The Planning Inspectorate
Yr Arolygiaeth Gynllunio

# PINS NOTE 18/2015r1

To: All Inspectors

Relevancy: Planning appeals and Secretary of State casework and Local Plan / LDP examinations

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Last updated: 1 May 2015 – amended paragraph 2 and inclusion of Annexe A with text of casework team letter to LPAs on 5-obligation limit.

# COMMUNITY INFRASTRUCTURE LEVY REGULATION 123(3) AND PLANNING OBLIGATIONS FOR POOLED CONTRIBUTIONS/TARIFFS

## Action

1. Inspectors should be aware that the transitional period under Community Infrastructure Levy (CIL) Regulation 123(3) (as amended)[1], after which s106 planning obligations designed to collect pooled contributions ('tariffs') may not lawfully be used to fund infrastructure which could be funded from CIL, ends nationally on **6 April 2015**. Only very limited pooled contributions (in respect of up to five separate planning obligations that relate to planning permissions granted for development within the area of the charging authority – the 'five-obligation limit', explained in more detail below) will subsequently be permitted towards infrastructure which could be funded from CIL.

2. Inspectors will need to proactively review casework already sent to them to establish whether the proposal includes a developer contribution to a specific infrastructure project, or a provision for a type of infrastructure funded through standard SPD/SPG-based 'tariffs', which may already have accrued five prior obligations entered into after 6 April 2010. If the answer to that question is not clear from the evidence, Inspectors will need to ask casework

[1] The Community Infrastructure Levy Regulations 2010 (SI 2010 No. 948).

teams to seek clarification directly from the Council (copying in the appellant) to establish where the case stands in respect of the five-obligation limit. A letter has been provided to casework teams for this purpose, and its text is included at Annexe A to this PINS Note.

3. Inspectors will need to take representations on this matter into consideration regardless as to whether they have been submitted outside of statutory timescales. Casework teams are also being asked to examine existing casework[2] prior to its being forwarded to Inspectors, and to write to the parties in respect of affected cases.

4. We are also amending the appeal questionnaire to require LPAs to explain the position with regard to the current number of relevant planning obligations, and raising the issue in external guidance for making appeals. You will appreciate that this could be a potentially very dynamic situation because LPAs, as well as other Inspectors, may well be relying on the same "project" at any one time for mitigating the effect. Further advice will follow as soon as possible as to how that position is to be tracked.

5. If the five-obligation limit has already been exhausted by the time Inspectors come to make their determination, further obligations will be considered to amount to a tariff which should be implemented through CIL.

6. In such circumstances, and where no CIL Charging Schedule has been adopted by the LPA, while the starting point for determination will remain the development plan, the legislative requirement not to accrue more than five obligations per project will necessarily outweigh the requirement of Local Plan / LDP policies for developer contributions.

## Background

7. CIL Regulation 123(3)(b) (as amended) places a limitation on the extent to which planning obligations made under s106 of the 1990 Act in respect of CIL liable infrastructure may constitute a reason for granting planning permission. Under CIL Regulation 123(4) (as amended), the restriction has force nationally from 6 April 2015. Locally, it has force on the day that a local authority begins to charge CIL if this preceded 6 April 2015.

8. Regulation 123(3)(b) still allows contributions to be sought from up to five planning obligations[3] for a specific infrastructure project, or for a particular type of infrastructure, that is capable of being

[2] They will check reasons for refusal for evidence of a request for an Obligation or absence of means of mitigating an impact as well as Grounds of Appeal and Statements of Case.

[3] One development could have several planning permissions. Also, one s106 agreement/UU can contain several planning obligations. Accordingly it is not simply a matter of counting the number of planning permissions granted, rather the decision maker must be aware and take account of the number of obligations set against a particular project or type of Infrastructure.

funded by CIL. These will be counted towards the limited number if they:

- relate to planning permissions granted for development within the area of the charging authority;
- 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 6 April 2010.

9. From that point, any further planning obligations in respect of that infrastructure project (or type of infrastructure) can no longer constitute a reason for granting planning permission. So, although the obligation would remain in place, and may remain enforceable[4], it effectively cannot be given any weight in coming to a decision. However, the PPG states that "no more [pooled contributions] may be collected" once the five obligation limit is reached. Therefore, it is clear that LPAs are expected not to seek to enforce such obligations.

10. Where an obligation makes provision for a number of staged payments as part of a planning obligation, these payments will collectively count as a single obligation in relation to the pooling restriction. Guidance on the application of the pooling restriction can be found in paragraphs 99-104 of the Planning Practice Guidance section on CIL.

11. Regulation 123 only applies, of course, where planning permission is being granted. Given that it works by preventing any weight from being attached to "surplus" planning obligations, there would be no need to address the planning obligations if the permission were to be refused.

12. There is no obligation upon LPAs to publish the number of obligations set against individual projects. Beyond five obligations, such arrangements will be considered to amount to a tariff and the expectation is that they should be funded through CIL. CIL Regulation 123 excludes affordable housing, and allows this type of infrastructure to be secured by planning obligation without any specific limit (although it must still comply with the other statutory and policy tests relating to planning obligations).

[4] Planning obligations have been shown to be enforceable even where they are not relevant in planning terms – see, for example, the case of *R. (Millgate Development Ltd) v Wokingham District Council [2012] J.P.L. 258*. Because of this, developers are increasingly making obligations to pay a contribution towards infrastructure conditional on a finding by an Inspector that the contribution should be given weight. If this has not been done, the obligation would in principle remain enforceable even if it exceeded the regulation 123 limit.

13. In appeals which have the potential to affect European Sites[5] Inspectors will need to have regard to the requirements of the Conservation of Habitats and Species Regulations 2010[6]. In the event that obligations exceeding the five obligation limit relate to an avoidance/mitigation strategy for a European site and the avoidance/mitigation strategy does not form part of a CIL charge, appellants will be unable to rely on mitigation by contributions to demonstrate that the appeal proposal will have no likely significant effect on the European Site.

14. If the Inspector is unable to conclude that there are no likely significant effects upon the European site, an appropriate assessment is required, unless it is proposed to refuse the proposal on other grounds. Detailed advice on the approach to Habitats Regulation Assessment can be found in Case Law and Practice Guide 4: Biodiversity, paragraphs 39-69.

15. There may be other situations (where there is no CIL) in which a proffered S106 Obligation relates to what would be the 6th development but the Inspector considers the infrastructure to which it relates to be necessary for the development to proceed. Placing weight on such an obligation, albeit willingly provided by the appellant, would be unlawful. It will, therefore, be a matter of judgment by the Inspector as to whether, absent of both a CIL and the ability to provide infrastructure through a S106 Obligation, the proposal would place unacceptable burdens on existing communities, thus warranting refusal of permission and dismissal of the appeal.

16. Finally, please note that Regulation 123 only limits the use of planning obligations in relation to the grant of planning permission. There is no limit on pooling in relation to development consent obligations. So this advice is not relevant to NSIPs.

17. Please contact XXXX if you have any queries on this Note or XXXX if it is case specific.

*XXXX*
Group Manager (Planning)

[5] Special Protection Areas (SPAs); Special Areas of Conservation (SACs); candidate Special Areas of Conservation (cSACs); potential Special Protection Areas; and Ramsar sites.
[6] The Conservation of Habitats and Species Regulations 2010 (SI 2010 No.490)

## Annexe A

*Text of letter to be used by case officers to seek information from LPAs on five obligation limit:*

**Community Infrastructure Levy Regulations 2010, Regulation 123(3) as amended**

I refer to the above Regulation 123(3), concerning limitations on the use of planning obligations in the determination of planning applications and appeals. Following the end of the transitional period on 6 April 2015, the requirements of the Regulation came into effect. The Regulations are available online at http://www.legislation.gov.uk/uksi/2010/948/regulation/123/made.

Broadly, following the end of the transitional period, a planning obligation may not constitute a reason for granting planning permission where it provides for the funding or provision of an infrastructure project or type of infrastructure, and five or more separate planning obligations have previously been entered into on or after 6 April 2010 that already provide for the funding or provision of that project or type of infrastructure. Obligations requiring a highway agreement to be entered into are not limited in this way.

Planning Practice Guidance paragraph: 024 Reference ID: 23b-024-20150326 at http://planningguidance.planningportal.gov.uk/blog/guidance/planning-obligations/planning-obligations-guidance/#paragraph_024 outlines that Councils are required to keep a copy of any planning obligation, together with details of any modification or discharge of the planning obligation, and make these publically available on their planning register.

From my review of the appeal documentation, I note that your Council considers that a contribution/contributions secured by a planning obligation or obligations would be required to make this appeal proposal acceptable in planning terms.

Please could you clarify the number of planning obligations which have been entered into on or after 6 April 2010 which provide for the funding or provision of a project, or provide for the funding or provision of that type of infrastructure for which your Council is seeking an obligation in relation to this appeal proposal. This information is required for **each** obligation sought by your Council.

I would be grateful for your written response within 14 days of the date of this letter. A copy of this letter has been sent to the appellant for information, and the appellant should be copied into your response.

Additionally, I would ask that your Council (and the appellant) informs me **as a matter of urgency** of any further changes in circumstances on this matter as the appeal progresses, i.e. if any further relevant obligations have been entered into as a result of your Council granting permission and / or appeals being allowed. I would stress that it is in the interest of both your Council and the appellant to do so, as any failure to keep me informed could result in delays in the processing of the appeal and / or, at worst, unlawful appeal decisions being made.