in authority monitoring reports but the authority monitoring report is not a substitute for the infrastructure funding statement.”

Paragraph: 175 Reference ID: 25-175-20190901 Revision date: 01 09 2019

PPG on Infrastructure Funding Statements (4)

- As to the contents of infrastructure funding statements:

“Infrastructure funding statements must set out:

- *A report relating to the previous financial year on the Community Infrastructure Levy;*
- *A report relating to the previous financial year on section 106 planning obligations;*
- *A report on the infrastructure projects or types of infrastructure that the authority intends to fund wholly or partly by the levy (excluding the neighbourhood portion).*

The infrastructure funding statement must set out the amount of levy or planning obligation expenditure where funds have been allocated. Allocated means a decision has been made by the local authority to commit funds to a particular item of infrastructure or project.”

Paragraph: 176 Reference ID: 25-176-20190901

Revision date: 01 09 2019

PPG on Infrastructure Funding Statements (5)

“It is recommended that authorities report on the delivery and provision of infrastructure, where they are able to do so. This will give communities a better understanding of how developer contributions have been used to deliver infrastructure in their area.

*The infrastructure funding statement **must also set out the amount of levy applied to repay money borrowed, applied to administrative expenses, passed to other bodies, and retained by the local authority.** Local authorities will need to choose when to report money passed to other bodies in an infrastructure funding statement, depending on how the date the money was transferred on relates to the date of reporting.”*

Paragraph: 176 Reference ID: 25-176-20190901

Revision date: 01 09 2019

PPG on Infrastructure Funding Statements (6)

“Authorities can also report on contributions (monetary or direct provision) received through section 278 highways agreements in infrastructure funding statements, to further improve transparency for communities.

It is recommended that authorities report on estimated future income from developer contributions, where they are able to do so. This will give communities a better understanding of how infrastructure may be funded in the future.”

Paragraph: 176 Reference ID: 25-176-20190901

Revision date: 01 09 2019

Limits on Monitoring Fees

- Monitoring fees now on a firmer footing.
- Addresses concerns arising from Oxfordshire CC v Secretary of State for Communities and Local Government [2015] EWHC 186 (Admin)
- Explanatory Note:
 - “Regulation 10 amends regulation 122 to ensure charging authorities can include provision for monitoring fees in agreements under section 106 of the Town and Country Planning Act 1990.”
- Fees now be subject to a test of ‘reasonableness’ relevant to the scale and type of development. Any fee must not “exceed the authority’s estimate of its costs of monitoring the development over the lifetime of the planning obligations which relate to that development”: **reg 122(2A)**

Limits on Monitoring Fees

- Important to note: Monitoring fees can include “reporting under this regulation”: allowing Local Authorities to pass on the cost of annual infrastructure funding statements to developers.
- See para 66 of the June 2019 Consultation Response on the changes:

“The Government acknowledges the comments made highlighting the challenges of producing infrastructure funding statements. The Regulations have been amended to move the implementation date for funding statements from 31 December 2019 to 31 December 2020. This will give local authorities a full year to collect data in the format required by the Regulations before having to produce their first funding statement. *The Regulations allow local authorities to use up to 5% of the Levy for the administration (including monitoring and reporting) of the Levy and to use section 106 agreements to secure fees to monitor and report on the planning obligations contained within those agreements.*”
- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806284/Developer_contributions_government_response.pdf

106 agreements: pooling restrictions (1)

- Pooling restrictions originally introduced to encourage Local Authorities to adopt CIL
- The number of contributions from s. 106 obligations was limited to 5 per infrastructure project or type.



Removal of pooling restrictions

Where does this leave “double-dipping”? (1)

NB removal of reg 123 takes away not only pooling restrictions, but also restriction on seeking 106 contributions to infrastructure on the infrastructure list

- Q: Does this mean developers will pay for the same infrastructure twice (i.e. Local Authority “double-dipping” is back)?
- A: Probably not as Reg 122 will continue to apply: the obligation must still be necessary in planning terms and be sufficiently related to the development.
- But even if it does, the Government seems unconcerned about this implication (see below)

106 agreements: pooling restrictions (2)

- Hugely problematic in practice
 - Attempts to avoid through artificial sub-division of projects in s. 123 lists
 - Conversely, resulted in applications being refused on the basis that the number of contributions had already been met.
- **Reg 123** has now been removed by Reg 11

Removal of pooling restrictions Where does this leave “double-dipping”? (2)

- Time will tell: note para 18 of the government consultation response (June 2019):

“Of the 112 local authorities that responded to the open question, 41 used the opportunity to underline that removing the restriction would **improve flexibility and/or improve certainty**. Three private sector organisations, and eight other respondents made the same point. However, nine respondents stated that the new regulations **undermine the purpose of the Levy or could add complexity**. Eight of the 21 private sector organisations that responded to the open question, together with two trade and voluntary organisations, and two other respondents, stated that removal of the pooling restriction should not allow the Levy and section 106 planning obligations to be charged for the same piece of infrastructure. A small number of respondents (ten local authorities, one private sector respondent and one other respondent) requested that the Government provide additional clarity on how historic section 106 agreements should be treated.”
- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806284/Developer_contributions_government_response.pdf

Removal of pooling restrictions Where does this leave “double-dipping”? (3)

- Time will tell: note para 21 of the government consultation response (June 2019):

“The Government acknowledges that 12 respondents expressed an opinion that using funds from section 106 and the Levy for the same piece of infrastructure (‘double dipping’) should not be allowed. This is dealt with in more detail in the response to Question 8. However, lifting the pooling restriction will address the uncertainty, complexity and delay that the restriction creates. Alongside the changes to regulation 123 lists, described in Question 8, it will allow authorities to use funds from both section 106 planning obligations and the Levy to pay for the same piece of infrastructure, regardless of how many planning obligations have already contributed towards an item of infrastructure. This will enable more flexible and faster infrastructure and housing delivery..”
- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806284/Developer_contributions_government_response.pdf

Removal of pooling restrictions: Heading off the possible consequences

The removal of pooling restrictions could encourage charging authorities to stop charging CIL. So ...

- A charging authority that wants to stop charging CIL will have to follow a prescribed procedure (new reg 28A).
- This involves preparing a statement setting out details of the CIL receipts for the last five years, and an assessment of the impact in the following five years of not having a charging schedule.
- The measures that will be put in place to fund infrastructure needs will also need to be published. This information will be made available for a minimum period of four weeks, during which representations can be made regarding the proposal.

abyass@landmarkchambers.co.uk

© Copyright Landmark Chambers 2019


London

180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham

4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us

 clerks@landmarkchambers.co.uk

 www.landmarkchambers.co.uk

Follow us

 [Landmark_LC](#)

 [Landmark Chambers](#)