COMMUNITY INFRASTRUCTURE LEVY

From the developer’s perspective

CHRISTOPHER CANT
COMMUNITY INFRASTRUCTURE LEVY

From the developer’s perspective

My original purpose in writing this guide was to provide information on CIL for those involved in development. It does not cover in detail the process of establishing CIL in an area. It seems to me this is a separate topic with the focus on local planning authorities which have to bear a heavy and changing burden. However, I hope that it will also assist those who have the task of administering the CIL regime.

I will seek to keep it updated. This is now the fifth revision to the guide. This time the revision is caused by the decision in R (oao Hourhope Limited) v Shropshire CC [2015] EWHC 518 (Admin), the first judicial review case on the operation of the CIL regime; the amendment in the 2015 Regulations which is not as extensive as amendments in previous years; the appeal decisions by persons appointed by both the VOA and the Planning Inspectorate; the increasing numbers of authorities bringing in CIL as illustrated by the growth in the First Appendix; the appreciation of issues arising now that more authorities have or are bringing in CIL; greater consideration of the relationship with section 106 planning obligations in chapter 20; and evolving views. As the rate at which the introduction of CIL by local planning authorities increases it is to be expected that more points will arise and come to light.

Any points on the Guide or CIL generally will be welcomed. It is now larger than I first anticipated. The web has made it possible to prepare and publicise this guide. The web will be particularly important for developers as regards the operation of CIL because it provides the tool by which crucial information concerning the CIL regime of any authority can be obtained within a few minutes. With CIL that tool will be used countless times. It also means I hope that with the google search facility on my personal website and the find facility in Word an index for this guide can be avoided. The scars of preparing an index nearly forty years ago are still with me.

The Guide contains my personal views and it is intended to be informative but not to provide legal advice. Specialist professional advice should be sought in respect of any step or transaction with CIL implications. As the Hourhope decision illustrates many of the points that will arise regarding CIL will depend heavily on the specific facts of the matter.

This guide can be found on my chamber’s webpage at http://9stonebuildings.com/cc_cv.shtml

or on my personal webpage which has additional material relevant to developments at http://www.christophercant.co.uk

The current Guide represents my understanding of CIL as at 24th April 2015.

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# Community Infrastructure Levy

Christopher Cant

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This fifth revised guide sets out my understanding of the levy as at 24th April 2015.

It is intended to further update this guide when substantial changes are made to the CIL regime.

First revision 28th March 2013; second revision 8th May 2013; third revision 5th November 2013; fourth revision 16th June 2014; fifth revision 24th April 2015.

Illustration by David Thomas
Community Infrastructure Levy

Christopher Cant

A. Introduction

1. Accelerating need to understand - The number of authorities putting in place charging schedules to enable the community infrastructure levy (“CIL”) to be charged is increasing but not as fast as had been expected. So far by April 2015 around eighty authorities have now put the CIL regime in place. There are just over 360 local planning authorities in total in England and Wales. It has been anticipated that about 70% will introduce it but it takes anything up to thirty months to complete the process of putting CIL in place. Over a hundred are in the process of introducing CIL but at different stages of progress. During the course of the rest of 2015 it is to be expected that many more authorities will have introduced CIL.

There is certainly a need for authorities to do so. The main motivator for introducing CIL is the coming into force of the “pooling restriction” with regard to section 106 planning obligations (see section 20.4 below). This is nationwide even in areas which have not introduced CIL. There would have been a major pile up if there had been no extension of the original deadline from 6th April 2014 to 6th April 2015. Many authorities would have failed to have introduced CIL by then and so would have had funding for infrastructure from section 106 agreements significantly reduced without making it up from CIL receipts. However, even with the new extended deadline of 6th April 2015 there will be a number of authorities that will miss the deadline and so have to face dealing with infrastructure funding deficits. There are over one hundred which having started the process of introducing CIL have yet to have introduced it. The likely consequence is that in such areas where the local planning authority (“LPA”) wants to introduce CIL but has not done so by 6th April 2015 there will be an increase in the number of planning refusals because it will not be possible to resolve the impact of proposed developments on local infrastructure. The use of pooled contributions may not be available after that deadline because of the “pooling restriction” and without those contributions developments may not be permitted. This in turn may mean that less houses will be built.

The Government has made it clear that having extended the deadline once it is for the local authorities to have made the decision whether to introduce CIL or alternatively operate within a more restricted section 106 regime. Not only has the government not extended the deadline again but it shows no signs at present of bowing to the pressure from some quarters to place the CIL regime into abeyance at least until there is a greater improvement in the financial climate. In 2013 a radical overhaul of CIL was announced leading to reforms being proposed for consultation with the outcome published on 25th October 2013 and the amending regulations coming into force on 24th February 2014. This was the fourth set of amendments but it did not really justify the description of a radical overhaul. For the fifth year running in 2015 there has been an amendment of the regime but only to a limited extent by expanding the mandatory social housing relief.
There are still issues outstanding which have not been addressed. There will have to be further consultations after the General Election leading to more amendments. Affordable housing is one such issue. The issue is a wider one than that addressed by the recent Starter Homes Initiative which relates to under-used or unviable brownfield sites. The intention is to make homes available for under-40s at a discount. Linked to this scheme is the proposal to exempt starter homes from both CIL and section 106 obligations which the government has said it will introduce in the next Parliament. If for these purposes a starter home has the same meaning as one within this scheme then it will not go far enough to achieve the desired objective. So far there is no statement as to how the costs of mitigating such schemes on the local infrastructure will be borne. As with the self-build exemption this will detract from the underlying rationale for CIL. How will the shortfall from such developments be made up? It may increase pressure on authorities that have already introduced CIL to review their CIL rates. For those in the process of introducing CIL it may require their figures to be reviewed.

There will be an increasing need for a comprehensive review as more authorities introduce the levy. The considerable divergence between authorities as to rates and instalments policies will possibly have unexpected consequences and this may require change in the CIL regime.

The British Property Federation is pushing for reforms. It is particularly urging the government to allow “bespoke contributions” for large, complex or strategically important schemes “on a case-by-case basis”. More generally it is seeking assurance that the CIL receipts will be spent on infrastructure that is needed and that the CIL regulations are made more certain and flexible.

However, for some authorities the predominant question now is not when to introduce CIL but whether it is viable to introduce CIL. The suggestion is that the further the authority is from the growth areas of London and the South East the less viable it is likely to be to do so. Authorities such as Wolverhampton and North Hertfordshire have said no for the moment. Wolverhampton Council made the original decision in August 2012 because of the cost estimated then at around £75,000 to introduce and £50,000 per annum to administer. It has renewed the decision in 2014 and is reviewed it again in 2016. Some authorities such as Redcar and Cleveland BC have put the introduction on hold. Other authorities are pushing ahead and even increasing the proposed CIL rates. The Royal Borough of Kensington and Chelsea originally proposed a rate of £650 for residential development but has now increased that proposed rate to £750 due to increasing house prices. One of the first to introduce CIL was Poole BC. It is now carrying out a formal review with the proposal that residential development in Sandbanks should be charged at a rate of £1,300. The rising house market means that such moves are likely to be followed by other authorities.

However, whatever the final figure for authorities implementing the CIL regime it is clear that there is a need to grapple with the terms and implications of the new CIL regime as it will impact many proposed developments. The immediate question for many developers will be whether to push ahead now to avoid the imminent introduction of CIL if the development site is situate in an area which has yet to introduce the levy. With some developments there may be an advantage in waiting as
the cost of the section 106 planning obligations will exceed the CIL charge. When carrying out such an evaluation it has to be borne in mind that a LPA’s Charging Schedule is not set in stone and so by the time a planning application is made after the introduction of CIL there could be material changes.

2. Claimed advantages for CIL regime – it had been anticipated that the new regime would have a number of advantages as against the previous predominant reliance on section 106 agreements.

2.1 Simple to operate – once the authority has put in place the CIL charging system it is claimed to be easier and speedier to operate than the system of section 106 agreements. There is a reduced scope for negotiation in contrast to the costly and lengthy negotiations sometimes involving section 106 agreements. This reduces the administrative and legal burden on both the authorities and the developer. Section 106 agreements will still continue to have a role albeit in the main focused on specific infrastructure issues related to the particular site and affordable housing. An element of negotiation and legal administration is being brought back by additions such as the possibility of discharging the CIL charge in whole or part by land transfers or infrastructure payments.

2.2 Simple to comprehend – it is not the first time that such a claim has been made for a new tax regime. The complexity of the recent amendments and the unanswered queries being raised suggests that this aim will not be achieved.

2.3 Certainty – developers will know where they are when formulating proposals for a development as it will not to the same extent as previously depend on the outcome of negotiations for a section 106 agreement. The calculation of the prospective CIL charge will be comparatively easy. However, the benefit of this certainty is reduced by two factors. First, with many developments it will be necessary to still negotiate section 106 agreements. Second, the amount of the CIL charge may well be at a level which discourages development notwithstanding the requirement that when setting the local CIL rates account must be taken of the need not to deter developments.

2.4 Increased infrastructure contributions for authorities - in contrast for authorities it is likely that there will be a greater contribution to the provision of infrastructure than with section 106 agreements only. At the end of 2012 the government estimated that the annual receipts for CIL by 2016 would be £1 billion so substantial sums are involved. Concern has been expressed that the CIL regime merely changes the mechanism by which the same pot is produced as was achieved before the introduction of the CIL regime. However, it may be in some areas at least that the pot will increase in size. It is expected to capture a broader range of developments. This is the enthusiastic outcome reported by Newark & Sherwood DC which was one of the first authorities to put in place a charging schedule. This continues to be supported by Redbridge BC. For example, Fairview Limited has started a residential development of 70 homes in March 2015 on a brownfield site and as a result has paid just under £850,000 CIL to Redbridge. A new Aldi store in Topsham with a floorspace of 1635 square metres will result in a CIL charge of £231,957.

It will be easier to charge a wider range of developments and the level of contribution will take into account the authority’s overall infrastructure priorities without having to
relate them to the particular development site. One issue for authorities in this context could have been the increasing potential for CIL liabilities to be revised due to development changes even after the development has started. If such revisions resulted in a reduced CIL liability and the need to make a repayment this would mean less certainty for the authorities. This is the case with section 73 planning permissions but not abatement as a result of a subsequent standalone planning permission. With the later there is no entitlement to a repayment if the CIL liability arising from the subsequent standalone planning permission is less than the earlier CIL liability.

2.4 Reduces scope for purchasing planning permission – one of the criticisms of unrestricted section 106 agreements is that large developers can seek to purchase planning permission by unilaterally offering to undertake infrastructure works. It is anticipated that the scope for this to occur with the CIL regime is very significantly reduced (see para. 20.7 below). It will be interesting to discover whether that expectation is fulfilled.

2.5 Section 106 system – the current section 106 system is criticised for being ineffective, arbitrary, lacking transparency, not encouraging or assisting with funding of major infrastructure projects, having a disproportionate effect on major developments and open to purchase. The scope of section 106 agreements will be significantly reduced but not wholly removed as they will still be available for site-specific matters.

3. Current drawbacks with CIL regime – until the CIL regime has been fully brought into force by a significant number of authorities the full impact of this new charging system will not be fully appreciated but there are already serious complaints against the regime.

3.1 Delivery of infrastructure – until the 2014 Regulations a very considerable drawback was the absence of any procedure in place by which the developer could ensure the provision of particular infrastructure for the benefit of the development site and certainly not within a timely manner. The developer will pay the CIL charge but not be certain that the infrastructure needed will be put in place. The only guarantee of delivery is if the developer provides it. As a result of reg. 9(6) of the 2014 Regulations it is now possible that a developer may at the election of the authority provide infrastructure in lieu of all or part of a CIL liability. Dependent on how liberally this new procedure is operated by authorities this could be a practical and significant change which will have advantages for both the developer and the authority. It will remove the burden from the authority of organising and funding such infrastructure whilst giving the developer certainty. It will be dependent on the particular authority agreeing to use the procedure. One further limitation will be that this will only apply to land which is owned by the developer or where the developer can ensure that the infrastructure will be provided but it is a valuable start.

3.2 Reduce construction of affordable housing – at present it appears that fewer developments which include affordable housing will be put forward. This problem is under review but no real solutions have been put in place. It is noted that a number of the authorities which have recently introduced CIL have followed the approach adopted by Dartford with varying CIL rates for residential development dependent not just on the number of dwellings comprised in the development but the extent to which
affordable housing is included. This could be a real encouragement dependent on the extent to which the rates vary.

3.3 Discouraging developments – it has been said that the level of CIL being fixed particularly for residential development is discouraging developments. For example it has been reported that the house builders Galliford Try have stated that the respective CIL rates for residential development fixed by Exeter and Torbay of £80 psm and £100 psm respectively are overcharging when £35 psm would suffice. In the judicial review case R (on the application of Fox Strategic Land & Property) v Chorley (see section 5.4.4.3 below) challenging the setting of a rate in a CIL Charging Schedule the CIL rate for residential development had been set at £65. Many developer’s views on Wandsworth residential rate of £575 psm for one zone or Kensington and Chelsea’s £750 would probably be unprintable It will be interesting to see whether instead of stopping developments one effect may be for a portion of such developments to be moved to other areas with a more attractive CIL rate.

3.4 Section 106 agreements – the CIL regime does not wholly replace the system of section 106 agreements and there will be a continuing need for such agreements with certain types of sites. Further sites subject to existing section 106 agreements may be caught by the operation of the CIL regime although the scope for double charging has been reduced by the new regulations in 2012 (see section 8.4.1 below). It seems that some authorities will attempt to mitigate the restrictions on them relating to section 106 agreements and this is likely to further complicate matters. There is a significant immediate need to renegotiate some current section 106 agreements and a mediation service focused on this has been set up to assist such renegotiations.

3.5 Negotiations – as more amendments are made the need for negotiations involving authorities increases. In the context of section 106 planning obligations it is still there but to a much more limited extent. However, it will also be needed if CIL charges are to be discharged in part or whole by a transfer of land or the provision of infrastructure. Such negotiations are likely to take some time.

3.6 Land bank – there is a substantial land bank which was acquired at prices which did not take into account the application of the CIL regime to possible developments of such land. This may deter developments in some areas where high CIL rates have been fixed for the particular type of development. It may also be a problem for landowners whose land is subject to an option entered into before CIL was contemplated. On an exercise of the option the price may be reduced by the CIL liability but the landowner have to discharge the CIL liability (see section 21.2 below).

4. Legal basis –

4.1 Sources - the CIL regime was set out in the Community Infrastructure Levy Regulations 2010/948 (“the 2010 Regulations”) which took effect on 6th April 2010 and is based on the authority and in accordance with the provisions contained in Part 11 of the Planning Act 2008 (“the 2008 Act”). The principal charging provision is section 206 of the 2008 Act. Amendments have been made principally by the Community Infrastructure Levy (Amendment) Regulations 2011/987 (which took effect on 6th April 2011); the Community Infrastructure Levy (Amendment)
Regulations 2012/2975 ("the 2012 Regulations") which took effect on 29th November 2012; the Community Infrastructure Levy (Amendment) Regulations 2013/982 ("the 2013 Regulations") which took effect on 25th April 2013; the Community Infrastructure Levy (Amendment) Regulations 2014/385 ("the 2014 Regulations") which took effect on 24th February 2014; and the Community Infrastructure Levy (Amendments) Regulations 2015/836 ("the 2015 Regulations") which took effect on 1st April 2015. There is the threat of many more amendments to come. A comprehensive review of CIL has been promised which will result in more amendments but it may be that piecemeal change will occur periodically.

4.2 Simplicity – one objective with the CIL regime was that it should be simple and readily comprehensible. The terms of the amendments to the 2010 Regulations show how hard it will be to achieve the objective of simplicity with this levy. These amendments also highlight what seems to be a continuing problem with the drafting of the CIL regime. There is a failure to spell out clearly how the provisions are intended to operate and an excessive reliance on assumptions. There is also an understandable tendency to rely on concepts taken from planning law which can result in uncertainty. For example, amongst the amendments in the 2014 Regulations the planning concept of abandonment of planning permission is introduced when determining whether a deduction may be made for the internal floor space of an existing building. This depends on intention and is uncertain in application. When relevant it could throw up difficult issues both legal and factual. This is not desirable with this type of tax.

In addition the new amendments are eating into the underlying rationale for CIL that developers should contribute to the cost of infrastructure because of the impact that the development has on infrastructure needs. Dwellings constructed by a self-builder will impact infrastructure in the same manner as one constructed by a developer. Yet the former is now exempt. Similarly there is a move away from the original rationale when providing for CIL monies to be passed to local councils or to be applied for local communities but not in a manner which does not involve infrastructure.

4.3 Approach to construction – the old presumption that a taxing statute has to be construed strictly in favour of the taxpayer is no longer the guiding principle but with local authority taxes it has been stated by Sales J. in Harrow v Ayiku [2012] EWHC 1200 (Admin) in the context of council tax that “it remains the case that in a context in which a clearly tenable and natural reading of a provision in tax legislation favours the subject, such a reading is (subject to any clear indications to the contrary) to be preferred. The legislator is presumed to have intended to produce a result which is fair to the tax-payer and not liable to defeat his or her reasonable expectations derived from the terms of the legislation.” Later in his judgment he made the point that setting a general rule means that there is a risk of hard cases falling the wrong side of the line but being able to imagine such cases will not be allowed to dictate the correct interpretation.
B. Putting CIL regime in place

5.1 Overview - CIL does not apply automatically in all areas. It has not been introduced as a normal tax applicable uniformly to the whole country. Each LPA has to elect to introduce it to the area for which it is responsible. It will decide the rates at which it is applied in that area. This requires the authority to set in place a charging schedule and to also issue a reg. 123 list of infrastructure projects. The former will set out the rate or rates applicable to all or certain specified types of development for which the authority gives or is deemed to give permission and this will be at a specified rate per square metre. The reg. 123 list sets out the projects or type of infrastructure which are to be financed by the authority exclusively from the CIL receipts (see section 5.5 below). It is not simply a matter of publishing such a schedule and list. There is first a demanding procedure to be gone through by the authority.

5.1.1 Balance to be struck - regulation 14 of the 2010 Regulations requires a Charging Authority to strike the appropriate balance between the “desirability of funding from CIL (in whole or part) the actual and expected estimated total cost of infrastructure required to support the development of its area” and “the potential effects (taken as a whole) of the imposition of CIL on the economic viability of development across its area”. The rate set should “not threaten the ability to develop viably the sites and scale of development identified in” the relevant Local Plan (in England), the Local Development Plan (in Wales) and the London Plan (in London).

5.1.2 Absolute obligation - until the 2014 Regulations the requirement was that the charging authority “must aim to strike what appears to the charging authority to be an appropriate balance between” the two stated objectives. This permitted a subjective element. With effect to authorities which have not published a draft charging schedule prior to 24th February 2014 (reg. 14(2) 2014 Regulations) those words have been deleted and such authorities are now required to strike such a balance rather than aim to and it is no longer enough that the charging authority considers that it has struck the required balance.

5.1.3 Evidence - the preliminary draft charging schedule has to be backed by evidence which is subjected to scrutiny by an examiner who has to be satisfied that the authority has complied with the requirements imposed on it. The charging authority must be able to justify how the proposed CIL rates will contribute to the implementation of the local plan and support development within the area. The authority will need to explain the appropriate balance it has struck; justify that balance; explain and substantiate how the levy will contribute to its local plan and also “support the development of their area”. The concern is that some rates may be set which will affect the financial viability of developments particularly residential developments. It is not intended that CIL should be a means by which the authority takes a share of profits from highly profitable developments

5.1.4 Draft reg. 123 list of infrastructure - as well as providing a draft charging schedule when setting the CIL rates a charging authority will also be expected now to put forward a draft reg. 123 list which it intends to publish as its infrastructure list (see section 5.5 below) as part of the relevant evidence for consideration and examination (reg.14(5) added by reg. 5(3)(b) 2014 Regulations).
5.1.5 Transitional provisions - these changes as regards the balance to be struck and the draft reg. 123 list will not apply if the charging authority has already published a draft Charging Schedule before 24th February 2014 (reg. 14(2) 2014 Regulations). Such authorities will have expended significant time, energy and funds on progressing the implementation of CIL and it would be wrong for those authorities to have to take on an additional burden. Those authorities that have started the process but not published its draft charging schedule by that date shall have to take account of the changes before publishing the draft charging schedule.

5.2 Charging authority – the charging authority will be the local planning authority (defined as regards England by section 37 of the Planning and Compulsory Purchase Act 2004 and section 78 for Wales) with the exception of the Broads Authority and the Isles of Scilly Council who are the only charging authorities for their areas. As mentioned above there are around 360 such authorities. In London the Mayor of London is an additional charging authority in addition to the local borough councils. This is changing as a result of the Localism Act 2011 which confers the power on the Mayor of London to create Mayoral Development Corporations (“MDC”) to act as a local planning authority and thus become a charging authority for the purposes of CIL in place of the local borough council (see para. 19.7 below). This power has been exercised in relation to the Olympic Park and is to be exercised again in relation to an area around Old Oak Common. The Mayor will also be able to carry out the functions of a charging authority on behalf of a MDC having initiated the establishment of the MDC but prior to that establishment (see new reg. 11A 2010 Regulations). Where a London borough council granted planning permission and then a MDC is established the CIL payable due to the development authorised by that planning permission will be received by the borough council (reg. 63A). For such purposes the borough council will remain the charging authority and the collecting authority as regards that CIL.

5.3 Collecting authority - Normally the charging authority will be its own collecting authority (reg. 10(1)) but it is possible for this to be undertaken on behalf of the charging authority by another body such as the Homes and Communities Agency, an urban development corporation or an enterprise zone authority (reg. 10(5)). In London the local borough council will be the collecting authority for the Mayor of London’s CIL (reg. 10(3)) and that is the case even if the borough council has not set up its own CIL regime. Care has to be taken to check whether the charging authority is also the collecting authority because the regulations distinguish between the charging and collecting authority – for example, notices often have to be given to the collecting authority and if this body is not the charging authority then service on the charging authority will not be effective. For a separate collecting authority to be able to function properly it will have to be provided with the necessary information. In particular planning details must be passed to the collecting authority within 14 days of the grant of planning permission.

5.4 Charging schedule –

5.4.1 Objective - the schedule of CIL rates for the particular area is intended to be based on the up to date development plan for the area. The charging authority has to put forward evidence to justify the CIL rate or rates that it wishes to charge. The authority has to balance raising the funding required for the infrastructure needs of the area which are to be paid for from the CIL revenue as against not putting at serious
risk the overall development of the area (reg. 14). Account has to be taken of other funding sources which will be principally core government funding for infrastructure and funding from anticipated section 106 agreements and highway improvement schemes. Section 106 obligations will be subject to the restrictions in regulations 122 and 123 of the 2010 Regulations (see section 20 below). As a result of the changes introduced by reg. 12 of the 2014 Regulations the restriction related to the reg. 123 list of infrastructure will apply to section 278 highway agreements (see section 20.5 below). In addition the London boroughs must also take into account the Mayoral CIL to be charged as well when assessing the effect on economic viability (reg. 14(3)).

5.4.2 Infrastructure – the non-exclusive meaning of infrastructure contained in section 216(2) Planning Act 2008 includes roads and other transport facilities, flood defences, schools and other educational facilities, medical facilities, sporting and recreational facilities (such as park improvements or leisure centres) and open spaces. CIL is to be raised for the purpose of “supporting development by funding the provision, improvement, replacement, operation or maintenance of infrastructure” (section 216(1) as amended by the Localism Act 2011). This amendment ensures that the operation and maintenance of infrastructure can be funded from this revenue source and it is not a pre-condition that the provision of such infrastructure should have been funded by CIL receipts. CIL receipts can, therefore, be applied by the authority in funding a very wide range of facilities. It will cover, for example, play areas, parks, academies, free schools and police stations. It does not include training and the acquisition of skills on which some authorities have wanted to apply CIL.

Importantly what is currently deliberately excluded from this definition is affordable housing so that the monies raised by CIL cannot be applied directly for that purpose and reliance has to be placed on section 106 planning obligations. It has been suggested that CIL receipts should be capable of being applied to fund affordable housing but as yet no proposals have been put forward notwithstanding the current proposals under consultation. Affordable housing may have an indirect effect on CIL. Greater emphasis has been placed on the impact of the proposed CIL rates on affordable housing targets during the examination stage of the introduction process. Differential rates are being fixed taking into account the amount of affordable housing in a residential development. The suggestion that a meaningful proportion of such receipts be passed to neighbourhood bodies has now been put into effect in the 2013 Regulations and these funds are not subject to such limitation and may be applied with regard to affordable housing (see section 5.6.2 below).

As regards the Mayoral CIL education and health have been specifically excluded so that it cannot be used to fund such projects and it is currently focused on transport and in particular Crossrail.

5.4.3 Procedure – it is not proposed in this guide to go through the process of setting the CIL rates in detail as it is a matter principally for the authority and for those developers and concerns that are able to fund involvement in the statutory process. For example, a major retailer intervened with the drafting of the charging schedule by Poole Council because it objected to the higher CIL rate proposed for large supermarkets. The intervention resulted in the removal of that differential rate so that the rate is the same for all retailers regardless of size. Poole is not seeking to change that in the review of its Charging Schedule it is now carrying out. For most developers
this will not be a realistic option. In any event the outcome R (on the application of Fox Strategic Land & Properties Limited) v Chorley BC [2014] EWHC 1179 (Admin) (see section 5.4.3.3 below) will operate as a deterrent to challenging charging schedules in the Courts. It is not just challenges during the examination of a draft Charging Schedule which may hold up the introduction of CIL. Challenges to a draft Local Plan may have the same effect as has occurred.

5.4.3.1 Official summary - The process for preparing a charging schedule is set out in para. 2.2.1.1 February 2014 Guidance and involves

(i) evidence arranged by authority on which to base draft charging schedule;
(ii) preliminary draft charging schedule prepared;
(iii) preliminary draft charging schedule published for consultation;
(iv) consultation takes place over a minimum period of four week (the proposal to increase this to six weeks in the 2013 consultation was not taken up);
(v) draft charging schedule prepared taking account of representations received under consultation;
(vi) draft charging schedule published;
(vii) period for further representations to authority;
(viii) public examination of draft charging schedule and recommendations made by examiner;
(ix) examiner’s recommendations published;
(x) examiner’s recommendations considered by authority;
(xi) approval of charging schedule and publication.

5.4.3.2 Steps in process - the authority must first prepare a preliminary draft charging schedule and is now encouraged to also prepare a draft reg. 123 list of infrastructure both with accompanying supporting evidence on which it will then have to consult the specified consultation bodies, local residents and businesses (reg. 15). Following this a new draft charging schedule with the relevant evidence and draft reg. 123 list of infrastructure will be published to enable representations to be made during a period of at least four weeks (reg. 16) which it was proposed should be extended to six weeks but which suggestion was not taken up. The authority has the power to select a longer period. Then unless withdrawn (reg. 18) the draft schedule, the draft reg. 123 list of infrastructure, the relevant evidence, and the representations made with a summary of the main issues raised by the representations will go to an independent examiner to be considered at a public hearing conducted in a manner directed by the examiner (reg. 21). The examiner may recommend one of three courses - approval, approval with specific modifications or rejection on the basis that the legislative requirements have not been complied with. In a number of cases the examiner’s report has required a rethink by the authority. If there are to be changes or a new schedule then the process has to be gone through again. The council must then approve the draft charging schedule and publish it on the authority’s website.

As mentioned above with authorities which have not published a draft charging schedule before 24th April 2014 a draft reg. 123 infrastructure list should also be included in the process (see section 5.1 above). Authorities which have published a draft charging schedule before that date do not need to as it would add an unexpected burden to the process. The reason for the change is so the effect of the list can be taken into account. This change will restrict the flexibility of the authority with regard
to what appears on the list. However, it has been reaffirmed that there will be no requirement that CIL receipts can only be applied for infrastructure appearing on that list so that authorities remain free to apply CIL receipts in other ways provided that it is on infrastructure whether or not it appears on the reg. 123 list.

5.4.3.3 Challenge to charging schedule - the setting of a charging schedule may be challenged by judicial review. Such a challenge was made in R (on the application of Fox Strategic Land & Properties Limited ) v Chorley BC [2014] EWHC 1179 (Admin) to the CIL rate of £65 fixed in relation to residential developments in charging schedules approved and published by Chorley BC, South Ribble BC and Preston BC. The applicant was a large landowner in the area. The challenge was made on the ground that the examiner’s approach was irrational, based on a misunderstanding of development costs and had failed to take account of the impact of a new development policy to be introduced regarding dwellings in 2016. It failed on all grounds. The task was an uphill struggle. It was not a rehearing of the examiner’s decision but rather the applicant had to show that the decision was outside the bounds of a reasonable decision-maker. In this case it was held that the decision of the examiner in recommending approval of the draft charging schedule was not outside those bounds. At para. 101 Mr. Justice Lindblom described the allegation of irrationality as particularly ambitious. Much as developers and landowners will dislike the CIL rates being set for residential development it will be difficult to successfully challenge any charging schedules approved by an authority following a properly conducted examination.

As regards the argument that account was not but should have been taken of increased development costs that would result from a proposed change in 2016 to the development plan this was not accepted. The need for a charging authority to keep its charging schedule under review is emphasised in the official guidance (para. 2.2.6.3 February 2014 CIL Guidance). The charging authority needs to ensure that “levy charges remain appropriate over time”. There are no rules as to when such reviews should be undertaken but if there is to be a substantive review of the Local Plan then it is suggested in the CIL Guidance that it would be sensible to link a review of the charging schedule with that review. The need on the part of the charging authority to monitor and when appropriate review the CIL rates meant that in the Chorley BC case it was open to the authorities and the examiner to disregard in 2013 the proposed future increase in development costs in 2016. Such reviews have in fact started to happen. Poole BC was one of the first authorities to introduce CIL and is now in the process of carrying out a formal review.

5.4.4 Differential rates –

5.4.4.1. General - there are no uniform CIL rates applicable across the country and each charging authority must set its own rates and thus they will differ greatly from area to area. Each area will have its own funding requirements for future infrastructure expenditure, anticipated infrastructure projects and expected types of development. In addition each authority can set differential rates. There is no common approach with differential rates. A few authorities may go for a single rate regardless of location or type of development. Many more will have differential rates depending on the type of development being carried out and, or alternatively, dependent on the part of the area in which the development is to be carried out. Again there will be no
uniformity as to the differing types of development that are to be charged at different CIL rates. It has been emphasised in the official guidance that differential rates “should not be used as a means to deliver policy objectives” but must be justified by reference to robust evidence on the economic viability of development. The different CIL rates currently being charged are set out in the First Appendix and a glance through that will show the variety that there is.

(a) Original basis for differing rates - until the 2014 Regulations it had been possible to have different rates set by reference to “different zones” and “different intended uses of development” (original reg. 13). Charging authorities have made great use of the ability to have different CIL rates for different types of user or different areas but without there being a common approach. For example, some, such as Bristol, have imposed a higher CIL rate for student residential accommodation than for ordinary residential development whilst others, such as Exeter, are seeking a lower rate for student residential accommodation. Separate and higher CIL rates for student accommodation has been a strong trend.

With the original provisions it made it possible to resist different rates by reference to different sizes of development. Such a differentiation was attempted in particular with regard to retail developments. In some cases it was accepted by the examiner but in some areas the authority had to withdraw the proposed differential rate. Both Wycombe and Plymouth have different CIL rates for retail development dependent on the size of the development. For example, in Wycombe there is a CIL rate of £200 psm for convenience based supermarkets and retail warehouses whilst other retail developments are chargeable at the CIL rate of £125 psm.

It had been emphasised in official guidance that such differences must be justified “by reference to the economic viability of development” of the different areas or the different types of development. In the guidance the point was made that a major strategic site may be a zone for these purposes if justified by the evidence. It was said in the 2014 Consultation paper that “differential rates cannot currently be set in relation to the size of a development.” (para. 21). Even then this last statement needed qualifying. As stated above differential rates have been set by reference to the size of a development. For example as set out above different rates have been fixed dependent on the size of a retail unit. This has been possible because the relevant examiner has accepted the evidence supporting the conclusion that the different types of retail development constitute different markets. With the changes effected by the 2014 Regulations such evidence will presumably no longer be needed albeit that evidence will still be required to justify the difference on the basis of economic viability and to show that it does not give rise to notifiable State Aid.

(b) extended basis for differing rates - the 2014 Regulations (reg. 5(2)) have extended the ways in which differential rates may be set to include different rates set by a charging authority by reference to the intended gross internal area of the development (reg. 13(1)(c)) and by reference to the intended number of dwellings or units to be constructed or provided (reg. 13(1)(d)).

(i) Retail - the most obvious type of development that will be affected by this change is those applied to permissions for retail development. Attempts to introduce higher CIL rates for new supermarkets had previously been vigorously opposed. The ability
to differentiate by reference to gross internal floor area now removes any doubt as the justification of such approaches by authorities. As a result it is now common for authorities to have a number of CIL rates relating to retail use dependent on location, internal floorspace and type of goods sold. It is left to each authority to select the size of unit which will qualify as a supermarket. Inevitably there is no uniformity. Presently the minimum area varies between 280 square metres (such as Bexley, Sandwell and Bath and North East Somerset) and 2000 square metres (such as Reading, Norwich and Broadlands) with a number in between such as Peterborough (500 sqm) and Plymouth (1000 sqm). Many authorities have their own definitions for supermarkets, supermarkets and retail warehouses. Hambleton’s Charging Schedule contains not just a definition but also then goes on to set out the general characteristics of a supermarket. Tandridge distinguishes between convenience retail (rated at £100) and comparison retail (nil rated). This is a distinction also employed in Richmond’s Charging Schedule.

(ii) **Residential** - differentiating by reference to the number of dwellings and units has been adopted as a method already by some authorities. For example, there can be different rates dependent on the number of dwellings constructed pursuant to a planning permission and this can be further elaborated by reference to the amount of affordable housing included in the development. Peterborough and Spelthorne BC both distinguish between residential developments of less than fifteen units and those with fifteen or more. Peterborough also had a separate rate for apartments. A similar distinction is made by Dartford BC but in addition with a lower rate for affordable housing.

(iii) **Special types of accommodation** – some authorities have introduced further refinements. With some student housing has a special CIL rate separate from the general residential CIL rate. The CIL rate can be high. For example in one of the zones in Camden it is £400. Those authorities which have introduced CIL later have gone further and fixed differential rates distinguishing between student housing let at market rent and those at less than market rent. This includes Bath and North East Somerset, Tower Hamlets and Southwark. Each has its own definition of what constitutes a letting at less than market value but all will require there to be a requirement relating to it in a section 106 agreement (see Appendix 1).

Some authorities have introduced special CIL rates for sheltered housing, retirement homes, residential care accommodation and extra care housing. Examples are the Charging Schedules established by Bracknell Forest and Woking. Some will refer to use classes for this purpose whilst others will have their own special definitions such as Dacorum which carefully formulates what will constitute a retirement home for these purposes (se Appendix 1). It will be necessary to consider each charging schedule as the definitions for such types of accommodation are not identical.

(iv) **Other types of development** – in many Charging Schedules there is clearing up group at the end described as “all other types” of development or use. This will usually be nil rated. In Lewisham there is catch all rate for all other use classes set at £80 psm which may cause unexpected problems for some developments which are not within the separately rated classes of residential or class B (commercial office and industrial).
(v) **Taking effect of change** - this extension of the methods of differentiating does not apply to any charging schedule if the draft charging schedule was published before 24th February 2014 (reg. 14(2) 2014 Regulations). It leaves open the possibility of challenge to charging schedules which include CIL rates differentiated by gross internal area or the number of dwellings or units constructed and in respect of which the draft charging schedule was published before 24th February 2014. If this is likely to be a real problem then it would be sensible for any such authority to revise or renew the charging schedule.

(c) **“Keep it simple”** - there has been a strong trend for each authority to set rates which are particular to its area and different from all other areas. Many of the charging schedules have contained complex sets of rates. The official guidance is that charging authorities should seek to avoid “undue complexity” and limit the permutations of different charges set within the authority’s area. One reason is to reduce the risk that the differential rates will not be State aid compliant (see para. 5.4.4.6 below). It has also been emphasised that differential rates “should not be used as a means to deliver policy objectives” (para. 2.2.2.6 February 2014 CIL Guidance). For developers operating in a number of areas or nationwide the differences in rates will be an inconvenience and will require considerable thought to be given to the impact of potential CIL liabilities dependent on the location of a particular development site.

(d) **Emergency services** - it is to be expected that authorities will want to ensure that developments for emergency services will not be subject to anything other than a zero rating for the purposes of CIL. However, this is not always the case. Brent has a CIL rate of £40 psm for fire and police stations. This rate also applies to water and waste infrastructure.

5.4.4.2 Use –

5.4.4.2.1 **Meaning** - one basis for differential CIL rates is by reference to “different intended uses of development” (reg. 13(1)(b)). There is no definition of “use” for these purposes. It has been argued that it means the use classes in the Town and Country Planning Act (Use Classes) Order 1987 (“Use Classes Order”). This would not appear to be correct. This is a point which has been made in the official guidance (the most recent being para. 2.2.2.6 of the February 2014 Guidance) in which the point is explicitly made that “use” is not tied to the meaning in the Planning Act (Use Classes) Order. It was proposed to clarify this point to put it beyond doubt in the 2014 Regulations but that opportunity was not taken. Subject to the case of retail developments it is to be expected that many CIL rates will be set by reference to the use classes in the 1987 Order but this is not a requirement. The extent of the classes in the Use Classes Order can be wide and the boundaries uncertain. This can mean that charging CIL by reference to a use class may pose problems because the class is not precise enough.

5.4.4.2.2 **Retail** - The main proponent of the argument that the meaning of “use” is linked to the Use Classes Order had been the large retailers and in particular the supermarkets. The reason for this is their desire to prevent authorities establishing different CIL rates by reference to size of retail units. If the meaning of “use” is limited in the manner argued then there would only be scope to have a differential rate
relating to retail use and it would not be possible to distinguish between different types or sizes of retail unit or a combination of the two. The larger retailers would then benefit from the single CIL rate applicable to all retail units which must inevitably be much lower as it has to take into account smaller units. So far as I am aware there has been no judicial decision based on this argument. However, when considering some draft charging schedules there has been an acceptance by independent examiners that it is possible to impose different CIL rates for retail use dependent on the size of unit and the type of retail user but to be justified this requires evidence showing that the differences in size reflect different characteristics of retailing and relate to different markets. In a number of cases, such as Huntingdonshire and Wycombe, the examiner has accepted that the evidence did justify splitting retail use. With Poole the examiner did not. It will be interesting to see whether these differential rates for retail units are challenged as being ultra vires the CIL regime. The recent updated guidance on this point mentioned in para. 5.4.4.2.1 is relevant. With the change in reg. 13(1)(c) now taking effect allowing the scale of development to be a differentiating factor this is unlikely to be an issue going forward. If there were a challenge the authority could revisit and review the CIL rates on the basis of the change in the 2014 Regulations.

5.4.4.2.3 Formulation of retail - the class may be formulated in a different manner altogether than just retail. For instance, the Broadlands charging schedule has a different rate for “large convenience goods based stores of 2000 square metres gross or more”. It then specifies that this is a store where more than 50% of the net intended floor area is intended for the sale of convenience goods. These are defined as covering food, alcoholic and non-alcoholic beverages, tobacco, periodicals and newspapers and non-durable household goods. This is an approach which has been adopted by some authorities whilst others have adopted differing definitions of the type of store covered. Wycombe set the limit on floor space at 280 sqm whilst Plymouth set the limit at 1000 sqm.

There may be problems ascertaining ahead of the commencement of the operation of the particular retail unit whether it is within the particular definition of store adopted by the authority. Reliance will have to be placed on the retailers’ proposals and projections. As mentioned above the amendment to reg. 13 (para. 5(2) 2014 Regulations) allows differential rates to be set by reference to the size of development which presumably means now that there is no need to prove an identifiable market.

5.4.4.3 Within use class - when differential charging rates are fixed by reference to particular use classes that will lead to issues as to whether particular developments fall within such use classes.

5.4.4.3.1 Class C3 - One example of this is CIL rates charged on residential developments by reference to class C3. Will this include houses built for holiday lets? There are a series of planning cases on this point leading up to the Court of Appeal decision in Moore v SSCLG [2012] EWCA 1202. These say that a holiday home may or may not be within Use Class C3 depending on the circumstances. Major factors will be the type of building, number of bedrooms, number of people staying and the type of groups occupying. Ordinary dwellings with lettings to families should be within the class. In contrast a large building with large groups of 20 occupying is unlikely to be within the class. Those cases were concerned with whether there had
been a material change of use. The big difference between such cases and those relating to CIL is that there was a history of use to be considered in the former cases whereas that will not be available when planning permission has just been granted.

This issue has been considered in a reg. 114 appeal (on the VOA website described as substitution of approved block of 5 No. holiday units into a single 9 no. bedroom holiday unit). The decision in the Sheila Moore case was applied. It was not enough that the building was going to be used exclusively for commercial holiday lets. Account was taken of the planning permission, the applicant’s planned use of the building and a number of enquiries for lettings. The conclusion was reached that it was likely that a significant number of future occupiers would not be occupiers living together as a family and thus it fell outside Class C 3. As a result no CIL was payable. There is no reason why the authority should not amend the charging schedules to put beyond doubt the matter. The uses specified in the charging schedule do not have to be by reference to use classes.

Rather than rely on the Use Classes some authorities have introduced a special definition of residential development for the purposes of CIL. For example, Woking has a lengthy definition focused on the houses being occupied as a single household.

5.4.4.3.2 Residential or other type of development – an appeal has raised the issue whether an extension to an existing garage situated within the grounds of a large dwelling house should be charged to CIL on the basis of a rating applicable to residential use or nil rated as within the category of all other types of development. It was to be used for garaging vehicles and landscape equipment belonging to the owner of the house. The appellant argued that the garage was not a dwelling house and a building ancillary to a dwelling was not residential in character. In contrast the authority argued that the extended garage located within the curtilage was ancillary and incidental to the dwelling. The appointed person held in favour of the authority that the garage was within the category of residential and chargeable to CIL at the residential rate. He then raised the issue whether the residential exemption would apply. It was not open to him to decide such a point but commented that the garage might be an extension to a dwelling. This depends on whether an extension must be physically part of the house (see section 11.6.3).

5.4.4.3.3 Retail or residential – an appointed person has had to consider whether the characterisation of the type of use authorised by a planning permission is to be determined in accordance with the planning Use Classes or by the actual proposed use. In the appeal concerning a development described as the erection of two storey with ancillary residential accommodation the choice lay between residential or retail. It arose from a planning permission authorising retail use (A3/A4) with ancillary residential accommodation. Amongst the conditions attached to the permission was a requirement that the residential accommodation be occupied only by persons solely involved in the managing or operation of the retail business. A further condition provided that the premises be used only for A3 and A4 purposes and no other purposes. The Charging Schedule chose to rate developments by reference to the TCP (Use Classes) Order 1987. It was held that the living accommodation should be charged at the rate applicable to retail use and not residential use.
5.4.4.4 Location of developments – for developers with a choice as to where developments are carried out CIL will be a significant factor to be taken into account. The absence of a uniform approach means that the CIL rate set by some authorities for particular types of development will be more attractive that those set by other authorities. In particular this could be an important influence in the locating of retail and residential developments. Some authorities are introducing a different CIL rate applicable to student residential developments. Bristol has set a higher rate of £100 psm than with ordinary residential developments (£70 psm for Outer zone and £50 psm for Inner zone). In contrast Exeter has set a lower rate of £40 psm for student purpose built residential developments than the CIL rate of £80 psm for ordinary residential developments. Although not a proper justification one possible reason for the higher CIL rate with proposed developments to provide student accommodation is that such developments produce a greater profit margin. Ordinary residential developers will also be affected. For example, Wandsworth LBC has set a CIL rate for residential development at £575 psm in one zone. This is in contrast to, say, Shropshire which operates two rates of £40 psm and £80 psm dependent on the zone. Other authorities are drawing a distinction between high and low rise residential developments. Retailers will be similarly affected. Although Poole had to reconsider its attempt to set different CIL rates by reference to the size of a retail development this has not deterred Exeter from setting a CIL rate of zero for supermarkets in the City centre and £125 psm outside the City centre. All such variations emphasise that the CIL rate applicable to a development will need to be considered and thought given as to whether a more favourable location can be found at a lower CIL cost.

5.4.4.5 Mixed user – as stated above the differential rates as regards types of development do not have to be formulated by reference to classes of planning use. However, if they are not then there could be a problem when permission is granted for a planning class which includes more than one type of development and they are chargeable at different rates. How is the CIL to be calculated? The same point arises if the planning permission granted authorises more than one class of use and different CIL rates are applicable. Reliance cannot be placed just on the terms of the planning permission. It will be necessary for the charging authority to investigate further as to the precise nature of the development to be carried out. A pragmatic solution will be for a liability notice to be issued on the basis of the information available at the time that the planning permission is granted and then once there is certainty as to the actual intended use a revised liability notice will need to be issued which will replace the earlier liability notice. This emphasises the importance of the charging authority being provided with full information at an early stage as it is in the interests of both sides that the amount of the CIL liability is established accurately as soon as possible. It suggests a degree of continuous engagement which may be hard to meet on the part of the authority. However, attempts to increase the CIL liability will receive a hostile reception.

5.4.4.6 State Aid – when setting different rates within its area the charging authority is responsible for ensuring that such differences are State Aid compliant. They must not provide a selective advantage. In consequence the charging authority must justify any differences by consistent evidence relating to economic viability

5.4.5 Local developers – for developers carrying on their business in a particular area consideration should be given to taking part in the consultation process and making
representations. The CIL rate will be a permanent, continuing and important factor in the development costs of the business.

5.4.6 **Subsequent change of use** – there may be a trend to carrying out an initial development for a use which attracts a low CIL rate and then subsequently seeking to change to a different use which would have attracted a higher CIL had it been the initial use. If there is no increase in internal floor area and no dwelling comprised in the development there should be no CIL liability as a result of that change due to the deduction of the GIA of the existing building. Even if there is a dwelling provided that the building has been in continuous lawful use for six months this should remove or at least keep down any CIL liability. Whether such a course of action will be feasible will depend on the CIL charging structure of the relevant charging authority and the local CIL rates applicable to the differing types of development. It will also depend on other practical factors such as whether the buildings constructed in the development are suitable for the alternative use or if it is economic to replace those buildings by new appropriate buildings. If such a trend were to begin it will be interesting to see how authorities react to future change of use applications. It has been raised in an online CIL forum and the response seemed fairly pragmatic. The view was that at present nothing could be done to stop but it may not be a problem as in practice it may rarely be possible to achieve.

5.4.7 **Review** – it is emphasised in the official guidance that charging authorities should keep their rates under review so that they remain appropriate. In particular account should be taken of changes in market conditions (para. 2.2.6.3 February 2014 Guidance). The worry is that this will result in the increase in CIL rates relating to residential developments. This is borne out by the increase by Kensington and Chelsea BC from £650 to £750 with regard to the residential rate during the process of introducing CIL. This has been followed by a formal review by Poole BC of its CIL Charging Schedule. It is reviewing the Poole Core Strategy and at the same time taking the opportunity to review its CIL rates. When the rates are compared it is not hard to understand why. Since 2nd January 2013 the CIL rates for residential developments have been £150, £100 and £75 for the three designated zones. In the review it is proposed to have eight zones for residential developments with the highest rate being £1,300 for Sandbanks. As is pointed out in the consultation document CIL monies received in respect of the Sandbanks area have amounted to £69,541 but if the new rate had been in force £602,666 would have been received. It is suggested that there are to be different rates for developments relating to retirement/assisted living and student accommodation and also a single rate borough wide for retail developments. Poole has laid out a timetable which is the same process as for the original introduction of CIL. It runs from February 2015 to the summer of 2016. Fareham is also carrying out a review with modest increases in CIL rates for residential and retail development proposed but with a greater focus on zones within the area.

With a rising housing market the incentive to carry out a review will be there for many authorities even bearing in mind the cost involved in such an exercise. A review will be particularly appropriate if the authority is proposing to review its local plan. The requirement that an authority keep under review the CIL rates in a charging schedule was a factor in the Fox Strategic judicial review case. Expected increases in development costs three years ahead due to changes with regard to the building
requirements could be coped with by a future review. The judgment emphasised that the charging authority did not have the power to set CIL rates for a fixed period. Once set the rates would continue unless and until revised or withdrawn.

5.4.8 Monitoring of authority’s CIL rates - As a LPA’s CIL rates are not set in stone it is important to monitor the relevant authority’s website to ensure up to date rates are being used for costing purposes. There are no proposals to introduce controls or restrictions with regard to the process of review to be adopted. In the February 2014 Guidance it is stated that any revision of an authority’s charging schedule (in whole or in part) should follow the same process as the original process for establishing the charging schedule. That is the approach that Poole BC has adopted. This will involve considerable expenditure and may deter some authorities. It certainly excludes the possibility of fine tuning. Changes in the CIL regime such as the change as regards differential rates may themselves cause an authority to reconsider its charging schedule. It may, for example, encourage authorities to introduce different CIL rates for supermarkets.

5.5 Reg. 123 list of infrastructure projects – this is a vitally important element of the CIL regime and will need to borne in mind by developers.

5.5.1 Requirement for list - the CIL revenue has to be applied in the provision, improvement, replacement, operation or maintenance of infrastructure but there is no prescribed means of challenging the application of such funds by an authority or requiring particular infrastructure projects to be carried out. The only real control is that the authority cannot seek to impose a planning obligation with a view to funding a type of infrastructure or an infrastructure project which the authority is funding exclusively through the CIL regime (reg. 123(2)). In order to police this restriction the authority has to publish a list of infrastructure projects and types of infrastructure that the authority intends to be funded wholly or partly by CIL. This means that if the authority is to have a charging schedule setting rates but wishes to make use of section 106 agreements as an additional means of funding then it must also have a reg. 123 list. If it does not have such a list then all infrastructure must be funded by CIL and there will be no scope for section 106 funding (reg. 123(4)). No local authority will allow this situation to arise. Any project or type of infrastructure appearing on such a list will have to be funded by CIL and not by section 106. However, this will not prevent section 106 funds accruing before the introduction of the CIL regime from being applied in such a manner. The stated principal purpose for the list is to provide transparency on what the charging authority intends to fund in whole or part through the CIL regime and to avoid “double dipping” by the authority. To assist in achieving these objectives the draft list should in the future be provided as part of the consultation and examination process with authorities which had not published a draft charging schedule by 23rd April 2014 (see section 5.1 above). It means that care has to be taken by the charging authority over the content of the list and the manner in which the projects and types of infrastructure included are described. As part of the examination process when setting up the CIL charging schedule for the area the charging authority should have set out how its section 106 policy will be affected by the introduction of CIL for the area.

5.5.2 Examples –
5.5.2.1 **Redbridge** – this authority has opted in its reg. 123 list for specifying the
generic type of facilities that CIL will be used to fund. It covers its education facilities
without any exception as well as leisure, health care, community care and community
facilities, provision of open space and transport improvements. However, originally
this was not as simple as it appeared at first sight. For example, if consideration was
being given to a large residential development within that area it cannot be said with
certainty that no section 106 planning obligations will be required for matters such as
schooling or community facilities. The reason for this was that at the bottom of the
Redbridge list was an exclusion which stated that “Unless the need for the
infrastructure arises directly from five or fewer developments, where section 106
arrangements may continue to apply if the infrastructure is required to make the
development acceptable in planning terms.” This sought to comply with the
restrictions imposed on section 106 planning obligations by regulations 122 and 123
of the 2010 Regulations (see para. 20.4 below) whilst at the same time seeking to
reserve the ability to impose planning obligations which relate to any of the facilities
listed in the reg. 123 list. It was seeking to continue the section 106 system for
funding to the maximum extent permissible whilst also applying the CIL regime.

5.5.2.2 **Validity of exclusion** - clearly at the time Redbridge LBC considered such an
exclusion valid but in my view it is questionable. It appears to be a classic attempt by
the authority to have its cake and at the same time eat it. In my view the facilities
listed by Redbridge constitute relevant infrastructure for the purposes of reg. 123
because they are a description of a type of infrastructure (reg. 123(4)) rather than an
infrastructure project. It is a type of infrastructure which it is intended is to be funded
in whole or part by CIL. I anticipated that Redbridge would argue that the words at
the bottom of the list had to be taken into account as part of the description of the type
of infrastructure. However, it seems to me that there is nothing in reg. 123 which
allows an authority to insert an exclusion from the description of the type of
infrastructure in this manner. The exclusion is not seeking to exclude a more specific
type of infrastructure within the wider type but to exclude that wider type of
infrastructure when the need for it has arisen in a certain way. Reg. 123(2) provides
that a planning obligation providing for the funding of relevant infrastructure cannot
constitute a reason for granting planning permission. I do not consider that the
wording at the bottom of the list will prevent this restriction operating. It will be
interesting to see if the point is taken. Such a point could be taken after the grant of
planning permission subject to planning obligations which include obligations related
to a type of infrastructure included on the original Redbridge reg. 123 list. The
original reg. 123 list has been replaced by a list which does not have this qualification
at the bottom so may be it has been accepted that it was not valid. As regards transport
projects it excludes site specific elements which will still be covered by highway
agreements and section 106 planning agreements.

5.5.2.3 **Portsmouth** - in contrast Portsmouth City Council has focused on projects by
including a number of specific highway projects, a couple of flood management
projects and the improvement of Southsea Common and the Seafront. There is
included in the list one item which is treated as a project but seems to be really
generic type of infrastructure expenditure – school places (primary and secondary
schools). There is no wording included seeking to undermine the reg. 123 list as
considered above with the Redbridge list. This means that a developer considering a
large residential development in the Portsmouth could be sure that there will be no
attempt to impose a section 106 planning obligation relating to school capacity projects. In so far as the items on the list relate to highway infrastructure it will now not be possible to make them the subject of a highway agreement (reg. 123(2A) introduced by the 2014 Regulations - see section 20.5.1). Huntingdonshire DC has adopted a similar approach to the formulation of its reg. 123 list in including a number of specific projects.

5.5.3 Consideration of reg. 123 list – it is sensible to consider such list for infrastructure for the area in which a development is to be located in order to ascertain whether any infrastructure issues relating to the site will be funded by CIL or will have to be negotiated as a planning obligation. For example, a residential development may result in a need for additional schooling facilities. If the authority’s published reg. 123 list includes education then that will be funded by the authority’s CIL receipts and there will be no section 106 issue unless there is included wording similar to that used in the Redbridge list discussed above. However, if it states education save for the local school then increased funded for that school will need to come from a section 106 planning obligation if the development will impact on that school. That in turn will raise the issue whether it is still possible for the authority to require a pooled contribution for the purpose of increasing capacity at the school under a planning obligation or whether this is no longer possible due to the number that have already been entered.

5.5.4 Changes to the list – such lists are not set in stone. They can be simply changed without going through an elaborate procedure although the official guidance advocates that the changes should be clearly explained and be subject to appropriate local consultation (para. 2.6.2.3 February 2014 CIL Guidance). It was suggested in the April 2013 consultation that an appropriate consultation process be gone through but without specifying what that process should be. However, this suggestion was not taken up. This ability to vary the list means that an eye should be kept on the relevant authority’s website to ensure that there is no material change which could affect a proposed development. There has been concern that specific projects may be removed from the list so that section 106 obligations can be imposed with a view to providing funding for such project. In the official guidance it is stated that “Charging authorities should not remove an item from the regulation 123 list just so that they can fund this item through a new section 106 agreement.” (para. 90 DCLG Guidance – December 2012 and para. 2.6.2.3 February 2014 CIL Guidance). Despite a proposal that charging authorities undertake consultation before making changes there is no such obligation nor any prescribed method of control and so reliance would have to be placed by any aggrieved person on judicial review. If the change to the list would have a significant impact on the evidence as to viability which was presented during the examination process then it is suggested that there should be a review of the authority’s charging schedule. The inclusion of the draft reg. 123 list of infrastructure now in that process encourages such an approach. A review of the Charging Schedule will require the authority to go through the same formal process as was gone through for the introduction of CIL.

5.6 Application of CIL – the CIL receipts must be applied in funding infrastructure or making a payment to a local council (see section 5.7 below).
5.6.1 **Application** - the principal obligation of the charging authority is to apply the CIL received in funding infrastructure (for meaning see para. 5.4.2 above). It permits the application of CIL for the maintenance of infrastructure as well as the provision of infrastructure. As stated above infrastructure does not include affordable housing which still has to be funded from other sources including section 106 agreements although changes may be introduced in the future which will allow such an application of CIL receipts. The only current qualification to this is that the portion of CIL receipts paid to neighbourhood funding can be applied for purposes not related to infrastructure and in particular can be expended on affordable housing (see para. 5.6.2.6 below). It cannot be used to pay interest on monies borrowed for the provision of infrastructure and charging authorities are not authorised to borrow against future CIL receipts. Further the CIL monies cannot be used to fund private companies. This precludes funding of water infrastructure owned by, say, a private water undertaker.

5.6.2 **Outside the area** – CIL receipts may be applied outside the authority’s area if for the benefit of the area. Examples of such permitted applications of CIL receipts given in the February 2014 CIL Guidance are payments to the Environment Agency to go towards flood defences and to County Councils for schools.

5.6.3 **Pooling of CIL receipts** – an alternative approach is for a charging authority to pool some of the CIL receipts with another charging authority with regard to a large infrastructure project such as transport which will support development in their respective areas.

5.7 **Local councils** –

5.7.1 **Amounts payable** –

5.7.1.1 **General** - a relevant proportion of CIL receipts from a chargeable development (see section 5.6.2.3 below) should be paid to the local council in whose area the chargeable development is situated (reg. 59A). This does not apply to the Mayor of London’s CIL. Any surcharge paid by the developer of such development will not be treated as CIL for these purposes (reg. 88(3)). A local council can refuse such payments in which case the charging authority must retain them (reg. 59A(12)). In England the proportion is 25% if there is either a neighbourhood development plan in place or no such plan but the permission was conferred under a neighbourhood development order including a community right to build order. Where neither set of circumstances apply the proportion is 15%. It is open to charging authorities to transfer more than the 25% proportion if there is a neighbourhood plan or neighbourhood development order in place but any excess amount must be applied with regard to infrastructure.

5.7.1.2 **Cap** - in England for such payments when there is no neighbourhood development plan and in Wales in all cases there is a cap in each financial year on the total of such payments being an amount equal to £100 for each dwelling in the local council’s area multiplied by the index figure for that year. In Wales the proportion is 15% if all or part of the chargeable development is within the area of a community council. If the development crosses local council boundaries then the CIL is divided between the local councils proportionally (reg. 59A(8)). A similar division occurs when the development straddles other different types of areas (reg. 59A(9) and (10)).
5.7.2 Area with no local council – in the event that a chargeable development is not within a local council area then the Charging Authority may use so much of the CIL relating to such development as would have been paid to a local council had the area been a local council area as permitted by reg. 59C (see para. 5.6.2.6 below) (reg. 59F). In England an area with no parish council but a neighbourhood plan will receive the higher proportion of 25%. It will be necessary for the charging authority to consult with the local community. There is no prescribed procedure for such consultation.

5.7.3 Relevant proportion – If the development is within an area with a neighbourhood plan in England or a community council in Wales the proportion will relate to the full CIL for the chargeable development. If the permission for the chargeable development is in part only under a neighbourhood development order or a community right to build order then the 25% proportion will apply to the CIL relating to that part and the 15% proportion will apply to the rest. It has been queried whether when calculating the amount payable to a local council any deduction can be made in respect of the administration costs of the CIL regime. There is no basis for such a deduction. The calculation is by reference to the full relevant CIL receipts.

5.7.4 Land payments and infrastructure payment – the value of any land payment or infrastructure payment in discharge of a CIL liability will be used to calculate any payments under these regulations (reg. 59B) but the proportion paid to a local council or community council must be in the form of cash and cannot be land or infrastructure.

5.7.5 Payment periods – the charging authority and the local council may agree a timetable for payment and in the absence of such an agreement in any financial year the due proportion of any CIL received between 1st April and 30th September shall be paid by 28th October and between 1st October and 31st March by 28th April.

5.7.6 Application of such payments – the local council receiving such payments must apply the payments for the provision, improvement, replacement, operation or maintenance of infrastructure or “anything else that is concerned with addressing the demands that development places on an area” (reg. 59C). This covers a wider range of expenditure than is authorised with charging authorities and is not limited exclusively to infrastructure. For instance, such funds can be expended on affordable housing if it addresses the development needs of the area which is in sharp contrast to the position of a charging authority. Any amount received from the charging authority in excess of the relevant proportion must be applied in relation to infrastructure.

5.7.7 Recovery of payment to local council – if any payment to a local council is not applied within five years of receipt or is applied but not in accordance with reg. 59C (see para. 5.6.2.6 above) then the charging authority may seek to recover the payments (reg. 59E). To the extent that the local council does not have unapplied CIL payments with which to recoup the charging authority then the charging authority can withhold payments otherwise due to the local council. Monies recovered by this process must be applied for the benefit of the relevant area of the local council (reg. 59E(10)).
5.7.8 **Transitional provision** – no payment is due from a charging authority to a local council under these regulations nor will a charging authority be liable to apply CIL in accordance with para. 5.6.2.2 (area with no local council) above if a liability notice was issued in relation to the development before the 2013 Regulations came into effect on 25\(^{th}\) April 2013 (reg. 12 of the 2013 Regulations).

5.7.9 **Concern over neighbourhood funds** – I have seen comment on the web referring to this payment as a “bung”. The concern was based on the fact that to receive the 25% payment all that has to be in existence is a neighbourhood plan but that plan may not have substantive proposals and in particular may not have any plans for affordable housing. The inclusion of this payment from CIL receipts is a political decision which detracts from the basic principles of the tax. However, there is now pressure on local councils to have a neighbourhood development plan in place in order to maximise the portion of CIL receipts received particularly as there is now a greater appreciation that more funds available if such a plan is drawn up.

5.8 **Administrative costs** –

5.8.1 **Costs covered** – the costs of establishing and running the CIL regime are recoverable subject to a cap (see section 5.6.3.2 below). This means that a charging authority can recoup the set-up costs from the future CIL receipts when received. Administration will include monitoring (which could be a burdensome task), negotiating agreements with regard to land or infrastructure payments in kind and enforcement. Challenges to the CIL decisions of a LPA may be expensive particularly if by way of judicial review. A collecting authority acting for a charging authority may retain up to 4% from the CIL receipts to fund its administrative costs.

5.8.2 **Cap** - a charging authority is permitted to expend up to 5% of the CIL received on the administrative costs of operating the CIL regime. The receipts include the value of any land payment or infrastructure payment (reg. 61 (7) and (7A) 2010 Regulations). This is a rolling cap for the financial year in which the CIL is set and the following three financial years. To the extent that the cap is not reached the balance must be applied on capital infrastructure projects. A collecting authority may retain up to 4% of the CIL receipts to meet costs leaving the charging authority with a cap of 1% on CL receipts. It means that each London Borough can retain up to 4% of the Mayoral CIL. The cap is calculated by reference to the amount of CIL collected and whether or not a proportion is then paid to a local council is immaterial to the amount that can be applied on administrative costs.

5.9 **Annual reporting** – the charging authority must pursuant to reg. 62 provide an annual report as to the CIL monies received, land payments, infrastructure payments and the application of such monies as well as details of any recovery steps taken against local councils under reg. 59E. The information to be provided in the report has been expanded by reg. 62A. These reports should be published on the authority’s website by 31\(^{st}\) December of each year for the previous financial year. There are similar reporting obligations on parish and community councils in receipt of CIL revenues.
C. Triggers for CIL charge

6. General – for such an important point there is a remarkable lack of clarity in the 2010 Regulations as to when a CIL charge arises. The objective is that the grant of planning permission will trigger the operation of the CIL regime and that the CIL liability thereby arising will only become payable as and when the development is commenced. There is no discretion conferred on the LPA to waive the CIL liability no matter what course events have taken between the LPA and the land owner/developer. In particular complaints that a planning permission should have been granted sooner and before the introduction of CIL will not prevent the CIL liability having to be discharged.

For a CIL charge to arise the LPA must have put in place a Charging Schedule and must have authorised or be deemed to authorise a chargeable development. The commencement of the development will then trigger the liability to pay.

6.1 Charging schedule in place – the charging authority for the area in which the site is located must have put in place a charging schedule (reg. 128). Until this step is taken no planning permission will cause the CIL regime to operate hence the increasing number of authorities implementing the procedure leading to the establishment of a charging schedule. It is not also essential that the authority publishes a reg. 123 list setting out the infrastructure which is to be funded exclusively by the authority from CIL receipts. That is optional because if no such list is published then the authority is to be treated as funding all infrastructure from CIL funding and not section 106 planning obligations (reg. 123(4)).

6.2 Grant of planning permission –

6.2.1 General rule – if the development has to be authorised by a grant of planning permission then CIL is only chargeable in relation to such development if the planning permissions is granted after the putting in place of the charging schedule for the area in which the site is located (reg. 128(1)). This includes a planning permission resulting from a successful appeal decided after CIL has been introduced regardless of when the appeal was made. There are special rules which extend the scope of CIL to catch the carrying out of developments under other means of authorisation such as general consents (reg. 5(3)). In such circumstances the development must commence after the CIL charging schedule has been put in place. Certain developments are excluded from the operation of the regime (see section 10) and there are an increasing list of limited exemptions (see section. 11).

6.2.2 Distinction between grant and “first permits” - It is important to bear in mind that there is a difference in the CIL regime between the grant of planning permission and when a planning permission “first permits” a development. The former will be used to determine whether or not the development is chargeable to CIL whilst the later determines the set of CIL rates applicable for the purposes of the calculation in reg. 40 and is not relevant to whether or not CIL is chargeable. With the introduction of CIL by numbers of authorities this is a point which is cropping up frequently and is often overlooked. The date when the development is first permitted will also be material in determining the relevant period for the application of the vacancy test (see section 9.3.2 below).
This means in particular that the provisions of reg. 8 deferring when a permission first permits a development do not apply for the purpose of determining whether CIL is chargeable. For example, if an outline planning permission which is not phased is granted subject to a number of reserved matters then the date of the grant of the outline permission will be the relevant date for determining whether or not this development is subject to the CIL regime. If the relevant charging authority does not establish its CIL rates until after the grant then commencing the development will not trigger a CIL liability even if the final approval of the last reserved matter associated with the permission was not obtained until after the establishing of the CIL rates for the area. If the grant of such planning permission was after the establishment of the CIL rates in the area then CIL will be chargeable. In those circumstances the date when the required final approval is obtained will determine which set of CIL rates applies so that if different from those applicable at the date of the grant of the permission the newer set of CIL rates will be used to calculate the chargeable amount.

6.2.3 “first permits” – in determining when a development is first permitted the starting point is that it will be the date of the grant of planning permission (reg. 8(2)) but in practice this will not normally be the outcome because planning permissions are rarely granted with no conditions or reserved matters. That starting point has been heavily qualified. As a result of the 2014 Regulations there are now two sets of qualifications. One set applies in respect of chargeable developments authorised by a planning permission granted prior to 24th February 2014 and the other to such developments authorised by planning permissions granted on or after 24th February 2014 (reg.14(1) 2014 Regulations).

6.2.3.1 Pre-24th February 2014 planning permissions – the original provisions in reg. 8(3)-(6) 2010 Regulations provided that as regards:

6.2.3.1.1 outline planning permission – subject to outline permissions for phased developments (see para. 6.2.3.1.2 below) the date of the final approval of the last reserved matter associated with the permission will be when an outline planning permission first permits development (reg. 8(4));

6.2.3.1.2 phased outline permission – each phase will be treated as a separate chargeable development and so it is the date of the final approval of the last reserved matter associated with the particular phase (reg. 8(5)).

6.2.3.1.3 conditional planning permission other than outline – if the planning permission is subject to a condition which requires further approval to be obtained before the development can commence then the date when final approval is given will be when the permission first permits development (para. 8(6). Prior to the 2014 Regulations the special treatment for phased developments did not apply to planning permissions other than outline planning permissions.

6.2.3.2 Planning permissions granted on or after 24th February 2014 – the treatment of outline and full planning permissions authorising phased developments is now in principle the same and such treatment is no longer applicable only to outline planning permissions. Each phase of a development will be treated as a separate chargeable
development for these purposes and not just those authorised by an outline planning permission (reg. 9(4)).

6.2.3.2.1 Phased planning permission – each phase of a development is a separate chargeable development (reg. 9(4)) so that the CIL regime is applied separately to each phase (see section 8.9 below). There is now a definition of phased planning permission for the purposes of CIL which is a planning permission “which expressly provides for the development to be carried out in phases.” (reg. 2(1) 2010 Regulations inserted by reg. 3(1)(g) 2014 Regulations). This means that the planning permission must expressly authorise the development to be carried out in phases. It is not enough that it is implicit. In some cases it will be important to ensure that the wording includes an express authorisation for a phased development. It may have a significant effect on the cash flow or avoid disqualifying events affecting parts of a development unrelated to the event. It will be important not just to have express phasing but also to ensure that the phases coincide with the works to be carried out. Phasing will not have the desired CIL effect if some of the works will cause the CIL liability to be triggered not just for the first phase of the development but for some other or all phases. This can occur, for example, if infrastructure works extend beyond the particular phase (see section 6.2.5 below).

6.2.3.2.1.1 outline planning permission – for each phase of an outline phased planning permission the phase will first be permitted to be developed on the day of the final approval of the last reserved matter associated with that phase unless it has been agreed in writing with the collecting authority that it will be the day final approval is given under any pre-commencement condition associated with that phase (reg. 8(3A)(a)). Such a written agreement must be reached before the commencement of any development under that planning permission which would seem to refer to all the development authorised by the planning permission and not just the particular phase of development. If correct then that could be a trap for the unwary to fall in. The agreement will only operate if it is an earlier date than the day of the final approval of the last reserved matter.

6.2.3.2.1.2 phased permissions other than outline – a permission relating to a phase of development authorised by a phased planning permission other than an outline permission will first permit development on the day that final approval is given under a pre-commencement condition associated with that phase or if there is no such condition then on the day of the grant of the permission (reg. 8(3A)(b)).

6.2.3.2.2 outline planning permissions which not phased – such a permission first permits development on the day that final approval is given for the last reserved matter (reg. 8(4)).

6.2.3.2.3 planning permission which is neither phased nor outline – reg. 8(6) has been omitted and so the date it first permits development is the day of the grant of the planning permission rather than the later date at which any required approval is given.

6.2.3.3 pre-commencement condition - a definition of a pre-commencement condition has been introduced in reg. 8(3B) as being a condition “which requires further approval to be obtained before a phase can commence”. It would seem that whether or not a condition has this effect will be a matter of construction as it does not state that
this has to be expressly provided in contrast with the definition of a phased planning permission. This issue has been considered by the courts in the context of disputes over the unlawful commencement of development (see section 6.3.4 below).

6.2.4 site clearance – it was also proposed prior to the 2014 Regulations that if there is a phase relating to site preparation this phase should be ignored for the purposes of CIL. This would have delayed a liability to pay CIL until the first phase in which construction work commenced but this proposal has not been taken up.

6.2.5 infrastructure works – an issue which has given rise to considerable thought is the effect of carrying out infrastructure works on a site in relation. Such works can span a number of phases or even the whole site and could thereby trigger the CIL charge in respect of each phase spanned or the whole site. With developments in strategic areas which are treated preferentially for CIL purposes with a low or zero CIL rate phasing will not give rise to CIL complications although it could have implications for the section 106 planning obligations particularly as regards the application of the “pooling restriction” (see section 20.6 below). With sites subject to normal CIL rates some imaginative solutions have been proposed. One is to treat the enabling infrastructure works as a separate phase and another and similar is to treat the planning application as a hybrid application with the enabling infrastructure being authorised by a full planning permission and the residential development as a separate permission.

6.2.6 self-build housing – when a development involves more than one self-build house it is recommended that the planning permission provides for a phased development with each self-build house being a separate phase (see section 11.5.8.2 below). Each self-builder will need to assume liability for the CIL in respect of that builder’s house (see section 11.5.6(iii) below).

6.2.7 Planning permissions obtained by third parties - there is no requirement that the planning permission should have been obtained by or on behalf of the owner of the site or with the owner’s consent. The operation of the CIL regime can be triggered by a planning permission applied for by a third party without the consent or involvement of the landowner. Normally this would not be a problem because the grant of planning permission alone does not cause CIL to be payable. It is the commencement of the development which makes the CIL payable and this will usually not occur without the consent of the landowner. However, there are two respects in which it could have adverse CIL consequences. The first is that it could result in the authority registering a local land charge against the owner’s title which could lead to complications if the owner wishes to deal with the land. Second if the planning application relates to other land as well and development commences on that other land his could give rise to an obligation to pay a CIL liability by the landowner being triggered. For example, if there has been a successful planning application by a third party relating to a larger area which includes land not owned by that third party but by X when the development is commenced on a different part of the land covered by the planning permission then unless the third party has assumed liability for all the CIL X will be liable to pay the portion of CIL relating to X’s part of the land. This is so even though X was not involved in the obtaining of such permission. In such circumstances X must seek a suspension of the CIL liability (see para. 15.7 below). Even this may not be available if the third party has the right to enter X’s land and carry out works.
which comprise part of the chargeable development such as construction of an access road or the laying of services.

6.2.8 Planning permission granted before charging schedule in place –

6.2.8.1. **General** - no CIL liability will arise if a development is commenced after the charging schedule is put in place pursuant to a planning permission granted before the putting in place of the schedule. A planning permission pre-dating the charging schedule cannot by itself give rise to a CIL liability. A successful appeal after such a charging schedule is in place will be subject to CIL regardless of when the appeal was made. Further if there is an application to vary such a planning permission then there can be CIL complications as the varied planning permission will be a new planning permission (see section 8.4 as regards section 73 applications; section 8.5 as regards replacement planning permissions; and section 15.8 as regards subsequent free standing planning permissions triggering the abatement procedure).

6.2.8.2 **Lapsed permissions** - to avoid a CIL liability the planning permission prior to the putting in place of the charging schedule must be still be a valid permission. This point was raised in an appeal to an appointed person in relation to a planning permission for the erection of single storey self-storage units (on VOA website with no further identifying information). A planning permission for such erections had been granted but on condition that the development be begun within three years which it was not. A fresh application was made but was not granted until after a charging schedule had been put in place. The owner disputed the CIL liability assessed by the authority. The appeal against the CIL assessment failed as the earlier planning permission was no longer valid. The grant of the new planning permission had been delayed by the need for a flood assessment and it was argued that reg. 65 had not been complied with which requires a liability notice to be issued as soon as practicable after the day on which a planning permission first permits development. On this issue the appointed person made the point that an appeal under reg. 114 can only be made on the ground that the chargeable amount has been calculated incorrectly. It was not part of the remit of the appointed person to determine whether the planning permission could have been granted earlier or whether reg. 65 had been complied with.

6.2.8.3 **Delay in grant of planning permission** – when it is known that a charging schedule is to be put in place it will encourage applications for planning permission to be made with a view to obtaining a grant which does not trigger a CIL liability. In the appeal mentioned in section 6.2.6.2 above the suggestion was that the grant had been delayed which had resulted in a CIL liability that could have been avoided with a speedier grant. Although reg. 65 was relied on that is not really material in my view because the operation of that regulation is only triggered by the grant and does not apply to the position prior to the grant. It is really a matter for planning law. Most planning applications should be decided by the planning authority within 8 weeks and if the appropriate time limit for the application is not complied with then the applicant can appeal to the Secretary of State as if the application had been refused (section 78(2) TCCP 1990). In a CIL enforcement appeal against Preston City Council (appeal ref: APP/N2345/L/14/1200007) reliance was placed by the appellant on delay by the Council in dealing with a planning application but this was held not to have any bearing on the appeal.
6.2.8.4 Timing planning applications before CIL established – in areas in which the authority has started the process of establishing CIL developers may bring forward their development plans to avoid being subject to a CIL charge. In such situations nice judgments as to timing may be required. However, it is not automatically the case that there will be a financial advantage to be gained in obtaining planning permission ahead of the establishment of the CIL regime. The financial burden can be less under the CIL regime. If the developer waits the particular CIL rate applicable to the development may be low or zero. The cost of complying with section 106 planning obligations may be significantly reduced. Again nice judgments may be needed to be made in order to assess the final financial outcome and whether it is better to press ahead or wait for the CIL regime to be established.

6.3 Commencement of development –

6.3.1 General - no CIL will be payable even though planning permission has been granted after the establishment of the CIL rates for the area unless and until the development authorised is commenced. An unimplemented planning permission will not result in any payment of CIL. Redbridge Council estimates that a fifth of planning permissions granted by it are not implemented. The danger with such a planning permission is that as the commencement of a development does not require a great deal of work the development may be unwittingly commenced by the carrying out of a small amount of work, possibly involving demolition, thereby causing the CIL to be payable and a surcharge to be claimed due to the failure to serve a commencement notice. The grant of a planning permission will also probably result in the registering of a local land charge. It is sensible to ensure that there is evidence establishing when a development commenced in case there is an issue raised over this. Such evidence will include photographs and communications.

6.3.2 What constitutes commencement – what constitutes the commencement of a development is governed by planning law. Section 56 of the 1990 Act provides that a development begins on the earliest date on which any material operation comprised in the development begins to be carried out. The threshold is low. It is specifically provided that this includes:

6.3.2.1 any construction work in the course of the erection of a building;

6.3.2.2 any demolition work of a building;

6.3.2.3 any digging of trenches to provide a foundation or part of a foundation. This is true even if the trenches once dug are then filled in (High Peak BC v Secretary of State (1981) JPL 366). However, these must be trenches which are required for the development and not merely dug so as to be able to argue that a start has been made on the planning permission being implemented.

6.3.2.4 the laying of any underground main or pipe to the foundations or part of the foundations of a building or to any trench within 6.3.2.3 above;

6.3.2.5 any operation in the course of laying out or constructing a road or part of a road. For example, the pegging out of the width of the road will be sufficient.
6.3.2.6 any change in the use of any land which constitutes material development but if there has already been a material operation then the first in time will constitute the commencement.

6.3.3 Earnest of intent – in the 1990’s it was considered that the operation relied on to constitute the commencement of a development required it to be an earnest of an intention to develop. Following Stafford CC v Riley [2002] PLCR 75 it is now accepted that there is no issue of intent and all that is required is that (i) the particular operation is carried out pursuant to a planning permission or similar authorisation; and (ii) it is material and not de minimis.

6.3.4 Operation contravenes planning condition – the position use to be that any operation contravening any condition attached to a planning permission could not constitute the commencement of planning permission (FG Whiteley & Sons Limited v CC for Wales [1992] 3 PLR 72). The issue has often arisen in the context of disputes as to whether a planning permission has lapsed due to the expiry of time. It is possible that in the context of CIL this point could now be an issue in disputes as to whether or not CIL has become payable. This earlier strict approach has been relaxed so that a development can in some circumstances commence even though there has not been full compliance with all the conditions (Agecrest Limited v Gwynedd CC [1998] JPL 325). If the developer has done all that can be done to comply or there has been substantial compliance then the development may commence. Similarly if the local planning authority has agreed that it can start or if enforcement action could not succeed. To reflect this a distinction has been drawn in R (Hart Aggregates Limited) v Hartlepool BC [2005] EWHC 480 between such planning conditions which prohibit a development from taking place before certain action has been taken and act as a true condition precedent and those which require certain matters to be agreed before the commencement of development. Mr. Stuart Isaacs Q.C., sitting as deputy judge of the High Court, in Glenmere plc v F Stokes & Sons Limited [2008] All ER (D) 92 at paragraph 23 stated that “the effect of Hart Aggregates is to suggest a more flexible approach which requires consideration on a case-by-case basis whether a condition is in truth a condition precedent and if so whether a failure to comply with it does indeed have the effect of engaging the Whitley principle”. This dicta and distinction appears to have been followed by the introduction in the 2014 Regulations of the new definition for a “pre-commencement condition” (see section 6.2.3.3 above). In practice this is not an easy distinction to be drawn and there is still scope for argument as to whether a development has truly commenced if not all the conditions attached to the planning permission have been satisfied. The oddity is that it could be the developer rather than the charging authority relying on this point to avoid the crystallisation of a CIL liability.

6.3.5 Phased developments – as each phase is a separate chargeable development works in relation only to one phase will trigger the CIL liability for that phase but not for the other phases. However, if the works relate to more than phase that will trigger more than one CIL liability. This can be an issue if infrastructure works need to be carried out across the whole site before construction works can start. How can the trigger of the whole CIL liability be avoided? A number of options have been suggested. One is to add a further phase to the development which relates only to the infrastructure work so that when that work starts it acts as a trigger only in relation to
the infrastructure phase. An alternative suggestion is to have a hybrid application which results in a separate planning permission in relation to the infrastructure work.

7. Who charges CIL – a charging authority is one which grants planning permission and puts in place the charging schedule. The CIL does not have to be collected by the charging authority but can be collected by a separate collecting authority although normally the charging authority and the collecting authority will be the same authority (see para. 5.2 above). The Mayor of London’s charge will be collected by the relevant local London Borough Council or MDC if set up by the Mayor (see para. 19.7 below). Care has to be taken if there is a separate collecting authority so that notices required to be given to the collecting authority are not by mistake given to the charging authority.

8. Planning Permission – as set out in section 6 above the operation of the CIL regime is triggered by a development being authorised. Normally this will be by the grant of a planning permission. However, it extends beyond such grants to general consents (reg. 5 and see sections 8.2.3 and 8.3 below). This includes permitted developments previously under the Town & Country Planning (General Permitted Development) Order 1995 (SI 1995/418) and the subsequent 22 amending orders but now consolidated and widened in the Town and Country Planning (General Permitted Development) (England) Order 2015. As a means of authorising developments this has taken on increasing importance with more changes in use being permitted without the need for the grant of a fresh planning permission. A prior application to the local planning authority may still be required relating to matters such as impact on highways; contamination risk and noise impact. Developments authorised by a neighbourhood development order (section 61E 1990 Act) will now be covered by the CIL regime.

The CIL regime will operate differently dependent on whether there is a grant or a general consent. With a grant it will trigger a liability notice from the charging authority (see para. 12 below for a summary of a possible sequence of events) but with a general authorisation the first main step should be the service of a notice of chargeable development by the developer or landowner (see para. 8.3.2 below) which in turn will result in a liability notice. Developments commenced before 6th April 2013 and authorised by a general consent (being a development order under section 59 1990 Act or a local development order or an enterprise zone scheme) will not be within the CIL regime (reg. 128(2) 2010 Regulations).

8.1 Pre-CIL permission – the implementation of a planning permission which was granted before the setting of the CIL rates in the relevant area (“pre-CIL permission”) will not give rise to a CIL charge even if the commencement of the development is after the setting of the CIL rate subject to one qualification (section 73 permissions – see para. 8.4 below). This is true even if the development is phased or conditional upon an approval which is obtained after the setting of the CIL rates (see para. 6.2.2 above). The pre-CIL permission will most probably be subject to section 106 planning obligations which will not have been subject to the restrictions introduced with the CIL rate setting (see para. 20 below).

1 2015/596 plus the removal of permitted development rights in relation to public houses listed or nominated for listing as an asset of community value by the Town and Country Planning (General Permitted Development)(Amendment) (England) Order 2015/659
8.2 What constitutes planning permission for CIL – there is an expanded definition of planning permission in reg. 5 which includes

8.2.1 ordinary grants of planning permission granted by the local planning authority and the Secretary of State;

8.2.2 modifications to or replacements of existing planning permissions pursuant to sections 73, 97, 100, or 177 of the 1990 Act. This does not extend to section 96A of the 1990 Act which allows a LPA to make a non-material change to a planning permission (see section 8.8 below);

8.2.3 general consents which term covers permissions under development orders, local development orders, neighbourhood development orders (which include Community Right to Build orders), developments under government authorisation and arising under a simplified planning zone scheme and an enterprise zone scheme. In the case of development authorised by a development order, local development order or by an enterprise zone scheme CIL will apply to developments commenced on or after 6th April 2013.

It is pointed out in the February 2014 Guidance (para. 2.1.5) that a grant of a Lawful Development Certificate issued pursuant to section 191 or 192 TCPA 1990 is not relevant to the operation of the CIL regime. Such a certificate will confirm the application of permitted development and that no further planning permission is required to carry out the development but it will not trigger a CIL liability or payment. It is not a planning permission for the purposes of CIL. The development to which the certificate relates will require the giving of a notice of chargeable development in the normal manner see section 8.3.2 below).

8.3 General consents –

8.3.1 Care needed - many developments under the general consents will be minor developments which do not equal or exceed the 100 square metre limit thereby benefiting from the minor works exemption (see para. 10.3 below). When they do exceed that limit or they are below that limit but relate to a new dwelling then particular care will need to be taken to ensure compliance with the requirements of the CIL regime because there will be no formal planning permission which will have alerted both the charging authority to serve a liability notice and the householder to the CIL charge. It will be up to the developer and landowner between them to alert the charging authority by the giving of a notice of chargeable development and to ensure compliance with the CIL regime.

8.3.2 Notice of chargeable development - Care must be taken to ensure that prior to commencement of such a development a notice of chargeable development is given to the collecting authority unless it is a minor development or one in relation to which the CIL chargeable amount is zero or one in respect of which an exemption for residential extension has been granted (reg. 64(2)). This notice must be in the prescribed form or a form “to substantially the same effect” (reg. 64(3)(a)). Accompanying the notice must be a plan which identifies (a) the land to which the notice relates; (b) the development; (c) any buildings relevant for the purpose of
calculating Kr or E when calculating the CIL liability in accordance with the formulae in regulation 40 (see sections 14.2.2n 14.2.3.1 and 14.2.5 below) (reg. 64(4)). There is a continuing obligation to inform the collecting authority of any changes which are made prior to commencement of the development. The collecting authority has power to request further information, documents or materials from the person giving such a notice (reg. 64(8)). Although it is not provided for I assume that the intended response to the service of a notice of chargeable development is that the collecting authority should issue a liability notice but so far as I am aware there is no provision to this effect. This is in contrast to the case where due to default by the developer it is the collecting authority that serves the notice of chargeable development as then the collecting authority is required to serve a liability notice as well (reg. 64A(3)).

8.3.3 Default in serving notice of chargeable development – in the event of a failure to serve such a notice of chargeable development the collecting authority must prepare such a notice and plan if it believes that development has been commenced and the charity exemption does not apply (reg. 64A)). The requirement to identify the buildings relevant for the purposes of Kr and E of the reg. 40 CIL calculation is qualified to applying “where the collecting authority has sufficient information to do so.” This should be served on every person known to have a material interest in the land. The authority may be short of information. If it does not have the necessary information relating to the existing buildings which are to be retained or demolished then it can treat those as zero for the purposes of calculating the CIL liability. At the same time as serving the notice and plan it should also serve a liability notice as the development has commenced and such a notice must be served as soon as practicable after the date on which development is first permitted (see para. 12.3.2 below). It would also seem sensible to serve the demand notice as well at the same time although there is no obligation requiring the authority to do so (see para. 15.6 below as regards demand notices). There is a right to appeal against such a deemed commencement date if a demand notice is served (see para. 18.6 below).

8.4 Section 73 permissions – section 73 TCPA 1990 confers a power to remove or change a condition attached to an earlier planning permission. If an application under this section is successful it results in a new planning permission. Such an application may involve a substantial change with, for example, additional floors or alternatively be a relatively minor change such as an alteration to the external appearance of the building. One will increase the floor space whilst the second has no impact at all on area. However, as the section 73 permission is a new planning permission it will cause the CIL regime to operate again. In consequence there is a need to consider the CIL consequences which flow from this second permission particularly as prior to the 2012 Regulations those consequences could be extremely unwelcome. This can arise in two different CIL contexts. The earlier planning permission which is being varied may have occurred either before the setting of CIL rates in the area or after the setting. Each set of circumstances will need to be considered separately. In neither case under the CIL regime in force before the 2012 Regulations would the CIL charge arising from the section 73 permission be limited only to any increase in the gross internal floor area brought about by the second 73 permission. This meant that the financial consequences with a large development could be huge. With a proposed redevelopment in Victoria Street by Land Securities the prospective CIL bill due to the section 73 application was said to be millions of pounds and was stopping the proposed development. This was avoided by the amendments in the 2012 Regulations
in the process saving 2,500 new jobs. It can mean the difference between a proposed development going ahead and being shelved. Such a prospect encouraged the Government to act and remove by the 2012 Regulations both of the CIL problems arising in relation to successful section 73 applications.

8.4.1 Earlier pre-CIL permission -

8.4.1.1 Position before 2012 Regulations in force - If between the grant of the pre-CIL permission and the grant of the section 73 permission a CIL charging schedule has been put in place for the area then the section 73 permission but not the earlier permission will trigger the operation of the CIL regime. In many cases if the proposed development involves a vacant site this will mean that the charge to CIL is levied on the full development. In a very few cases there may be a deduction from the gross internal space of the development if it had already commenced before the section 73 application and one or more buildings or parts had been constructed and already been in continuous lawful use for the required six months or more. In all cases the site will already be subject to a section 106 agreement as a result of the earlier permission. No relief is given as against the CIL charge for the burden arising from that section 106 agreement. The burden of the section 106 agreement will have been anticipated by the developer but not the additional CIL charge. This was a very harsh outcome bearing in mind that it occurs whether or not the section 73 permission has resulted in an increase in gross internal floor area.

8.4.1.2 Position after 2012 Regulations in force – with effect from 29th November 2012 on the grant of the section 73 permission the amount of CIL payable shall be the amount by which the CIL chargeable by reason of the section 73 permission exceeds what would have been the CIL charge if CIL had been chargeable on the occasion of the earlier grant of planning permission. The earlier deemed charge is calculated at the same CIL rate as applies on the second occasion (new regulation 128A inserted in 2010 CIL regulations by reg. 9 2012 Regulations). No CIL is payable as a result of the section 73 permission if the CIL otherwise chargeable is the same or less than it would have been if there had been a CIL charge on the occasion of the earlier permission. Thus a change, for example, in a planning condition relating to the opening hours of a retail unit will not have CIL consequences. On the other hand if the change adds a floor thereby increasing the gross internal area of the development CIL will be charged by reference to that increase only and not the gross internal area of the whole development. It is stated in the revised June 2014 Planning Practice in para. 7 that the provisions in reg. 128A should apply to all subsequent section 73 permissions in relation to a development regarding which the original planning permission was prior to the introduction of CIL. I take this to mean there can be more than one section 73 planning permission and the CIL position arising from the second or later section 73 permission will be determined by reference to the original planning permission.

8.4.2 Earlier CIL permission – if the earlier planning permission was after the setting of the CIL rates for the relevant area so that it was chargeable to CIL then

8.4.2.1 Position before 2012 Regulations in force - prior to the coming into force of the 2012 Regulations there was a similar unwelcome CIL outcome if the earlier planning permission was granted after the introduction for the area of such a CIL
charging schedule. The earlier planning permission will have been subject to the CIL regime. For instance assume a planning permission is granted for a development on a vacant site and the development is commenced giving rise to a liability to pay the CIL charge. A section 73 application is made to change a condition attached to the earlier permission and a new section 73 permission is granted. The development is still substantially the same but with a modification. Until the 2012 Regulations came into force there is nothing to mitigate in such circumstances the second charge arising on the occurrence of the successful section 73 application. The second CIL charge is not restricted in scope to the modification. It will be chargeable on the full amount of the gross internal area of the development save that if any building has been constructed in accordance with the earlier permission then its internal floor area will be taken into account as a deduction but only if it has been in lawful use for a continuous period of six months or more during the relevant period prior to the successful section 73 application.

8.4.2.2 Position after 2012 Regulations in force - in cases where the CIL regime applied to the earlier permission then there is an abatement so that on the occasion of the second permission only any increase in CIL is payable. The amount of CIL payable due to the earlier permission is deducted from the CIL payable as a result of the section 73 permission (new regulation 74A inserted in 2010 regulations by reg. 8 2012 Regulations). In order to obtain the benefit of this relief the person liable to pay the CIL arising from the section 73 permission must request it and provide proof of the payment of CIL on the first permission.

8.4.2.3 Social housing relief – in the event that social housing relief (see section 11.3 below) has been granted in relation to a development and then there is a section 73 permission in respect of that development but the amount of the social housing relief has not changed as a result then all the acts done with regard to the relief under reg. 51 in relation to the first permission will be treated as done for the section 73 permission (reg. 40(7). This applies in relation to developments regarding which a liability notice is issued on or after 24th February 2014 (reg. 14(3) 2014 Regulations).

8.4.2.4 Other reliefs – the special treatment of social housing relief in this context (see section 8.4.2.3 above suggests that this treatment will not apply as regards other types of relief. This is important because the abatement authorised with a section 73 planning permission by reg. 74A will not itself assist when the earlier planning permission has had the benefit of a CIL relief. In those circumstances there will have been no CIL paid in respect of the earlier planning permission so there is no CIL to credit against the CIL liability arising from the later section 73 planning permission. In consequence the abatement provisions will not assist and the relief applicable to the earlier planning permission may not be applicable to the subsequent planning permission particularly if the development has already commenced before the grant of the subsequent planning permission. One relief that may be caught by this problem is the self–build relief. One authority at least is denying the self-build relief when there are changes to the original authorised by the first planning permission. To avoid such complications it may be necessary for the special treatment of social housing relief to be extended to other reliefs. Without such an extension the best approach may be not to make any changes until later after the completion of the development.
8.4.3 **Chargeable development** - additionally reg. 3(2) of the 2012 Regulations (amending reg. 9 of the 2010 Regulations) changes the definition of chargeable development to ensure that it is the actual development carried out by the developer which is charged. The definition now is in terms which show how hard it will be to achieve the objective of simplicity with this levy. The effect is that the chargeable development may be the development authorised by the original planning permission or a subsequent varied permission and that it will be possible to revert back from one to the other even when one or more has already been commenced.

8.4.4 **Procedure** - it is not spelt out whether the CIL charge relating to the section 73 permission replaces the earlier charge or remains separate and there is a need to revise the CIL liability with regard to the earlier permission. The regulations talk of a “new or revised liability notice” in relation to the development under the section 73 permission which leaves the point open. The CIL guidance given by the DCLG (April 2013) states that “the most recently commenced scheme is the liable scheme” (para. 95).

8.4.5 **Overpayments** –

8.4.5.1 **Whether overpayment?** - if the CIL charge relating to the earlier permission exceeds the CIL charge following the grant of the section 73 permission then it seems that it is expected that there will be a repayment of the difference as an overpayment because it is provided that in those circumstances no interest is payable by the collecting authority pursuant to reg. 75(3) 2010 Regulations (new reg. 75(4) added by reg. 8(4) 2012 Regulations). This is consistent with there being one chargeable development. It is material that with the new abatement procedure introduced by the 2014 Regulations in relation to free-standing planning permissions it is expressly provided that no repayment will be made if the CIL liability relating to the subsequent planning permission is less than that arising from the earlier permission. This effectively confirms that such repayment will occur with subsequent section 73 permissions but not subsequent free-standing permissions. The possibility of such repayments will increase the administrative burden for authorities and make more uncertain the authority’s budgets regarding CIL receipts. It could particularly be a problem if the subsequent section 73 permission causes the development to be exempt as a minor development when previously it was not and CIL was paid.

8.4.5.2 **Changes in ownership** – it seems that this overpayment is to be achieved by a revised liability notice in relation to the earlier permission resulting from the change in the chargeable development. In cases in which there has been a change in the person liable for the CIL the repayment should go to the person who paid the CIL arising from the first permission. The revision of the liability notice for the earlier permission may secure that outcome. However, prudence may dictate that as a back up this outcome should be expressly covered by the terms by which any change in ownership or liability occurs.

8.4.6 **Warning** - the provisions in the 2012 regulations came into operation on 29th November 2012 and are not retrospective. Any section 73 permissions granted before these regulations came into force will still bear the adverse CIL consequences discussed above without the benefit of the mitigating provisions in the 2012
Regulations. In those circumstances two courses of action could have been considered.

8.4.6.1 Fresh section 73 application – first it could be considered whether it is possible to make a further section 73 application after the coming into force of the new 2012 regulations? If so then that could be the permission which is implemented thereby obtaining the benefit of the relief conferred by those regulations. Alternatively

8.4.6.2 Implement earlier permission - can the original proposed development be carried out rather than the varied development? In this respect it is relevant to note that the new definition of chargeable development expressly covers the possibility in reg. 9(8) of the 2010 Regulations that a development may start under an earlier permission, be halted, work then start on a different development under the section 73 permission, be halted and then the earlier development be restarted. This is to ensure that the “recommenced” development is the chargeable development.

8.4.7 Section 106 agreements - Separately when the first permission is a pre-CIL permission it may be necessary to re-visit the section 106 agreement in order to ascertain whether the burden can be mitigated by varying the terms of that agreement.

8.5 Replacement permission –

8.5.1 Relief - similar unwelcome CIL consequences arose with permissions granted pursuant to reg. 18(1)(b) or (c) Town and Country Planning (Development Management Procedure) (England) Order 2010. This procedure allows the replacement of permissions which are extant but have not been implemented provided that they were granted before 1st October 2010. It is not possible to use the power in section 73 to change a time limit when a planning permission is due to lapse (subsection (5)) so this procedure is available for such purposes but only for older planning permissions (pre-1st October 2010). If the replacement permission is granted after a charging schedule has been put in place in the area it will result in a CIL charge even though no such CIL liability would have arisen in relation to the permission replaced. The new reg. 128B (added to the 2010 regulations by reg. 9(2) of the 2012 Regulations) removes from the CIL regime the development carried out in accordance with such a replacement permission when there was no charging schedule in place at the date of the first permission. This amendment operates in England but was not needed in Wales as this had always been the position in Wales.

8.5.2 Warning - As with the new provisions relating to section 73 permissions a warning has to be given that this relief applies only to replacement permissions granted after the new reg. 128B came into force on 29th November 2012 (reg. 10(5) 2012 Regulations). Any granted before that date will remain subject to a CIL charge.

8.6 Stand alone permissions – the special CIL treatment relating to subsequent section 73 permissions has been applied by the 2014 Regulations to subsequent free-standing planning permissions which are granted after the commencement of a development but before its completion. It does not operate in precisely the same manner. It allows the earlier CIL liability to be set off against the later CIL liability but only to the extent that there are uncompleted buildings. It is not possible to obtain a repayment by
this route if the earlier CIL liability is greater. There are a number of restrictions and limitations and details are contained in section 15.8 below.

8.7 Building for limited period – a building for which permission has only been granted for a limited period will not be a building for the purposes of the CIL regime.

8.8 Section 96A permission – the statutory power conferred by section 96A TCPA 1990 allows changes to be made to planning permission if the authority is satisfied that they are not material. The power allows conditions attached to a planning permission to be removed or varied or new conditions to be added. The applicant must have an interest in the land subject to the permission. The outcome of such an application is unlikely to result in any appreciable change to the internal floor space and this is not treated as a new planning permission for either CIL or the Crossrail contribution.

8.9 Phased developments - What now constitutes a phased planning permission is set out in section 6.2.3.2.1 above. Phasing is important in the context of CIL because each phase is a separate chargeable development (reg. 9(4)). This means that the CIL arising from a particular phase will only be payable when the works relating to that phase of the development starts. It allows for the CIL liability to be assumed on a phase by phase basis and does not require the same person to assume liability for all the phases (see section 15.2). It also means that the CIL rates applicable to different phases within the development may differ because the date when each first permits development need not be the same (see section 6.2.3 above). With reviews of existing CIL rates beginning now to take place this is no longer an academic point. It means that budgets for a development may have to be changed if new CIL rates are brought in before some phases have commenced.

Phasing may also affect the CIL bill arising from a development due to the application of differential CIL rates. This may because the development is a mixed use development with different CIL rates applicable to the different uses. The manner in which the different use areas are phased will affect the cash flow dependent on whether the higher CIL rates are applicable to the earlier or later phases. More importantly phasing could affect the particular CIL rate applicable as regards a specific use particularly residential use. Some authorities are bringing in CIL rates for residential use which differentiate by reference to the number of units constructed. For example Peterborough has introduced CIL with effect from 24th April 2015 and as regards residential use the CIL rates are markedly lower if the development involves 15 or more market houses than if it involves less than 15. A development of 60 houses divided into four phases of 15 each will result in CIL charged in respect of each phase at the lower CIL rates for residential use. However, if any of the phases are for the construction of less than 15 houses then the higher CIL rate for residential use will be applicable to such phase resulting in a higher total CIL bill for the whole development.
D. Chargeable development

9.1 General – For a planning permission to trigger the operation of the CIL regime it must authorise a chargeable development. The CIL regime is not limited to permissions authorising a commercial development or the development of commercial property. Further an important basic feature of the CIL regime is that the development must relate to a building and not just structures such as pylons or wind turbines. The definition of building ensures that it covers any building in, under or over the land (reg. 1(4)(c)). The currently popular basement developments (subject to the exemption for residential exemptions) will be caught just as will be developments over railways. Excluded developments (see para. 10 below) will not be caught. In particular it will not include the addition of mezzanine floors in existing buildings unless there has been a change of use which triggers the operation of the CIL regime (see para. 10.4 below). Subject to one qualification the focus is on whether there is an increase in the gross internal area of a building or buildings as a result of the development. The qualification is important and is a possible trap. It concerns permissions which change the use of an existing building and arises from the regulation governing the determination of the gross internal area of buildings (see para. 9.3 below).

9.2 Building –

9.2.1 General - what constitutes a building is crucial to CIL as the authorised development must relate to a building for a CIL charge to arise and the CIL charge is then calculated by reference to the gross internal floor area of the building. Oddly there is no special definition of building for the purposes of CIL. It cannot just follow the definition applicable for planning law because that definition includes any structures and erections (s. 336(1) 1990 Act) and in consequence is far too wide for CIL purposes. For the purposes of the Planning Act 2008 building has the meaning in section 336(1) of the 1990 Act save as regards Part 11 of the 2008 Act which relates to CIL (section 235(1)). The absence of such a definition or guidance on the topic is unhelpful. In the majority of cases there will be no doubt and it will be clear whether the particular construction falls one side or the other of the line. However, there will be cases in which there is real doubt.

9.2.2 Question of degree - in Moir v Williams [1892] 1 QB 264 it was stated that it is a question of degree and circumstances whether a construction is a building and that the usual meaning is a block of brick or stonework covered by a roof. This chimes with what has been suggested by Bristol planning department as the test which is to ask whether the structure is weather tight so that if it rains any one in it will remain dry. This is workable and practical but is it correct? It would exclude lean tos, verandahs and covered walkways. If applied to stadia Bristol considers that it would include changing rooms, executive suites, office, bars and conference facilities but exclude terraces and seats which are open to the elements.

9.2.3 Rating purposes - in Cardiff Rating Authority and Cardiff Assessment Committee v Guest Keen and Baldwin’s Iron and Steel Co [1949] 1 KB 385 the test for the purpose of rating legislation as to whether a construction is a building was set out as relying on three factors – size, permanence and degree of physical attachment. This test has been applied with regard to planning legislation (Barvis Limited v
Secretary of State for the Environment [1971] 22 P & CR 710) and it is to be anticipated that it will be utilised for the purposes of the CIL regime.

9.2.4 Planning purposes - However, for planning purposes a steel and concrete frame clad with corrugated sheeting is a building even though it had no roof (R v Ealing LBC ex parte Zaimuddain [1994] 3 PLR 1 which concerned an uncompleted mosque which was used for the purposes of a religious gathering). A tunnel under a public highway linking two adjoining plots of land was a building for the purposes of the statutory right of a gas undertaker to open up land in order to carry out work (Schweder v Worthing Gaslight Co. [1912] 1 CH. 83). This last authority had applied Thomson v Sunderland Gas Co. (1877) 2 Ex 429 which held that underground arches supporting a road which were used as storage cellars constituted a building. The specific decisions are not significant but they are an indication of the type of construction that can be treated as a building for planning purposes but which one would not expect to be a building for the purposes of CIL. It suggests that arguably covered walkways or a complete stadium could be regarded as buildings.

9.2.5 Polytunnels - An illustration of both the test in operation for planning purposes and a possible area where this could be a real issue with the application of the CIL regime is R (on application of Hall Hunter Partnership) v Waverley BC and Others [2006] EWHC 3482 (Admin). This was a contest over the validity of an enforcement notice issued with regard to polytunnels erected without planning permission. In this case the tunnels were found to be substantial in bulk and volume. Their height varied from 3.2m to just under 4m. Their width was up to 8m and their lengths varied from 50m to 400m. Machines and a considerable number of man hours were involved in their installation. The legs attaching them to the land went into a depth of up to 1m. The tunnels covered up to 99 acres. They were erected for periods from three months to seven. On the facts such a project was regarded as having the characteristic of permanence which did not require it to be everlasting but more than temporary. The appeal upheld the findings that these were buildings for the purposes of the planning legislation because they were substantial, firmly attached to the land and permanent. That definition is not the same as for CIL. With the increased use of polytunnels in farming to protect crops one can see plenty of scope for battles with local authorities.

At present the likelihood is that such use will be either zero-rated (as currently in Huntingdonshire and Shropshire) or at a low rate for CIL. Some authorities have proposed applying a higher CIL rate to agricultural buildings but have met with determined opposition. For example, the proposal by Leeds to charge a CIL rate of £5 psm for agricultural use faced vigorous opposition from the NFU and Country Landowners Association. This has not stopped developments for agricultural use being charged at £5 under other uses. However, what a tempting target for cash strapped local authorities. With the introduction of the new permitted development rights for redundant agricultural buildings this may be looked at again. Agricultural buildings can be converted without the need for planning permission to residential use or for use as a state-funded school or nursery. Such developments will be chargeable at the relevant CIL rate for such types of development subject to the application of possible exemptions and exclusions but it may draw attention to agricultural land and the possibility of raising revenues.
The polytunnel case also indicates another point. It involved the use of an enforcement notice seeking to bring under the control of the local authority such activities. With the introduction of CIL there is an added reason for issuing such notices in appropriate cases. It can be a means of protecting the authority’s revenue. Presently farm land should not often give rise to real CIL problems due to a combination of low rates and excluded developments if it either relates to less than 100 square metres (provided it does not concern a new dwelling) or involves buildings into which people do not normally go or only for the purpose of inspecting or maintaining plant. There is scope for issues and there has been an appeal concerning whether two barns qualified as buildings into which persons did not normally go (see section 10.1). With other types of land enforcement notices may be a further option for authorities seeking to protect CIL receipts.

9.2.6 Marquee – the Hall Hunter partnership decision applied Skerrits of Nottingham Limited v Secretary of State and Harrow LBC (No. 2) [2002] 2 PRL 102 which had held for planning purposes that a marquee was a building.

9.2.7 Caravans - one area which could throw up issues is caravans. For the purposes of planning law a wooden self-build chalet/shed resting on pillars and not forming part of the land has been held by the Court of Appeal to be a building (R v Swansea City Council ex parte Eliotstone [1993] 2 EGLR 212). One reason for this decision was that it had a prospect of permanence. There would seem no good reason why such a chalet should not be a building for the purposes of CIL. In contrast in Tewkesbury BC v Keeley [2004] EWHC 2594 it was held that a wooden caravan mounted on a steel chassis with wheels which could be moved round the site was not a building for planning purposes. The unit was manufactured off site in two parts and transported to the site to be erected and a roof placed on it. The crucial factor appeared to be from para. 34 of Jack J’s judgment that “in none of the cases has a structure been held to be building which is mobile to the extent of having wheels so that it can be freely moved around the site”.

If so will this apply equally to caravans? Such a home is a structure for the purposes of the Caravan Sites Act 1968 (section 13) and the Caravan Sites and Control of Development Act 1960 (section 29) and this includes structures composed in two sections. These Acts impose a separate regime from the planning regime by which to control caravans. However, for planning purposes a caravan is not a building and the placing of a caravan on land does not constitute operational development (Wealden DC v Secretary of State for the Environment [1988] 1 EGLR 187 following cases such as Guildford RDC v Fortescue [1959] 2 QB 112) as has been noted in the Mayor of London’s Guidance (para. 5.7). Jack J. considered the regime applicable to caravans in para. 36 of his judgment in the Tewkesbury BC case supra and concluded it did not help with the issue he had to decide because “the law has put “caravans” in a special category of their own.”

Some local authorities such as Waveney take the firm view that as mobile homes are not a building for the purposes of the planning regime the CIL regime will not apply. As regards ordinary mobile caravans that should be correct. Clearly such caravans are capable of being moved freely round the site. With static caravans there is more doubt. Other authorities are uncertain. Requests for official guidance have not so far as I am aware resulted in guidance. Normally such static homes will have an air of
permanence. They may even be combined with a brick construction. How will the grant of planning permission for a site comprising such static mobile homes be dealt with under the CIL regime? Will it depend on whether the static caravan rests on pillars or some similar means of support or whether it will continue to have wheels attached to it? For the purposes of the CIL regime I can see no real distinction between such a park and a park comprising log chalets. There is certainly none as regards demands on the local infrastructure. It seems that the definition of building for the purposes of planning law is not intended to automatically apply for the purposes of the CIL regime. If that is so then will the decision in ex parte Elitstone supra or Tewkesbury BC supra govern the outcome? Although some consider the matter to be clear it seems to me as regards static caravans to be uncertain.

Such an issue can arise if there is a chargeable development involving the placing of static caravans on land or if there is a change of use and the availability of a deduction is considered. In such circumstances if for the purpose of CIL a static caravan is a building then how will CIL be chargeable? What will be the gross internal area for the purposes of the CIL calculation? Should it be based on the maximum internal area of the static caravans with the possibility of a revision if some of the static caravans are smaller? My understanding is that official guidance has been sought on this issue but no answer has yet been provided.

9.2.8 Mobility – apart from with regard to caravans mobility may be an important factor in other cases in determining whether something is a building for the purposes of CIL. In the Tewkesbury BC case (see section 9.2.7 above) the ability to move the caravan/shed round the site was crucial. Similarly in Cheshire CC v Woodward [1962] 2 QB 126 a large mobile coal hopper and conveyor was held for planning purposes not to be a building but it was accepted in the judgment of Lord Parker CJ that the ability to move a thing was not conclusive. In contrast in Barvis v Secretary of State (1971) 22 P & CR 710 a mobile crane 89 feet in height which ran on tracks fixed in concrete and could be dismantled to move to the next site was held notwithstanding the limited degree of mobility to be a structure or erection requiring planning permission. The facts of neither case are likely to be relevant to CIL which is focused on the internal area of a building. However, they do highlight that the facts of each case will need to be investigated to ascertain quite how mobile the subject matter of the issue actually is.

9.2.9 Designs - The introduction of CIL may cause designs to be modified. It may encourage attempts at reducing the gross internal area of a building by converting what would have been parts of the building for the purposes of CIL to areas which are not. Instead of providing access between buildings by a wholly enclosed link a covered walkway may be used. Instead of an internal or detached garage a carport could be included in the design. This is an area which is likely to give rise to a number of appeals. There have been two already in relation to areas not fully enclosed – one a garage with an open front and the other loading bays which were not fully enclosed (see section 14.2.1.3 below).

9.3 Change of use – A material change in the use of a building can be a development for the purposes of planning and therefore require a fresh planning permission (section 55(1) 1990 Act). When a single dwelling house is changed to two or more separate dwelling houses that inevitably will be a development for planning purposes
due to section 55(3)(a) 1990 Act but not for the purposes of CIL (reg. 6(1)(d) and see section 10.2 below). For the reason explained in para. 9.3.1 it is unlikely that a change of use will give rise to a CIL charge. Similarly the creation of buildings within reg. 6(2) or works relating to such buildings will not constitute development for the purposes of CIL. These are buildings into which people do not normally go or which house fixed plant or machinery (see section 10.1 below).

There is considerable scope for changing use under the authorisation of a general consent such as the Town and Country Planning (General Permitted Development) Order 1995. For example, Class E of Part 3 Schedule 2 permits a change of use to any other use which would have been originally authorised by the planning permission. This is consistent with the general exclusion from developments for the purposes of planning conferred by section 55(2)(f) 1990 Act and article 3(1) TCP (Use Classes) Order 1987 which provides that a change of use does not involve development if the change if use for any other purpose of the same class. There are fifteen use classes as well as those which are sui generis.

This means that it may be important to determine whether a change in use constitutes a material change of use which in turn constitutes a development thus giving rise both to the need for a new planning permission and a possible CIL charge. In planning law this is a matter of fact and degree (Birmingham Corp. v Habib Ullah [1964] 1 QB 178 applied in Panayi v DDE (1985) 50 P & C R 109) taking into account the whole site and not just the area of change (Bendles Motors Limited v Bristol Corp. [1963] 1 WLR 247). Account has to be taken not just of the impact of the change on amenities and the environment but wider planning considerations such as the impact on services and the character of the area (Westminster CC v Great Portland Estates plc [1985] AC 661).

One especially uncertain area is intensification of user and whether this constitutes a material change for planning purposes (see Peake v Secretary of State for Wales (1971) 22 P&CR 889 and Kensington & Chelsea v Secretary of State for the Environment (1981) JPL 50). Another will be when there is a resumption of a planning user which had been previously abandoned. The abandonment will not be a material change of use but the resumption will be (Hartley v Ministry of Housing and Local Government [1970] 1 QB 413).

A further particularly difficult issue can be whether a proposed conversion of a number of residential units into one single dwelling will be a material change of use requiring a fresh planning permission. The argument that a reduction in the number of residential units with no significant change to the external appearance of the building will not constitute a material change of use was rejected in Richmond upon Thames BC v SSETR [2000] 2 PLR 115. The conversion of seven one bedroom flats and studios in a two storey semi into a single dwelling was held to be a material change justifying the refusal of a certificate of lawful user. It was accepted that the loss of a certain type of residential unit in the area was a factor which should be taken into account when determining the issue. If it is a material change of use then planning permission will be needed and it will be a chargeable development because the development comprises a dwelling. In those circumstances it will be necessary to rely on a deduction if no CIL is to be payable.
CIL will have been charged on the actual use adopted by the original planning permission (assuming that the CIL regime applied to it) rather than on the basis of any use which is authorised by the planning permission and then when there is a change the CIL position needs to be reconsidered afresh. If the change constitutes a development for the purposes of planning law then a new CIL charge could arise. This will depend on whether there is any increase in the internal floor area or the development includes a dwelling.

A change in use will normally not by itself give rise to a CIL liability. There are two reasons for this. First a development does not give rise to CIL if within reg. 42 (see section 10.3). A building which is just subject to a change of use or is subject to works only involving the conversion or sub-division of the building will not be liable to CIL provided there is no increase in internal floor space in excess of 100 sqm and the development does not involve a dwelling. A conversion of a factory to an office or vice versa will not be liable to CIL if there is no increase in area. This is regardless of whether the building has been in use during the last three years.

Second, even if otherwise liable to CIL the gross internal area of the building which is subject to the change of use will be a deduction when calculating the CIL liability arising from the permission if the building is an “in-use building” (see section 14.2.5.4) If the deduction is available then there will remain no area to be charged to CIL (see section 14 below). However, in some cases a change of use when combined with either prior non-use of the building preventing it satisfying the vacancy test or prior unlawful use can give rise to a CIL liability because the gross internal area of the relevant building will not be available as a deduction and in consequence the whole of the gross internal area of that building will be chargeable to CIL.

9.4 Extension of unused building – if it is intended to extend a building which has been unused for three years by say 70 square metres there will be no CIL charge if the planning permission relates only to the extension. The new build will be within the 100 square metres limit (see section 10.3 below). Even if the extension exceeds 100 square metres the CIL will be charged only on the area of the extension unless it is now exempt from CIL due to the application of the exemption for residential extensions (see section 11.6 below). The position would be different if there has been an abandonment of the planning permission so that a fresh planning permission for the whole building is needed.

9.5 Unlawful use –

9.5.1 General - when there has been user of the building in the three years (or twelve months if the liability notice relating to the development was issued prior to 24th February 2014) prior to the day that the planning permission first permits the development but it is unlawful use then the gross internal area of the existing building will not be deductible when determining the area to be charged to CIL. The deduction is only available if there has been lawful user of the building or a part continuously for at least six months within the three years (or twelve months if the development is prior to the operation of the 2014 Regulations) immediately prior to the development first being permitted. This means that a grant of retrospective permission or a deemed grant on the quashing of an enforcement notice on appeal will give rise to a possible
CIL liability. In addition there will be a possible surcharge due to the failure to serve a proper commencement notice (see para. 17.1.4 below).

9.5.2 Unlawful change of use - When changing the use of a building a failure to obtain the appropriate planning permission before acting will have the potential to increase the CIL liability when the position is finally legitimised. It may create a CIL liability when one should not have arisen. This could be a substantial penalty.

9.5.3 Mixed lawful and unlawful use - The position is unclear if there is a mixed user of a building in the sense that there is lawful user of part and an unlawful user of another part. The definition of “in-use building” in the new reg. 40(11) (see section 14.2.5 below) (previously covered by reg. 40(10)) appears to be intended to apply to a building which is only partly in use. It would not seem to apply if the building is wholly in use but only part is lawful. Even if that is the case what happens if part is not used part is used lawfully and the final part is used unlawfully. One argument is that so long as part of the building is used lawfully that is sufficient and it does not matter for these purposes what happens with the remainder of the building. On the strict wording that would appear to be correct. The alternative would be to apportion so that the area of the part lawfully used will be a deduction but not the remaining area of the building including the part in unlawful use. There seems to be no justification for this in the regulations.

9.6 Unlawful development –

9.6.1 Options - there will be no charge to CIL arising from the commencement of an unlawful development as there will be no actual or deemed planning permission authorising the works. As has been pointed out in the guidance prepared by PAS the matter would be dealt with by the authority’s planning enforcement team with four possible outcomes:-

9.6.1.1 Demolition – no CIL liability;

9.6.1.2 No action – this is only likely with small infringements and there would not be likely to be a CIL liability in any event;

9.6.1.3 Retrospective planning permission – CIL becomes due as a result of the planning permission;

9.6.1.4 Enforcement notice quashed on appeal – deemed planning permission as a result triggers CIL liability.

9.6.2 Surcharges on unlawful development - surcharges will be due if CIL becomes due in these circumstances as no commencement notice will have been given. CIL could be due even though the development commenced before a charging schedule was in place for the area if a deemed or retrospective planning permission occurred after the charging schedule is in place.

9.6.3 Proceeds of crime – the powers in the PoCA 2002 have been invoked for an infringement of planning law (see, for example, R v del Basso [2010] EWCA Crim 1119). If a planning department is going to adopt such an approach then it will not be
concerned to authorise the development so as to raise the CIL. Alternatively, committal proceedings may be used.

9.7 Subject matter of the chargeable development – the CIL is charged on the area which is the subject matter of the chargeable development. The ascertainment of this area, therefore, has an important role to play in determining the amount of CIL payable.

9.7.1 Starting point – the chargeable development is the development for which planning permission is granted (reg. 9(1)).

9.7.2 Development under general consent – where there is no actual planning permission granted but the development is under a general consent then the development will be that identified in the notice of chargeable development given to the collecting authority or in default prepared by the collecting authority (reg. 9(3)).

9.7.3 Phased planning permission development (reg. 9(4)) –

9.7.3.1 Prior to 24th February 2014 - each phase of a development pursuant to an outline planning permission was treated as a separate chargeable development and so the subject matter of each phase comprised a separate chargeable development. The CIL regime was applied separately to each phase of the development. This had obvious advantages for arranging the cash flow of the development expenditure but was limited only to outline planning permissions and not full or hybrid planning permission. However, the phasing of the development could give rise to problems when computing the CIL liability. One problem could be with regard to the demolition of buildings and the deduction of the area when operating the reg. 40 formula. Another was if there was a long period between the grant of planning permission and the commencement of a phase preventing a retained building being in lawful use for a period of six months in the twelve month period prior to the commencement for the particular phase. There could also be complications where different parts of the development have different uses. A number of these issues have been addressed by the 2014 Regulations by amending the formulae in reg. 40.

9.7.3.2 Post 23rd February 2014 - The treatment of each phase of a development as a separate chargeable development for the purposes of CIL now applies not just to outline planning permission but to all types of planning permission (reg. 4(2) 2014 Regulations). It now applies to all phased planning permissions which expressly provide for development to be carried out in phases and so it does not matter whether it is an outline, full or hybrid planning permission. This applies from 24th February 2014. There is nothing in the transitional provisions in reg. 14 of the 2014 Regulations which prevents the change applying to phased planning permissions granted before the coming into force of the 2014 Regulations. In the case of outline planning permissions granted before 24th February 2014 there is no change but as regards full or hybrid planning permissions it will be interesting to see whether this phased treatment will be accepted by authorities as applying.

The 2014 Regulations have made a number of amendments to the formulae in reg. 40 with a view to addressing issues that had arisen with regard to phasing (see section 14.2.3 below). In particular the deduction available for the purposes of CIL in respect
of the internal area of a demolished building can be carried forward to later phases of
the development to the extent not used in an earlier phase.

9.7.4 Section 73 planning permission – this section confers a statutory power to
remove or modify the conditions attaching to a planning permission. The exercise of
this statutory power will result in a new planning permission. Reg. 9(5) provides that
if this statutory power is used to extend the time limits for the commencement of
development then the chargeable development will be determined by reference to the
development for which the earlier planning permission was granted. This applies only
to changes in that time limit. Section 73 has been amended so that it is no longer
possible to exercise this statutory power to change time limits (sub-section (5)). In
consequence this provision can only apply to section 73 permissions changing time
limits before 24th August 2005. Other exercises of the section 73 power can give rise
to CIL complications (see para. 8.4 above).

10. Excluded developments – it will be important to know which developments are
outside the scope of the CIL regime and which are not. The obvious reason is so that
clients can be told at the start of their consideration of a proposed development the
good news if it is not caught. The other is so that the client can be told that a proposal
devised to avoid the operation of the CIL regime does not work and is caught. There
is plenty of scope for confusion with such proposals when clients do not have a
detailed grasp of the CIL regime. For this reason I am including in this section the
exemption for minor developments.

10.1 building into which people do not normally go or only for purpose of inspecting
or maintaining fixed plant or machinery (reg.6) – any works relating to the
construction, repair or improvement of such a building are not treated as development
for the purposes of CIL. This covers buildings such as substations or pumping
stations. In the Mayor of London’s guidance on CIL it is stated that the Mayor has
been advised that this only applies to separate buildings and does not apply to parts
only of a building. This is supported by the VOA CIL Appeals Guidance Note. In
Appendix 1 example 17 it gives as an example a thirty storey building with the
basement and fifteenth floor of the building to be occupied solely for the purposes of
plant and machinery such as boilers and air conditioning. In calculating the
chargeable GIA of the building no deduction is made for the GIA of the two floors.
The justification for this approach is that the two floors are part of a larger building
and do not comprise a separate building.

This exclusion from CIL has been claimed in respect of two agricultural buildings in
an appeal (concerning a development described as the erection of two agricultural
buildings). The buildings were two barns which were to be used for keeping calves
over the winter months until they were eighteen months rather than being sold
between three and five months. Hay, straw, machinery and equipment were also to be
stored in them. The appointed person held that the barns did not qualify as such
buildings because they would be entered on a daily basis for the purpose of feeding,
checking on and looking after the calves. For these purposes the appointed person
considered that one person entering was sufficient.

It is possible to envisage tricky issues arising in respect of large sites such as railway
stations, airports and power stations. Three separate issues will arise. First, what on
the site is actually a building? For instance how are extendible walkways, tunnels, luggage ducts or platforms with a partial cover to be treated? Second, if a building will it be excluded by either limb of reg. 6(2)? This could raise the third issue as to whether the area is part of a bigger building or constitutes a separate building (see para. 14.2.1.6 below)? Once these issues are dealt with there then may a fourth difficult issue. How will the various parts of the large site be categorised as regards use.

10.2 Change of use from single dwelling to two or more dwellings (reg. 6(1)(d)) –

10.2.1 General – there is a specific exemption when converting one dwelling into two or more. This means that a conversion to flats of a single house which had not been in lawful use for six months or longer in the three years prior to the date the planning permission first permits the conversion will not be subject to CIL. This exclusion covers any works relating to the change of use of a single dwelling house to two or more separate dwelling houses. It has been suggested that this exclusion is limited to conversion to two separate houses as opposed to flats but in my view notwithstanding the continuing problems over the construction of “dwellings” in tax legislation this limitation is not correct. Support for this is gained from an appeal relating to the conversion of existing property to two self-contained flats in which the appointed person found that CIL was not due although the authority put in no representations (decision on VOA website concerning development being conversion of existing property to two self-contained flats).

10.2.2 Extension included - It is not immediately apparent what is to happen if there is an extension of the building. Will this increase in the internal space be excluded or be used to calculate a CIL charge or could the whole gross internal area be caught? It seems to me that it is the increase in area which will be caught but there is a risk that the need for such works will take it wholly outside the exclusion and so the question will be what deduction if any is available with regard to the existing building. This is a matter which will need to be explored before works start.

10.2.2.3 Conversion of flats to single dwelling house - in contrast a conversion of flats to a single dwelling in such circumstances will give rise to a CIL even if there is no increase in the internal space subject to the availability of any deduction in relation to retained buildings (see section 14.2.5 below).

10.3 New build less than 100 square metres (reg. 42) –

10.3.1 General - if the development does not result in 100 square metres or more of new build then it will be outside the CIL regime unless the development comprises one or more new dwellings. This is an important exclusion. It means that if the development does not involve any “new build” or a new dwelling then it will be exempt from a charge to CIL. In consequence planning permission for a change of use of an existing building will not result in a charge to CIL unless it results in a new dwelling (see section 9.3). However, if the “new build” is 100 sqm or more then the floorspace of an existing building which remains part of the development will be included within the gross internal area of the development subject to the availability of one of the deductions (see section 14.2.5 below).
The particular GIA is crucial with regard to this exemption. Inevitably the land owner will be seeking to reduce the area otherwise chargeable to CIL. There is no definition of GIA within the CIL regulations and so reliance is placed on the definition contained in the RICS Code of Measuring Practice (6th Edition) (“RICS Code” - see discussion in section 14.2). Inevitably the land owner will be seeking to reduce the area otherwise chargeable to CIL. This will involve arguments over whether particular areas should be included. There have been a number of appeals relating to such issues (see sections 14.2.1.3 and 14.2.1.4 above).

For these purposes new build comprises either a new building or an enlargement of an existing building. In calculating the area it does not allow for the internal area of the new or enlarged building to be reduced by the internal area of any building demolished as part of the development. It is focused on the internal area of the new building that is constructed in place of the demolished part.

The whole of an extension exceeding the 100 square metres limit will be chargeable to CIL and not just the amount by which it exceeds 100 square metres. This has been confirmed by a decision on an appeal dated 21st June 2013 (to be found on the VOA website concerning a development described as remodelling and extension to single dwelling with a detached carport) that reg. 42 does not provide an exemption for the first 100 square metres of new build in any development.

10.3.2 Example –

(i) Conversion of building – a factory with GIA of 600 sqm is to be converted into a supermarket. The building is not to be extended. There will be no CIL because the development does not increase the GIA and does not comprise a dwelling. Whether the factory has been in use during the last three years and qualifies as an “in-use building” is immaterial as there is no CIL calculation pursuant to reg. 40.

The CIL position is different if the factory is to be converted to a mixture of retail and flats. Reg. 42 will not apply because the development includes dwellings. In such circumstances CIL will be chargeable on the whole of the GIA apportioned between the retail and the residential use unless the first retained buildings deduction applies (see section 14.2.5). If the deduction applies then the whole of the GIA of the factory will be deductible from the chargeable GIA so that there will be no CIL liability if the development does not result in an increase in GIA. To be entitled to the deduction the factory must qualify as an “in-use building” (see section 14.2.5 below) by being in lawful use for a continuous period of at least six months in the three years ending with the date that the development is first permitted. If the planning permission authorises a mixed retail and residential development in an extended building then only the GIA of the extension will be chargeable to CIL if the deduction is available.

(ii) Extensions to buildings

An office building is to be extended by 130 sqm. The LPA’s CIL rate is £40 psm. in relation to office use

CIL charge on the extension is 130 x £40 = £5200
This will be reduced by either the first retained building deduction or if the building does not qualify as an “in-use building” by the second retained building deduction.

If the extension had been 95 sqm then there would be no CIL charge. If instead of an office the building was a sole or main residence of the owner then the residential extension may apply (see section 11.5.3 below).

10.3.3 **Appeals** – an appeal involving a dispute over the application of this exemption is possible under reg. 114. In an appeal concerning the use of premises as a place of worship (on VOA website but no further identifying information) there had been temporary permission to use premises for worship (use class D 1) and then a full unconditional planning permission was granted for use as a place of worship and to carry out minor works. The authority assessed CIL on the gross internal area of the building notwithstanding that the building was found to have been in lawful use due to the temporary permission. This was set aside on appeal. It was held that there was no new build on the basis that the appeal papers showed that the style and size of the church was largely the same before and after the grant of planning permission. In consequence the reg. 42 exemption was applied.

10.3.4 **New build with dwelling** - If any part of the development comprises a new dwelling then that would appear to be sufficient to prevent the benefit of this exemption being gained. The exemption will not only be lost if the whole of the development is one or more new dwellings. This is subject to the application of the new exemptions for self-build housing, residential annexes and residential extensions (section 11.6 below). The term “dwelling” has always caused problems in both fiscal and non-fiscal legislation. An extension to a school or college dormitory with an increase in internal floor area of less than 100 square metres should not give rise to a CIL charge whereas prior to the introduction of the new exemption for residential extensions the same extension to a house would.

10.3.5 **Extensions/annexes** – the significance of this exemption for minor developments has been reduced in its most contentious area which is with regard to extensions to a home or the construction of an annex within the curtilage of a home. The new exemptions (sections 11.6 below) will remove from the CIL regime the majority of extensions to residential property. It may even encourage larger extensions which otherwise would have been smaller to avoid CIL. The non-availability or limitations of the minor developments exemption will still be material with houses where the work has started before 24th February 2014 because the new exemptions will not apply. It seems harsh in cases in which the extension had not been completed by that date. Issues will still arise in relation to extensions of buildings other than dwellings. One issue may be whether the extension relates to an area which is already treated as part of the GIA of the building or whether it is caused to become part of the GIA as a result of the works. There have been two appeals already on such issues (see section 14.2.1.3 below).

10.3.6 **Staggered developments** - In attempting to come within this exemption clients may make mistakes and carry out schemes which raise interesting legal issues. One obvious route for developers to consider is to design a development in separate parts with the objective that each part is within this exemption. Such staging will be harder with new dwellings as the minor works exemption does not apply so the internal area cannot be disregarded if below the limit of 100 sqm when determining whether the
development is chargeable to CIL. To defer say a garage to a second application may not be successful if the garage is viewed as a matter of law as part of a dwelling but as it will not by then be a new dwelling that point should not succeed. Now there will also be the question whether the construction of the garage would qualify for the residential extension exemption. A development will not face the same problems or issues if instead of a dwelling it concerns say an office. If the internal area of the office is 95 square metres and the garage 45 square metres then dealing with the development in two stages could result in a CIL advantage. There is as yet no provision which allows the two developments to be aggregated. Such provisions are to be found in property taxes such as stamp duty land tax and may be inserted into the CIL regime if this were to become a problem for charging authorities. At present the principal hurdle, therefore, is the practical one whether the planning authority will grant permission for the first stage without the second or be difficult with the second application.

10.4 Mezzanine floors – This is a topic which has thrown up a significant amount of uncertainty. An improvement or alteration of the interior of a building which does not materially affect the external appearance of a building will not be a development for the purposes of the TCPA 1990 (section 55(2)(a)). This will exclude works which only add a mezzanine floor from the CIL regime. However, there is one special case involving mezzanine floors which is brought within the planning regime. The increase of the gross floor space of a building by more than 200 squares metres will be a development if the building is used for the retail sale of goods other than hot food and such a building will include a retail warehouse club (Article 3 of the Town & Country Planning (Development Management Procedure) (England) 2010/2184 pursuant to section 55(2A) TCPA 1990). A mezzanine floor within that article 3 will, however, not be a development for the purposes of CIL (reg. 6(1)((c)). Oddly the February 2014 CIL Guidance states that mezzanine floors “of less than 200 square metres inserted into an existing building are not liable for the levy unless they form part of a wider planning permission that seeks to provide other works as well” (para. 2.1.2). This appears to leave open the possibility of mezzanine floors exceeding 200 square metres being a chargeable development which is not correct. Any other mezzanine floors will not be a development for the purposes of CIL because it is not a development for the purposes of the TCPA 1990. The new build limit of 100 square metres will not apply. Thus the addition of mezzanines should not give rise to a charge to CIL. However, it should be noted that mezzanine floors in a new development will be taken into account for the purposes of CIL. The RICS Code includes the floor space of a mezzanine floor in the computation of internal floor space provided that there is a permanent means of access. Similarly additional floor space created by an underground development will be caught for CIL unless the residential extension exemption applies.
E. Exemptions

11. Exemptions – there are limited exemptions from CIL and with some the charging authority has the discretion as to whether or not they will be applicable. Even if such discretionary exemptions are applied by an authority the operation of the discretion will be limited. There are no exemptions for bodies such as local authorities (including the charging authority) or the emergency services. However, it may be that developments relating to such bodies will be zero rated in the charging schedule which is an approach adopted by some authorities but not all. There are now three principal exemptions – charities, social housing and self-build.

11.1 Charitable exemption – there is a compulsory exemption available in all areas and an additional discretionary exemption which the charging authority can elect to offer. It should be noted that there is no specific exemption for buildings for purposes such as education, defence or emergency services. To qualify for these charitable exemptions an owner with a material interest in the building has to be a charity. This exemption may be available, for example, to academies or free schools.

11.1.1 Compulsory charitable exemption - Subject to three qualifications (see para. 11.1.5 below) a charity which owns a material interest in a development site will be wholly exempt from CIL if the chargeable development will be used wholly or mainly for charitable purposes whether by that charity alone or with other charities (reg. 43).

11.1.2 Treble Warning - a charity qualifying for the benefit of the charitable exemption may easily lose it. There are three steps that must be taken before the commencement of the relevant development. These are:-

11.1.2.1 Claim – the benefit of the exemption must be claimed (see para. 11.1.8 below) and this claim must be made before the commencement of the development (reg. 47(2)(a)).

11.1.2.2 Notification of decision - then there must be a wait before starting the development to receive notification of the decision on the claim from the collecting authority. If the development is commenced before that notification the claim will lapse (reg. 47(3)). The collecting authority is obliged to respond as soon as practical (reg. 47(5)). There is a right to appeal against the decision (see para. 18.4 below).

11.1.2.3 Commencement notice – having got this far the benefit of the exemption will be lost if a commencement notice is not submitted to the collecting authority before the date the chargeable development is commenced (reg. 47(7) – prior to 24th February 2014 submission on the date of commencement would have been sufficient but after 23rd February 2014 it is not (reg. 7(3) 2014 Regulations)). Failure to give such a notice will cause the exemption to be lost and a surcharge to be payable.

11.1.3 Protection - care must, therefore be taken to ensure that the development does not start before the claim has been properly made, the collecting authority’s decision has been notified and a commencement notice has been submitted before the commencement of the development. Contractual provisions to impose responsibility for taking such steps at the right time should be considered between the charity and
the developer and possibly the inclusion of an indemnity to protect against any failure resulting in the development commencing before these steps have been completed.

11.1.4 Extent of exemption - this exemption will not cover any part of the actual CIL liability attributable to the development which is not exempt because part of the development is not to be used for charitable purposes. In consequence if the charity becomes responsible for that part of the CIL liability it will have to pay it and cannot rely on the charitable exemption. This can occur if a person has assumed such liability then defaulted in payment and the outstanding CIL is transferred back to the charity as an owner.

11.1.5 Limitations on availability of charity exemption – the application of the charitable exemption will be excluded in three sets of circumstances:-

11.1.5.1 No control or occupation by charity – it is not enough that the chargeable development is to be used for charitable purposes but it must also be either occupied by a charity or under the control of a charity (reg. 43(2)(a)). It need not be the charity which is the owner but can be any charity. It would seem from the wording and in particular the use of the words “will not be” that whether this requirement has been satisfied is to be tested by the circumstances prevailing at the time the development has been completed and the site is to be used. In consequence a liability notice is likely to be issued on the basis that this limitation will not apply but if it is found that it does then a revised liability notice can be issued. This may come as shock to any person who has assumed liability and finds the liability unexpectedly increased. It is something which the person assuming liability may want to protect against and take an indemnity from the charity so that the risk lies with the charity.

11.1.5.2 Joint ownership of material interest with non-charity – if the material interest owned by the charity is jointly owned with a person who is not a charity then the exemption will not apply (reg. 43(2)(b)). However, if there is more than one material interest and the charity is the sole owner of a material interest then the exemption will apply to the charity but not to the owners of any other material interests in the site. For example, if a charity develops a site that it leases from L then the charity will be exempt from the CIL liability apportioned to the charity’s leasehold interest but L will be liable to pay the CIL portion apportioned to the owner of the freehold reversion. Similarly, if the development site is comprised of a part owned by a charity and another part owned by a person who is not a charity the site is jointly owned but not their respective interests in the site. In consequence the charity will be entitled to an exemption from the portion of CIL apportioned to it. In such circumstances the CIL liability will be apportioned between the charity and the other owner in accordance with the value of their respective interests in the site and only the portion of CIL apportioned to the other owner will be payable.

11.1.5.3 State Aid – no charitable exemption is available if it would constitute State Aid (reg. 43(2)(c)). The guidance from the Mayor of London raises the query whether an indemnity should be sought by the collecting/charging authority from a charity against the possibility that the relief is State Aid. It is hard to understand the basis on which such an indemnity could be compelled. Either the claimant qualifies for the relief or not and if it does then it should be given without negotiation.
11.1.6 **Meaning of “charitable”** – whether or not a body qualifies as a charity will be determined under the general law. For the purposes of CIL a “charitable institution” is defined by reg. 41 as

(i) a charity which is any person or trust established for charitable purposes only. Charitable purposes is defined by section Charities Act 2011. These will comprise charities registered as such with the Charity Commission; exempt charities listed in Schedule 3 of the Charities Act 2011 which cannot register; and excepted charities which do not need to register but are supervised by the Charity Commission.

(ii) a trust of which all the beneficiaries are charities;

(iii) a unit trust scheme in which all the unit holders are charities.

Registration with HMRC as a charity will be a strong indicator but will not be conclusive. The regulations do not require such registration and there will be bodies which qualify as a charity but are not registered with HMRC.

11.1.7 **“Wholly or mainly”** – to qualify for the exemption the development must be used “wholly or mainly” for charitable purposes. There is no definition or test for this phrase in the regulations and it is one the application of which has given rise to problems in the context of rating matters. It has been indicated that it means that more than half the development will be used for such purpose. I take this to mean more than half of the area of the development. The test is similar to that which arises in respect of business rates which particularly in the context of attempts to avoid rates on vacant commercial premises has resulted in a number of cases.

With a view to the owner avoiding paying rates on vacant premises leases have been granted to a charity on a peppercorn rent with a break clause on a short notice allowing the charity to install a transmitter to broadcast messages on crime prevention and public safety. Such arrangements have been successfully challenged on the ground that the hereditament was not “wholly or mainly used for charitable purposes.” (Public Safety Charitable Trust v Milton Keynes [2013] EWHC 1237 (Admin)). In that case Sales J. stated at para. 34 that in “the context of this legislation [section 43(6) Local Government Finance Act 1988] and having regard to the language used, it is reasonable to infer that Parliament intended that the substantial mandatory exemption from rates for a charity in occupation of a building should depend upon the charity actually making exclusive use of the premises for charitable purposes (i.e. use of the building which is substantially and in real terms for the public benefit, so as to justify exemption from ordinary tax in the form of non-domestic rates), rather than leaving them mainly unused.” This would apply equally to the mandatory exemption from CIL. It applies the Court of Session decision in English Speaking Union Scottish Branches v Edinburgh City Council [2009] SLT 1051 which held that premises were not wholly or mainly in use for charitable purposes when a charity occupied one of eight floors in a building. The purpose of the use was wholly charitable but that was not sufficient as the whole building was not used for such purpose. It was possible to look not just at the purpose of the use but also at the extent or amount of the use. There is an important distinction between occupation and use in this context. A charity as in the English Speaking Union case may be in occupation of
the whole building but that does not mean that the building is wholly or mainly in use for charitable purposes.

However, in reaching a decision on this requirement account is not to be taken as to whether the charity is making the most efficient use of the building nor whether it really needs to occupy all the space actually occupied (Kenya Aid Programme v Sheffield CC [2013] EWHC 54 (Admin)). Issues of necessity or efficiency are not material. In that case two units were leased by a registered charity to use as a store for furniture which was to be shipped to Kenya. The charity was funded by donations from the landlord and as a result of the arrangement the landlord did not have to pay non-domestic rates on the vacant building. When rejecting the claim for charitable relief on the grounds that the units were not used wholly or mainly for charitable purposes the District Judge took into account that only one unit would have been sufficient and that the furniture was spread out through the units making poor use of the space. The Divisional Court held that these factors should not have been taken into account and remitted the case to be reheard.

The development will not be eligible for this exemption if the property is to be let out to achieve an income for the charity. However, it is expressly provided that using a chargeable development includes leaving it unoccupied (reg. 41(3)).

11.1.8 Claim – the charity must make a written claim for the application of the charitable exemption to the collecting authority (reg. 47). As warned above the claim must be made before the commencement of the development. The claim must be in, or substantially similar to, the prescribed form and contain the particulars required by the form. The first port of call for such a form will be the relevant authority’s website. A link should be present to enable the form to be downloaded. Care has to be taken to ensure that the claim is accompanied by an apportionment assessment when there is a material interest in the development site owned by a person other than the charity (reg. 47(2)(d)). The collecting authority may substitute its own apportionment assessment. As highlighted above in para.11.1.2.2 as well as making the claim before the commencement of the development it is essential that notification of the authority’s decision is received before such commencement and a commencement notice is submitted before commencement.

11.1.9 Example - a charity owns a site and obtains planning permission to build a hostel for the homeless which would have a GIA of 200 sqm. CIL would be chargeable at the rate of £30 psm and amount to £6,000. A claim for charitable relief is made by the charity and as a result the charity is not liable to CIL.

If the site is owned by a developer and a long lease has been granted by the developer to the charity then there will need to be an apportionment based on the respective values of the two interests. If the freehold reversion is valued at £100,000 and the leasehold interest at £300,000 then the portion of the CIL liability apportioned to the charity will be £4,500 (CIL liability x [value of leasehold interest/aggregate value of freehold reversion and leasehold interest]. The charity will not be liable to pay this sum. The developer will be liable to pay £1,500.

11.1.10 Appeal – an interested person aggrieved by a decision made with regard to charitable relief may appeal to an appointed person on the ground that the value of the
interest in the land to which the claim for relief applies was incorrectly determined (reg. 116 – see section 18.5 below). Such an appeal must be made within 28 days of the issue of the decision.

11.1.11 Clawback – the benefit of the charitable exemption can be lost during the seven year period beginning with the commencement of the chargeable development and the CIL previously exempted clawed back if one of the following occurs:-

11.1.11.1 Cessation of qualification for charitable exemption (reg. 48(1)(a)) – the initial satisfaction of the requirements set out above (see in particular 11.1.5) may cease. For example, charity may lose its charitable status or the development may no longer be used wholly or mainly for charitable purposes. If this occurs during the seven year period there will be a charge to CIL.

11.1.11.2 Transfer of charity’s material interest (reg. 48(1)(b)) – a transfer of all the charity’s material interest in the development to a non-charity during the seven year period will trigger a claw back of CIL. A transfer to another charity will not lose the benefit of the exemption. It would seem that a transfer of part will not trigger this provision but it has to be borne in mind that one of the pre-conditions to be satisfied if the exemption is to apply is that the material interest must not be jointly owned by the charity and a non-charity (see para. 11.1.5.2 above). To effect a transfer which causes a non-charity to become joint owner of the material interest with a non-charity will cause the clawback provisions to be triggered.

11.1.11.3 Termination of charity’s lease (reg. 48(1)(c)) – when the charity’s material interest was a lease which expires, or is forfeited, broken or otherwise terminated during the seven year period and then reverts to a non-charity landlord that will trigger a clawback.

11.1.11.4 Liability for clawback – the amount of CIL relieved by the operation of the charitable exemption will be the amount clawed back and it must be paid by the person who owns the material interest immediately before the event triggering the clawback (reg. 48(2)).

11.1.11.5 Notification and surcharge - the person liable to pay the CIL on the withdrawal of the exemption is obliged to notify the collecting authority within 14 days of the occurrence of the event (reg. 48(3)) and if there is failure to do so then the collecting authority can impose a surcharge equal to 20% of the CIL liability triggered by the disqualifying event or £2500 (whichever is the smaller) (reg. 84). The surcharge is payable immediately if the development has started but if it has not started then on the commencement day. It is apportioned between the owners of material interests in the relevant land in respect of which charitable relief was granted (reg. 84(6)). This provision does not make clear for these purposes at what time the material interest must be owned. It presumably is the same time as applies regarding the determination of liability for the clawed back CIL which is immediately before the disqualifying event. Further it does not limit the liability to pay the CIL to the person failing to give notice of the disqualifying event. This is in contrast to reg. 48 regarding liability for the clawed back CIL. It appears to apportion this surcharge liability amongst all the owners of material interests in the development regardless of whether or not they have received the benefit of the charitable exemption.
11.1.11.6 **Protection** – the ability to clawback CIL due to a disqualifying event means that if a charity which has claimed the benefit of this exemption from CIL transfers its material interest there will be a need to consider what contractual provisions should be included to cover the CIL thereby clawed back if the transfer is to a non-charity or which might in the future be clawed back if the transfer is to another charity. The provisions will need to be more elaborate if they are to protect an unexpected surcharge liability due to a failure to give notice of a disqualifying event. Similar provisions may be needed by other owners of material interest in the development who have not had the benefit of the charitable exemption. These will probably have to be obtained at an earlier stage when the arrangements regarding the proposed development are being negotiated. It is at that stage that such owners will have a say. Once the development is completed it is unlikely that the other owners will be in a position to require indemnities or other such protection.

11.2 **Discretionary charitable relief** –

11.2.1 **Availability** - a charging authority may elect to offer a discretionary charitable relief. To do this it must issue an appropriate document; publish this document on the authority’s website; and make it available for inspection at its principal office and other appropriate places in its area (reg. 46). In the absence of such document or publication the discretionary relief is not available in the area. It is open to the authority to revise its policy (reg. 46(2)) or revoke it (reg. 46(3)). Similar publicity must be given to the revision or revocation as when the relief was made available although in the case of revision the authority can change the places at which such documents are available for inspection (reg. 46(2)(c)). If the relief is to be revoked then the authority must state when is the last day that the collecting authority will accept claims for such relief and the revocation can be no earlier than 14 days from the publishing on the website of the statement relating to the revocation. Newark and Sherwood DC have elected not to offer it. In contrast Swindon and Shropshire has elected to offer it. It is stated in the draft notification of relief notice on the Shropshire website that it is available “where the chargeable development delivers facilities, services or infrastructure that have been identified as a requirement in the LDF Implementation Plan or Place Plans. The amount of relief granted will be in direct proportion to the proposed development’s benefit to the community, as assessed by Shropshire Council in consultation with the Parish or Town Council.”

11.2.2 **Discretionary relief** – provided that this relief is available in the relevant area and subject to the satisfaction of certain specified statutory limitations (see para. 11.2.3 below) and any additional limitation imposed by the charging authority (see Shropshire’s limitation quoted in para. 11.2.1 above) there is an additional charitable exemption. This applies if a charity or charities hold the whole or the greater part of the chargeable development as an investment from which the proceeds will be applied for charitable purposes whether of the holding charities or any other charities. For these purposes it has been stated that a greater part is 51% or more (see para. 2.7.2.6 February 2014 CIL Guidance). It is open to the charging authority to impose its own additional criteria as to eligibility (reg. 46(1)(a)(iii)). Examples of such criteria given by the DCLG are the extent of the benefit provided by the charity to the local community; the annual income of the charity; and the annual rent payable on the charity’s investment.
11.2.3 **Limitations** – this exemption is not available if one of the three following limitations applies.

11.2.3.1 **Occupation for an ineligible trade** – a charity will not be entitled to the benefit of the exemption if it is going to occupy that part of the development and use it for a trade other than a trade which is the sale of donated goods and from which the proceeds less any expenditure are applied for the charity’s charitable purposes (reg. 44(3)(a) and (4)). It is not enough that the net proceeds are applied for charitable purposes not involving this charity.

11.2.3.2 **Joint ownership with non-charity** – as with the mandatory exemption the charity must own the material interest in the development alone or jointly with other charities but not with a non-charity (reg. 44(3)(b)). Ownership of a different material interest in the development by a non-charity will not cause the benefit of the discretionary charitable exemption to be lost.

11.2.3.3 **State Aid** – a collecting authority cannot grant such exemption if satisfied that it would constitute State Aid which must be notified to and approved by the European Commission (reg. 44(5)). However, if the CIL relief constitutes State Aid but the collecting authority is satisfied that it does not need to be notified to and approved by the European Commission then the CIL relief will be available if the charity otherwise qualifies (reg. 45). This particular relief must be specified in the document and publication making such discretionary exemption available in the area. It is not enough that relief under reg. 44 is made available by such method.

11.2.4 **CIL rate** – it is for the relevant Charging Authority to decide what rate is to be applicable.

11.2.5 **Claim and warnings** – the provisions relating to claims for mandatory charitable exemption (see para. 11.1.8 above) will also apply to this discretionary exemption. In consequence the same warnings (see para. 11.1.2 above) will apply.

11.2.6 **Example** – a charity owns land which has planning permission for a mixed retail and residential block. It grants a long lease of the site. It will hold the freehold reversion as an investment and the rents paid by the lessee will be applied for charitable purposes. The value of the freehold interest is £750,000 and the value of the lease £3 million. The retail GIA is 200 sqm which is chargeable at a CIL rate of £120 so that the CIL attributable to the retail area is £24,000. The GIA of the flats in the development is 600 and the CIL rate for residential in that zone is £85 so that the CIL attributable to the residential area is £51,000. The total CIL liability is, therefore, £75,000. The portion attributable to the charity is 20% as the value of the freehold reversion is one fifth of the aggregate value of the freehold reversion and the leasehold interest. This means that the developer is liable for £60,000 whilst the charity would be liable for £15,000. However, the charging authority has elected to offer discretionary charitable relief at 50%. Following a claim for this relief the charity is liable to pay £7,500 by way of CIL.

11.2.7 **Clawback** – when available this relief can be withdrawn and the CIL clawed back in the same manner as the mandatory charitable relief (see para. 11.1.9 above).
The disqualifying event will be similar but ceasing to hold or apply the profits as specified in para. 11.2.2 will be disqualifying events.

11.3 Social Housing - a development which includes social housing or a communal area for more than one occupier of such housing will be eligible for relief from CIL to the extent that the development is intended to be used for social housing. It will cover most lettings for social rent, affordable rent and intermediate rent provided by a local authority or private registered provider and shared ownership dwellings. It has been extended by the 2015 Regulations to landlords who are not registered providers of social housing which will include charities.

The qualifying amount of the relief is set against the whole of the potential CIL liability (reg. 49(10)) as it must be claimed by the person who has assumed liability for the CIL even though not necessarily the owner of the land to be used for social housing. As well as the mandatory social housing relief the 2014 Regulations have also introduced a discretionary social housing relief (new reg. 49A) which a charging authority may make available in its area in relation to discounted market sales. The discretionary relief is to be given in the same manner as the mandatory relief.

11.3.1 Qualifying dwellings – to be entitled to this relief the development must include “qualifying dwellings” either wholly or in part (reg. 49). To constitute such a dwelling one of the five (originally four) prescribed conditions must be satisfied (reg. 49(2))

11.3.1.1 Condition 1 (social rented housing by local authority) reg. 49(3) – to satisfy this condition two requirements must be met being one as to the type of landlord and one as to the type of letting.

(i) Landlord – the landlord of the dwelling must be a local housing authority.

(ii) Lettings – in addition the letting of the dwelling must be any one of the following specified types of tenancy being a demoted tenancy; an introductory tenancy; a secure tenancy; or an arrangement which would be such a tenancy but for para. 4ZA or 12 Sch. 1 Housing Act 1985.

11.3.1.2 Condition 2 (shared ownership arrangements) reg. 49(4) – covers a shared ownership arrangement which complies with all the following requirements

(i) the dwelling is occupied in accordance with shared ownership arrangement within section 70(4) Housing and Regeneration Act 2008;

(ii) not more than 75% of the market value of the dwelling (being the price which would reasonably expect to receive on sale on open market) is paid by way of premium on the day that a lease is granted under the arrangement;

(iii) at the date of the grant of the lease the annual rent is not more than 3% of the value of the unsold interest (being the freehold or leasehold interest owned by the person providing the dwelling);
(iv) the annual rent cannot increase by more than the increase in RPI for the year to the September immediately preceding the anniversary of the lease plus 0.5%.

11.3.1.3 Condition 3 (social housing letting by registered social landlord) reg. 49(5) – covers lettings satisfying the following requirements:

11.3.1.3.1 Landlord – must be private registered provider of social housing;

11.3.1.3.2 Lettings – must be one of following, namely:

(i) assured tenancy including assured shorthold tenancy;

(ii) assured agricultural occupancy;

(iii) arrangement that would be assured tenancy or assured agricultural occupancy but for paragraph 12(1)(h) or 12ZA of Schedule 1 to the Housing Act 1988;

(iv) demoted tenancy.

11.3.1.3.3 Prescribed criteria – the rent must satisfy one of the following three sets of circumstances:

(i) the rent is subject to the national rent regime and regulated under a standard controlling rents set by the Regulator of Social Housing under section 194 of the Housing and Regulation Act 2008;

(ii) the rent is neither subject to the national rent regime nor regulated under a standard controlling rents set by the Regulator of Social Housing but is less than 80% of market rent;

(iii) the rent is not subject to the national rent regime but is regulated under the standard controlling rents set by the Regulator of Social Housing which requires the initial rent to be no more than 80 per cent of the market rent (including service charges).

The national rent regime is the rent influencing regime set out in the Social Rent Guidance within the Rent Standard Guidance as published by the Regulator of Social Housing for matters prior to 1st April 2015 in March 2012 and for matters on or after 1st April 2015 in January 2015.

11.3.1.4 Condition 4 (letting in Wales by registered social landlord) reg.49(7) – covers:

(i) a letting in Wales by a registered social landlord;

(ii) which is an assured tenancy or an assured agricultural occupancy or a demoted tenancy or an arrangement that would be an assured tenancy or assured agricultural occupancy but for paragraph 12(1)(h) or 12ZA of Schedule 1 to the Housing Act 1988; and
(iii) the rent is no more than 80% of market rent.

11.3.1.5 **Condition 5 (discounted letting in private sector) reg. 49(7)** – this extension of the social housing relief has been added by the 2015 Regulations with effect from 1st April 2015. It covers lettings at a discounted rent when the landlord is not a local housing authority or a private registered provider of social housing or a registered social landlord (within the meaning of Part 1 of the Housing Act 1996). It is intended to encourage the provision of affordable housing by the private sector and not just the voluntary sector. The following requirements must be satisfied:

11.3.1.5.1 **Lettings** – must be one of the following:

(i) assured tenancy including assured shorthold tenancy;

(ii) assured agricultural occupancy;

(iii) arrangement that would be assured tenancy or assured agricultural occupancy but for paragraph 12(1)(h) of Schedule 1 to the Housing Act 1988.

11.3.5.2 **Prescribed criteria** – each of the following must be complied with

(i) the dwelling is let to a person whose needs are not adequately served by the commercial housing market (on which there is no guidance);

(ii) the rent is no more than 80 per cent of market rent (including service charges); and

(iii) a planning obligation under section 106 TCPA 1990 designed to ensure compliance with both (i) and (ii) has been entered into in respect of the planning permission which permits the chargeable development.

11.3.2 **Qualifying communal development** - the relief was extended by the 2014 Regulations to cover qualifying communal development such as stairs, corridors and car parking as well as qualifying dwellings (reg. 49C added by reg. 7(5) 2014 regulations). This applies to developments in relation to which a liability notice is issued on or after 24th February 2014 because the changes to reg. 50 including qualifying communal development (reg. 7(6) 2014 Regulations) take effect in such a manner (reg. 14(3) 2014 Regulations).

11.3.2.1 **Qualifying area** - subject to the exclusions in reg. 49C(3) the qualifying communal development is so much of the development as is for the communal benefit of the occupants of more than one qualifying dwelling whether or not also used by others (reg.49C(1) and (2)). This is to ensure that the relief applies to the whole area used for social housing and not just the internal area of the dwellings. The exclusions in reg. 49C(3) are any parts of the development:

(i) comprising one or more dwellings;

(ii) used wholly or mainly by the public;
(iii) used wholly or mainly for the benefit of occupants of development which is not relevant development (being that part of the development which is authorised by the same planning permission as the qualifying dwellings but which does not include such dwellings or communal area (reg. 49C(5));

(iv) used wholly or mainly for commercial purposes.

11.3.2.2 Area of qualifying communal development – a formula is provided in reg. 49C(4) to calculate the area of the qualifying communal development. It is

\[ \frac{X \times A}{B} \]

Where—

X = the gross internal area of the communal development;

A = the gross internal area of the qualifying dwellings to which the communal development relates; and

B = the gross internal area of the qualifying dwellings and the relevant development, provided that the communal development is for the benefit of those dwellings and that relevant development. The relevant development is the development under the planning permission authorising the qualifying dwellings but excluding the parts which are not such dwellings or communal development.

11.3.2.3 Claim for relief for qualifying communal development – the claim must be made at the same time as the claim for social housing relief in relation to the qualifying dwellings to which the communal area relates or if a phased development in relation to any phase of that development (reg. 49(8)). This applies in relation to discretionary social housing relief as well as to such mandatory relief.

11.3.3 Discretionary social housing relief reg. 49A – this was introduced by reg. 7(5) 2014 Regulations. It extends the relief to sales at a discounted market price the circumstances in which the qualifying amount can be set against the chargeable amount of CIL for the particular chargeable development. As regards discounted rents the similar change has been introduced to the mandatory social housing relief through condition 3 (see section 11.3.1.3 above as regards registered social landlords and section 11.3.1.5 for the extension by the 2015 Regulations to landlords who are not so registered). It is for each authority to decide whether to make this relief available. Some have such as Swindon. The amount of the relief will be the same as with the mandatory social housing relief and will be given in the same manner (reg. 49A(4)). The intention is that such relief should meet EU requirements which are that:

(a) there is an obligation that the house is used in a certain way;

(b) the house is for persons who needs are not met by the market which is stated to be “disadvantaged citizens or socially less advantaged groups who due to solvency constraints are unable to obtain housing at market conditions”;

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(c) the total aid must not exceed the cost of providing the social housing

11.3.3.1 Availability – the charging authority must decide that it wishes to make the discretionary relief available. To achieve this it must comply with reg. 49B(1) by issuing a document giving notice that relief available in area; giving the date when claims will begin to be accepted; setting out the authority’s policy on how housing to be granted relief is to be allocated in the area to extent that the authority is responsible. This document must be published on the authority’s website and be available for inspection at its principal office and such other places as it considers appropriate. A copy must be sent to the collecting authority if different to the charging authority. Any revision of the charging authority’s policy of allocation of such housing in the area must be set out in a document giving notice of the revision; stating the date it is to take effect; and setting out the revised policy (reg. 49B(2)). That document must be published on the website and made available for inspection. A similar process must be gone through if the availability of the discretionary relief is to be withdrawn (reg. 49B(3)) but the last date on which the authority will accept a claim for this relief must be not less than 14 days after the day on which the withdrawal is published on the website (reg. 49B(4)). Any claim form for discretionary relief received by the collecting authority on or before that day must be considered by the authority (reg.51(10)).

11.3.3.2 Qualifying dwelling for discretionary relief – this relief is intended to meet the needs of those whose needs are not met by the market taking into account local income levels and local house rent/prices. To qualify for the discretionary relief all the following criteria in reg. 49A(2) must be satisfied:-

(i) the dwelling is sold for no more than 80% of its market value;

(ii) the dwelling is sold in accordance with the authority’s published policy;

(iii) the CIL liability in relation to the dwelling remains with the person claiming the relief.

11.3.4 Qualifying amount – as with the calculation of the CIL liability the sensible way to calculate the qualifying amount is to use a special calculator designed for the specific purpose. Such a calculator may be available on the relevant authority’s website. It seems to be a feature of CIL that the formulae are complicated and off putting to an unusual degree. It is unfortunately a further feature that they are regularly amended which adds to the complications. As with the formulae in regulation 40 for the calculation of CIL these have been changed by both the 2012 Regulations and 2014 Regulations in part to correct errors in the formulae.

11.3.4.1 Applicable set of formulae - The changes in the 2012 Regulations to the formulae (para. 6) took effect with regard to planning permissions granted on or after 29th November 2012 as the transitional provisions in para. 9 exclude cases in which the permission was granted before the coming into force of the 2012 Regulations. The changes in the 2014 Regulations to the formulae take effect with regard to developments if a liability notice is issued in relation to it on or after 24th February 2014 as they do not apply to developments if a liability notice has been issued in relation to it before 24th February 2014 (para. 14(3) 2014 Regulations). It means that
so far there are three different sets of formulae that have applied for the purposes of calculating the qualifying amount.

(i) developments under planning permissions granted before 29th November 2012 unless liability notice issued on or after 24th February 2014 – three formulae contained in original reg. 50 2010 Regulations (see original reg. 50 2010 Regulations);

(ii) developments not within (i) above but in relation to which development a liability notice has been issued prior to 24th February 2014 – two formulae resulting from amendment by par. 6 2012 Regulations (see section 11.3.4.4);

(iii) developments in relation to which a liability notice is issued on or after 24th February 2014 – two formulae resulting from amendments by para. 7(6) 2014 Regulations (see sections 11.3.4.2 and 11.3.4.3 below).

The discussion in sections 14.1 and 14.2 below with regard to the calculation of CIL pursuant to reg. 40 of the 2010 Regulations will be relevant also to the operation of these formulae. There used to be one significant difference as between the calculation of the CIL liability under reg. 40 and the calculation of the qualifying amount for the purposes of social housing relief. The relevant areas were determined in a different manner. For the CIL liability the formulae used the gross internal area of the relevant building or buildings whereas the formulae for social housing relief used the gross internal area of the relevant dwellings which left out of the calculation the common parts of a building in which the dwellings were situate and any ancillary areas such as car parking. That could result in a significant difference (see para. 11.3.4.5 below). With the extension of the relief to qualifying communal areas (reg. 49C and see section 11.3.2 above) this is no longer the case.

11.3.4.2 First formula – this is the governing formulae for calculating the qualifying amount but in order to determine the amount representing A (previously referred to as NR and originally N) in the formula it is necessary to apply the second formula (the current second formula is in section 11.3.4.3 below and its predecessor is in section 11.3.4.4). This first formula has remained the same throughout the changes save that the symbol A has been substituted for NR.

Currently $\frac{R \times A \times \text{Ip}}{I_c}$ previously $\frac{R \times \text{NR} \times \text{Ip}}{I_c}$

Where-

R = the relevant CIL rate

A (previously NR) = the deemed net area chargeable at rate R;

IP = the index figure for the year in which planning permission was granted; and

IC = the index figure for the year in which the charging schedule containing rate R took effect.
The indexation is to be in accordance with reg. 40(6) (reg. 50(5) as to which see section 14.2.6).

11.3.4.3 Formula to determine $A$ – instead of setting out a complete formula as was previously the case this formula is now based on the formula contained in reg. 40 for calculating $A$ (see section 14.2.3.1 below) with amendments by substituting $Q_r$ for $G_r$ and $K_{qr}$ for $K_r$. Using the new reg. 40 formula as the basis is a means of incorporating the changes in that formula made to more accurately reflect the allowances for retained buildings and buildings that are demolished and their treatment in the context of phased developments. It also allows for the extension of this relief to qualifying communal development. The formula is:

$$Q_r - K_{qr} - \frac{(Q_r \times E)}{G}$$

Where -

$Q_r$ = the gross internal areas of the part of the chargeable development which will comprise the qualifying dwellings or qualifying communal development, and in respect of which, but for social housing relief, CIL would be chargeable at rate $R$; and

$K_{qr}$ = the aggregate of the gross internal areas of the following—

(i) relevant retained parts of in-use buildings; and

(ii) for other relevant buildings, relevant retained parts where the intended use following completion of the chargeable development is a use that is able to be carried on lawfully and permanently without further planning permission in that part on the day before planning permission first permits the chargeable development.

$G$ = the gross internal area of the chargeable development (see section 9.3.1 above as regards measuring the area);

$E$ = the aggregate of the following—

(i) the gross internal areas of parts of in-use buildings that are to be demolished before completion of the chargeable development, and

(ii) for the second and subsequent phases of a phased planning permission, the value $E_x$ (as determined under reg. 40(8) (see immediately below), unless $E_x$ is negative, provided that no part of any building may be taken into account under both of paragraphs (i) and (ii) above.

(as regards effect of demolition see section 14.2.7 below)

$E_x$ - There is yet another formula (reg. 40(8)) to enable the value $E_x$ to be calculated for the purposes of determining the treatment of demolished buildings when the development is phased. It is a means of carrying forward to subsequent phases so
much of the internal floor space of a demolished building as has not been deducted from the GIA of a phase of the development. The following formula is used for this purpose-

\[ Ep - (Gp - Kpr) \]

where—

\[ Ep = \text{the value of } E \text{ for the previously commenced phase of the planning permission;} \]

\[ Gp = \text{the value of } G \text{ for the previously commenced phase of the planning permission;} \]

and

\[ Kpr = \text{the total of the values of } KR \text{ for the previously commenced phase of the planning permission.} \]

The phrases used in the formula will have the same meanings as in reg. 40 save as modified by reg. 50(8) to allow for their adaption to retained buildings which qualify for social housing relief.

11.3.4.4 Formula to determine NR – this applies to developments in relation to which a liability notice has been issued before 24th February 2014 save for those dealt with in accordance with the original formula in reg. 50.

The value of NR in the first formula must be calculated by applying the following formula—

\[ Qr - Kqr - (Qr \times E) \]

\[ G \]

Where—

\[ Qr = \text{the gross internal area of the part of the chargeable development which will comprise the qualifying dwellings, and in respect of which, but for social housing relief, CIL would be chargeable at rate } R; \]

\[ Kqr = \text{an amount equal to the gross internal area of all buildings (excluding any new build) on completion of the chargeable development which—} \]

(a) on the day planning permission first permits the chargeable development, are situated on the relevant land and in lawful use;

(b) will be part of the chargeable development upon completion; and

(c) will be chargeable at rate } R \text{ but for social housing relief; \]

\[ E = \text{an amount equal to the aggregate of the gross internal area of all buildings which—} \]
(a) on the day planning permission first permits the chargeable development, are situated on the relevant land and in lawful use; and

(b) are to be demolished before completion of the chargeable development; and

\[ G = \text{the gross internal area of the chargeable development.} \]

The two deductions were to reduce the internal area attributable to social housing by that which existed already and is either to be retained or demolished but required more refinement which lead on to some of the changes in the formula introduced by the 2014 Regulations and set out in section 11.3.4.3 above. In particular it was not possible to carry forward to future phases of the development such amount of the internal floor space of a demolished building as had not been utilised in the phase in which the demolition occurred.

11.3.4.5 Internal area of qualifying dwellings – Prior to the extension of the relief to qualifying communal development (addition of reg. 49C) the amount of social housing relief granted was not as great as would have been expected. The calculation of the gross internal area of such dwellings could be significantly less than the gross internal area of the building comprising such dwellings. The area of the dwelling will be the area let (original reg. 49) and thus this was likely to exclude parts of the building. For example, the aggregate internal space of the flats in a block of flats would be less than the gross internal area of the block. Common parts and other spaces not included within the flats were included in the block’s gross internal area but not in the aggregate area of the flats. For example, stairways, corridors, reception areas and internal car parks were not included. This meant that the CIL relief applied to an area which was less than expected and in turn the CIL liability was greater. The extension of the relief to communal areas by the addition of 49C has rectified this and the relief will be applied to a wider area and not just the aggregate of the internal area of the qualifying dwellings.

11.3.5 Claim –

11.3.5.1 Claim form - this relief must be claimed in the prescribed form for the relief submitted to the collecting authority and be accompanied by a relief assessment (which must identify where the qualifying dwellings and qualifying communal development will be constructed and their gross internal area and include a calculation of the qualifying amount) together with evidence to establish that the development qualifies for the relief.

11.3.5.2 Claimant - the claimant must have assumed liability for the CIL arising from the development and also be the owner of the relevant land (reg. 51(2)). A developer who does not own a material interest in the site cannot if assuming liability for the CIL claims the benefit of this relief.

11.3.5.3 Prior to Commencement of development – before starting the development the claimant must (i) make the claim (reg.51(3)(b)); (ii) receive notification of the authority’s decision (reg. 51(4)); and (iii) give a commencement notice. The claimant will cease to be entitled to this relief if liability for the CIL is transferred or the assumption of liability is withdrawn prior to commencement of the development.
Until the 2014 Regulations these restrictions precluded any change to the amount of social housing relief if there was a change in the provision of qualifying dwellings after the development had commenced. The restrictions will still apply to the original claim for relief but as regards a subsequent change in the provision of qualifying dwellings and qualifying communal development neither the claim nor notification of the decision need occur before commencement of the development (reg. 51(4A) as regards development which have not completed by 24th February 2014). This means that there is now an ability to revise the CIL liability even after the development has commenced.

11.3.5.4 Subsequent section 73 planning permission – if social housing relief has been granted in relation to a development and then there is a section 73 permission granted but the relief does not change then all that has been done under regulation 51 with regard to the social housing relief will be treated as done with regard to the development under the second permission (reg. 50(7)).

11.3.5.5 Subsequent change in provision of affordable housing – an ability to recalculate the CIL liability has been added by reg. 51(4A) in the event that there is a change in the provision of affordable housing or qualifying communal area after the start but prior to completion of the development. This applies as from 24th February 2014. It would appear to apply to a development which had commenced before that date but not been completed by then. This amendment had particularly in mind a transfer to a body such as a housing association after the commencement of the development and then a change in the number of qualifying dwellings. Such arrangements are known as Golden Brick arrangements and the housing association acquires the development after the foundations have been laid.

11.3.5.6 Warnings – the warnings given with regard to the charitable exemption set out in para. 11.1.2 will apply equally to this relief but with the addition that the claimant must have also assumed liability.

11.3.6 Example – a registered social housing provider owns an unbuilt on site and obtains planning permission for the construction of twenty houses. The GIA of each house is 100 sqm. The owner intends to let five to qualifying tenants under assured tenancies. The others are to be sold to a developer. The CIL rate for residential use is £80 psm. The CIL liability would be £160,000 (£80 x [20 x 100]) if all the housing was private. However, a claim for social housing relief is made in respect of the five houses to be let to qualifying tenants. This relief amounts to £40,000 (£80 x [5 x 100]) so that the CIL payable is £120,000.

If there is an existing building on the site which needs to be demolished then the demolition deduction (see section above) will be available if the building qualifies as an “in-use building”. In the example above if the building has a GIA of 600 sqm then this will be apportioned between the area subject to CIL and the area with the benefit of the social housing relief in accordance with their respective GIAs. In consequence the CIL charge prior to any social housing relief being claimed would be [2000 (GIA of chargeable development) – 1000 (GIA of existing building to be demolished)) x £80 = £80000. This will then be reduced by the applicable social housing relief. The demolition deduction has been to be taken into account when determining the GIA of the area with the benefit of the relief. It will be 1000 (total GIA of five houses
qualifying for social housing relief) x 1000/2000 = 500. In consequence the relief will be 500 x £80 = £40,000 leaving a CIL charge of £40,000.

11.3.7 Disposal of land before available for occupation – any disposal of a material interest in land on which any qualifying dwelling or qualifying communal development will be situate before the dwelling is available for occupation or the communal area available for use will result in the transfer of the benefit of the social housing relief to the transferee (reg. 52). Once the dwellings are available for occupation or the communal area available for use the benefit of the relief will not pass on to any subsequent transferees. The transferor is obliged to inform the collecting authority of the disposal with a copy to the transferee and any previous beneficiary of the relief. After a disposal made before the dwellings or communal area are available for occupation or use (as appropriate) a new revised liability notice will be issued adding the transferee as a beneficiary and stating the amount of the transferee’s relief and the transferor’s revised relief.

11.3.8 Withdrawal of relief –

11.3.8.1 Disqualifying event - as with charitable relief the social housing relief can be clawed back if a disqualifying event occurs. The occurrences must be in the seven year period from the commencement of the development save as regards social relief applied to discounted rent lettings by condition 5 (section 11.3.1.5) when the disqualifying event must occur within seven years of the date of the first letting of the qualifying event. A disqualifying event will occur when the dwelling or communal area ceases to be a qualifying dwelling or qualifying communal development (reg. 53(2)). For example, with a dwelling that is a social letting if the landlord ceases to be one of the types specified in Condition 1 this will be a disqualifying event. This is subject to the exception within para. 11.3.8.2 below.

11.3.8.2 Application of proceeds to purchase new qualifying dwelling or qualifying communal development - a sale of a qualifying dwelling or qualifying communal area will not be a disqualifying event if the proceeds are applied in the purchase of a new qualifying dwelling or qualifying communal development or the proceeds are transferred to one of the Secretary of State, Welsh Ministers, a local housing authority, the Greater London Authority, or the Home and Communities Agency. Similarly a disposal of a qualifying dwelling or qualifying communal development will not be a disqualifying event if the disposal is to the Welsh Ministers or the Regulator of Social Housing under the statutory provisions specified in reg. 53(3). In a case in which the discretionary social housing relief has been granted in relation to a qualifying dwelling or qualifying communal development then it will not be a disqualifying event if disposed of at a market discount in accordance with the criteria set out in reg. 40A(2) (see section 11.3.3.2 above). In the case of a new qualifying dwelling there is no provision which expressly states that the new qualifying dwelling will be treated and have the CIL regime apply to it as if it were the original qualifying dwelling. In consequence it is not clear whether a sale of that new qualifying dwelling will be a disqualifying event.

11.3.8.3 Liability for repayment - The beneficiary of the relief will be liable to make the repayment. This will be the person who owned the land on which the dwelling is situated immediately prior to the dwelling becoming available for occupation. Such
person is obliged to notify the collecting authority within 14 days of the disqualifying event giving details of the gross internal area of the dwelling or communal area which has ceased to be a qualifying dwelling or qualifying communal development and this must be accompanied by a plan identifying the dwelling or communal area (reg. 53(7)). An explanation must be given as to how the dwelling or communal area ceased to be a qualifying dwelling or qualifying communal development. Failure to comply with this obligation may result in the imposition of a surcharge of 20% of the CIL or £2,500 (whichever is the lower).

11.3.8.4 Collection of withdrawn relief – the amount to be paid by reason of the withdrawal of the relief will be calculated by the collecting authority by redoing the social housing relief calculations in reg. 50. This must be notified to the beneficiary of the relief and a new liability notice and demand notice be served. In a case in which the disqualifying event relates to a dwelling which had previously qualified for social housing relief under condition 5 (discounted rent letting by private landlord who not registered as provider of social housing – section 11.3.1.5) late payment interest will be payable under reg. 87 on the withdrawal amount from the date of the commencement of the chargeable development (reg. 53(4A) added by reg. 4(2) 2015 Regulations).

11.3.8.5 Protection – it will be necessary to consider on the disposal of a qualifying dwelling or qualifying communal area what implications the disposal will have for the social housing relief applicable to it and whether any contractual provisions need to be included to deal with the possibility of future disqualifying events. Should a transferor disposing of a qualifying dwelling or qualifying communal development after it has become available for occupation seek to include an indemnity to cover against having on the occurrence of a disqualifying event to repay CIL? Whether such a disqualifying event may occur will be outside the control of the transferor once the disposal has completed unless a right of pre-emption is reserved.

11.4 Exceptional circumstances – the third type of relief from CIL may be available if the particular development is not financially viable because of the CIL charge. It is discretionary. Some authorities have elected for it to be available but many have not. Brent, Swindon, and Barnet are examples of authorities which have. A number of authorities have been deterred by the fear that there could be a large number of applications for such relief. Even if made available in the relevant area it would only have been in rare cases that it applied in its original form due to the need to satisfy the viability condition (the costs of complying with the relevant section 106 planning obligations must have exceeded the amount of the CIL charge). This resulted in concern that the conditions were too strict. Proposals were put forward in the 2013 Consultation that it could be removed or limits be introduced as to the proportion of the costs of the planning obligations to the amount of CIL. As a consequence the viability condition was removed altogether with the intention that this relief could be available with regard to “sites with specific and exceptional costs burdens.” (para. 75 April 2013 Consultation Document). The application of this relief will allow projects relating to such sites to be financially viable. Even with this change the relief should still only be available in a limited number of cases because when setting the CIL rate the LPA will have taken into account the viability of developments in the area, development costs and policy requirements across the area.
The removal of the strict financial condition means that some authorities will make use of the availability of this relief imaginatively to allow developments to be implemented which otherwise would not happen.

One example of the actual operation of this relief is a development in Neenton, Shropshire involving the construction of seven houses and the renovation of the Pheasant pub as a community pub owned by Neenton Community Society. Shropshire Council approved that application for relief in relation to this development provided that an appropriate section 106 planning agreement was entered into so that the project regarding the pub could go ahead. No CIL was paid and this enabled the developer to provide funds for the renovation. The pub had been listed as an asset of community value and an appeal to the First-tier tribunal by the owners failed to have it removed. It is an interesting example of such a listing then being taken forward with the assistance of the authority.

In the Torbay DC draft charging schedule it is stated that this relief will be available for retail elements of large mixed use schemes so as to secure more sustainable and viable developments.

11.4.1 Qualification – there are a number of conditions which must be satisfied before this relief, namely:-

11.4.1.1 Availability (reg. 55(3)(a)) – many authorities will not make this relief available within their area. In consequence the first step that needs to be taken is to check the website of the relevant authority to find out whether it has made the relief available. If it has not then the relief cannot be claimed. To make it available the authority must publish on the authority’s website a statement complying with reg. 56. A number of authorities such as Brent, Bedford, Dacorum, Southampton, Huntingdonshire, Shropshire and Plymouth have made the relief available in their areas. Portsmouth City Council originally made it available within its area from 5th March 2012 but has now withdrawn it as from 10th March 2015. Trafford has made it available but only in relation to defined Strategic Locations. In contrast other authorities have decided not to make it available such as Oxford, Bristol and the Mayor of London. The authority can revoke this by issuing a fresh statement, as Portsmouth has done, but this cannot take effect earlier than 14 days from the revocation statement appearing on the authority’s website. It emphasises the importance of keeping an eye on the websites of any authorities relevant to particular developments. Any application for this relief received on or before the last day announced for receiving such applications must be considered by the charging authority (reg.57(15)).

11.4.1.2 Planning obligation (reg.55(3)(b)) – there is a planning obligation in existence relating to the permission for the development but now no additional requirement as to the level of the costs of complying with such planning obligation.

11.4.1.3 No longer need for viability – reg. 7(11) 2014 Regulations removes the need to satisfy an additional viability condition. Prior to 24th February 2014 to qualify for the relief the charging authority must consider that the cost of complying with the planning obligation exceeds the CIL arising from the development and that the requirement to pay that CIL “would have an unacceptable impact on the economic
viability” of the development (reg. 55(3)(c)(ii) which is now removed). There is still a requirement that there is a planning obligation in relation to the development but there is no stated requirement as regards the cost of complying with the planning obligation. However, the original requirement may be imposed by the LPA as one of its local requirements for the relief to be applicable. For example, Dacorum has imposed such a requirement. As it has been removed as a statutory requirement there must be a risk that it is open to challenge whether such a requirement can be imposed by the LPA.

Although the viability condition has been removed the charging authority will still need to judge that the CIL charge “would have an unacceptable impact on the economic viability of a development” and that it is expedient to grant relief (para. 2.7.4.2 of the revised February 2014 Guidance). This will require the circumstances of each individual case to be considered.

11.4.1.4 State Aid - the charging authority must also be satisfied that the relief will not constitute State Aid which has to be notified to and approved by the European Commission.

11.4.1.5 Expedient – the satisfaction of the three (previously four) earlier conditions does not necessarily entitled the claimant to the relief as there is also a requirement that the charging authority considers that it is expedient to allow the relief (reg. 55(1)(b)). There has been debate in the context of this point as to whether an authority should set out criteria to be satisfied and if so what they should be. Transparency is commendable but it will tie the authority down when it may prefer flexibility. Suggestions that the proposed developments must provide community benefits may be seen as varying the terms of the relief.

Some authorities have focused on the development contributing to local infrastructure, facilities and services which have been identified as priorities in local development or business plans. Leeds states in general terms that the development must contribute to wider regeneration or wider benefits within the area. Dacorum requires not only that the section 106 costs exceed the CIL but that

i) it can be demonstrated that the requirements of the section 106 planning obligations provide items of infrastructure which has been identified as a priority in the Infrastructure Delivery Plan;

(ii) the infrastructure items secured via the section 106 planning obligations are identified as being necessary to support development in a Development Plan Document or Supplementary Planning Document; or

(iii) the chargeable development would constitutes a large scale major development. For these purposes a large scale development is one involving 200 or more dwellings or floorspace exceeding 10,000 sqm or a site area exceeding two hectares.

Such local requirements suggests the type of factors that should be included in any claim for such relief even if the particular LPA has not specified any local requirements.
The relief may be applied to a phase of the development if authorised by a phased planning permission.

11.4.2 Claim - the relief must be claimed by a person who has a material interest in the land subject to the development and must be made before the commencement of the development.

11.4.3 Form of claim – a written claim in the prescribed form must be made in accordance with reg.55(4) giving the required particulars and accompanied by

(i) assessments carried out by an independent person as to the economic viability of the chargeable development. It is no longer necessary to provide an assessment as to the cost of complying with the planning obligation;

(ii) an explanation as to why in the claimant’s opinion the CIL payment will have an unacceptable impact on the economic viability of the development;

(iii) an apportionment assessment if there is more than one material interest;

(iv) a declaration that the completed claim form has been served on the other owners of material interests in the land.

The independent person needs to have been appointed by the claimant with the agreement of the charging authority and have appropriate qualifications and experience. There is no statement of what constitutes appropriate qualifications and experience so it is left to the authority to consider each person put forward by the claimant. One authority has been asked to authorise an individual for these purposes but this is not possible as there is no procedure or authority for this. An authority would be ill-advised to adopt such a course. It would have to set up a register and to monitor any persons so authorised to ensure that they retained the appropriate qualifications and experience.

A copy of the completed claim form needs to be sent to all owners of material interests in the relevant land (reg.57(6)) together with notice that the accompanying documents required by reg.55(4) are available and if requested are to be sent.

There are special rules for developments in London (reg. 58 2010 Regulations) but as the relief is not currently available in respect of the Mayoral CIL these are not currently material.

11.4.4 Notification of decision – the charging authority must notify its decision as soon as practical after receipt of the claim. No development must commence before notification otherwise the relief will be lost.

11.4.5 Amount of relief – so far as I can ascertain most authorities that have introduced the relief have not publicised the level of relief that will be granted if a development qualifies. Dacorum is an exception and has stated that it will not exceed 25% of the CIL liability which means that it could be less.
11.4.6 **Disqualifying event** – the relief will be lost if prior to commencement of the development charitable or social housing or self-build housing or residential annexes or extensions relief is granted (reg. 57(11)(a)(i)) or an owner of a material interest in the site makes a material disposal of the interest (reg. 57(11)(a)(ii)). Further the relief is lost if the development is not commenced within twelve months of the issue of the decision (reg. 57(11)(b)). An owner of a material interest in the land is obliged to notify the charging authority within 14 days from the occurrence of the disqualifying event and send a copy to all owners of material interests in the relevant land (reg. 57(12)). Failure to do so will result in a surcharge of the lesser of 20% of the chargeable amount or £2,500. A copy of the notice must be sent by the charging authority to the collecting authority, if different, and the person who is responsible for enforcing the section 106 planning obligation (reg. 57(13)).

11.5 **Self-build** – there has been considerable pressure to remove the CIL burden from individuals building their own homes. The view has been put that commercial developers can pass on the cost to the house purchasers but that self-builders have to bear that costs themselves and this deters self-builds from going ahead. The government has stated that it is keen to support and encourage self-builders and is seeking to encourage the increase of the self-build market. The problem is that the impact on the local infrastructure is the same whether the new house is occupied by a self-builder or a purchaser from a residential developer. The beneficial treatment under the CIL regime of the self-builder has been questioned and there is no obvious equitable answer. It is a political decision which distorts the underlying justification for the levy. As a result of the introduction of the exemption it is anticipated that over 5,000 self-build homes will be constructed.

11.5.1 **Exemption** - the exemption from CIL arises in respect of any chargeable development comprising self-build housing or self-build communal development. The relevant planning permission does not need to relate exclusively to the self-build housing and communal area (if any). It can cover other developments as well. There is a two staged approach. The first stage is the making of a claim for exemption which will involve self-certification that the proposed development is a self-build project and the requirements applicable to the exemption will be satisfied. Upon completion of the development the second stage will involve the production of the documents to corroborate the claim.

11.5.1. **Self-build housing exemption** – the basic concept is simple. A person who builds a dwelling to live in it as his or her sole or main residence is a self-builder. There may be issues as to whether the dwelling is the sole or main residence which will be similar to those that arise in relation to the capital gains tax exemption in relation to residences. Subject to that issue the concept is readily understandable. What is not so easily understood is the extension of the exemption to dwelling “where built following a commission by P” (reg. 54A(2) the 2010 Regulations). In the revised February 2014 Guidance it is stated that the exemption covers “anybody who is building their own home or has commissioned a home from a contractor, house builder or sub-contractor.” (para. 2.7.5.1). This clearly does not extend to a purchaser of a completed house from a residential developer. But does it extend to a purchaser off plan? To be eligible for the exemption does P have to be the owner of the land prior to work starting? To qualify does the contract relating to the development have to be exclusively a building contract? Does the dwelling to be constructed have to be
in accordance with plans drawn up in accordance with instructions given by P or is it enough that there is a choice of plans and P selects the particular plan? Must the planning permission be applied for by P or can P take the benefit of a planning permission granted to a developer? Must the planning permission be limited to the one site or could it involve more than one site? What is involved in commissioning the construction of a dwelling for the purposes of this exemption is very far from clear and it is important.

This could impact on the manner in which dwellings are constructed and sold. A developer could obtain a grant of planning permission for the construction of a dwelling and then complete the sale of the land whilst entering into a separate contract with the purchaser of the land to build the dwelling. The claim in such circumstances would be even stronger if the planning permission was obtained in the name of the purchaser.

11.5.2 Self-build communal development exemption –

11.5.2.1 Exemption - the inclusion of self-build communal developments extends the exemption to communal areas for the benefit of a number of self-build housing. This is to cover areas such as shared facilities or guest accommodation. It attributes such qualifying area between the self-builders in accordance with the formula in reg. 54A(6). The communal area will still qualify if enjoyed not just by self-builders but also by persons who are occupants of the same development authorised by the planning permission as the relevant self-build housing (reg. 54A(4)).

11.5.2.2 Disqualified area - the area will not qualify as self-build communal development due to reg. 54A(5) if it is:-

(a) wholly or partly made up of one or more dwellings;
(b) wholly or mainly for use by the general public;
(c) wholly or mainly for the benefit of occupants of a development which is not authorised by the planning permission permitting the self-build housing;
(d) to be used wholly or mainly for commercial purposes.

11.5.2.3 Additional qualification – in order for the self-builder to claim the exemption in relation to the self-build communal development the self-builder must have assumed liability to pay CIL in respect of the development which it can do jointly (reg.54A(8)). As there will be a number of self-builders a joint assumption of liability will be required if all are to claim the benefit of the exemption. The claim by the self-builder must be made at the same time as the claim in respect of self-build housing or if the planning permission is a phased permission then in relation to any phase of that permission. The second opportunity does not expressly link the claim to the phase involving the self-builders dwelling but that is probably the intention.

11.5.2.4 Exempt amount of self-build communal development – in order to determine the amount of the communal area to be attributed to each self-builder the following formula set out in reg.54A(6) is to be applied.

\[
\frac{X \times A}{B}
\]
where—

\[ X = \text{the gross internal area of the self-build communal development}; \]

\[ A = \text{the gross internal area of the dwelling in relation to which P is claiming the exemption for self-build housing}; \] and

\[ B = \text{the gross internal area of the self-build housing and relevant development, provided that the self-build communal development is for the benefit of that housing and that relevant development.} \]

11.5.3 Residential annexes and extensions – in addition there is a separate exemption for extensions and annexes to dwellings (reg. 42A - see section 11.6 below).

11.5.4 State aid – a self-build housing exemption cannot be granted to the extent that the collecting authority considers that it would constitute State aid which would be required to be notified to and approved by the European Commission but the exemption will be granted to the extent that the amount does not constitute State aid (reg. 54A(10) and (11)).

11.5.5 Taking effect of exemption – surprisingly there is no provision in the 2014 Regulations stating how it is to take effect with the coming into force of those regulations on 24th February 2014. If a development has commenced on or before that date then the exemption cannot apply as it is excluded by reg. 54A(3) (see section 11.5.6.1 below). It is made clear in the revised 2014 Guidance that no CIL will be repaid as a result of the introduction of this exemption (para. 2.7.5.2). In cases in which planning permission has already been granted by that date but the development has not been commenced then the exemption should be capable of being claimed provided that the necessary steps can be taken before the development commences.

11.5.6 Claim Procedure –

11.5.6.1 Timing - a claim for the exemption must be made before the commencement of the chargeable development (reg. 54A(2)(b)) and also the collecting authority’s decision on the claim must have been received before the development has commenced (reg.54B(3)). Subject to any State aid issue the authority is required as soon as practicable to grant the exemption and notify the claimant if there is a valid claim (reg.54B(4)). Failure to submit a commencement notice prior to the commencement of the chargeable development will cause the exemption to be lost even if the authority has granted it (reg. 54B(6)). In cases involving more than one dwelling it is suggested that a phased planning permission is obtained so as to avoid the commencement of the development in relation to the first unit triggering a charge in relation to all the units (para. 2.7.5.7 revised February 2014 Guidance).

11.5.6.2 Claimant’s qualifications - the person making the claim must in accordance with reg.54A(2):

(i) intend to build or commission the building of a new dwelling;
(ii) intend to occupy the dwelling as their sole or main residence for the clawback period which is three years starting with the date of the completion certificate

(iii) have assumed liability to pay CIL in respect of the new dwelling whether or not liability has been assumed in respect of any other development. With multi-unit sites it is recommended that the planning permission is for a phased development so that each dwelling is a phase of the development. This will require that each self-builder assumes liability for their own phase but no other. As each phase is treated as a separate chargeable development (reg.9(4)) this should be possible.

11.5.6.3 **Form** – the claim must

(i) be in a form published by the Secretary of State which is Form SB1-1: Self-build Exemption Claim Form Part 1 which will be found on the relevant authority’s website to be downloaded or at www.planningportal.gov.uk

(ii) include the particulars required by the form. This will require the claimant to certify:-

(a) the name and address of the claimant;
(b) that the project is a self-build project; that the claimant will occupy the dwelling as their principal residence for three years from completion;
(c) that the claimant will provide the required supporting documentation on the completion of the project to confirm that it qualifies for relief;
(d) the amount of de minimis State aid received by the claimant in the last three years prior to the submission of the claim.

(iii) if liability has been assumed jointly then it must clearly identify the area that is subject to the claim;

(iv) be submitted to the collecting authority complying with the time requirements set out in 11.6.5.1 above.

11.5.6.4 **Effect of exemption applying** – to the extent that the exemption applies to a development the CIL will not be payable on the commencement of the development. The charging authority will register a local land charge to secure the payment of CIL if it should become payable during the clawback period of three years.

11.5.6.5 **Change in development** – as discussed in section 8.4.2.4 difficulties have occurred when a planning permission has been granted which qualifies for the self-build relief and then after the development commences changes are carried out. The self-build relief is being lost as a result of the changes. There is no equivalent to reg. 50(7) in relation to social housing relief which saves that relief if there is a subsequent section 73 planning permission. It emphasises that the better course is to avoid the need for changes by ensuring that the development authorised is the one which is to be carried out and completed.

11.5.7 **Second stage additional evidence** – within six months of the date of the compliance certificate (given under either reg. 17 of Building Regulations 2010 or section 51 Building Act 1984) relating to the development subject to the self-build
housing exemption additional evidence must be supplied to confirm that the project is self-build (reg. 54C). Failure to comply within the prescribed time will result in the CIL previously exempt becoming payable but the consequences of this failure can be avoided (see section 11.5.8.4). Compliance involves the submission of a form SB1-2 Self-Build Exemption Claim Form – Part 2 and the provision of the following documentation:-

(i) copy of building completion or compliance certificate for the dwelling providing proof of date of completion;

(ii) copy of title deeds to prove ownership;

(iii) proof of occupation as claimant’s principal residence by supplying Council Tax certificates and two further proofs of such occupation (such as utility bills, bank statements or confirmation that claimant is on local electoral roll);

(iv) approved claim from HMRC under “VAT431C: VAT refunds for DIY housebuilders” or specialised self-build warranty (latent defects insurance policy accompanied by certified stage completion certificates issued to the owner/occupier) or self-build mortgage (approved mortgage to finance purchase of land or cost of building or both and provide funds to be paid in stages as work progresses) from a bank or building society.

11.5.8 Withdrawal of exemption – the amount of CIL exempted by the self-build housing exemption will be clawed back if a disqualifying event occurs within three years of the date of the compliance certificate relating to the relevant development (reg. 54D).

11.5.8.1 Disqualifying event - for these purposes a disqualifying event is any one of the following:-

(i) any change causing the self-build housing or self-build communal development to cease to satisfy the specified requirements. For instance if the self-builder ceases to occupy the dwelling as the main or sole residence.

(ii) a failure to comply with reg. 54C requiring additional evidence confirming self-build project (see section 11.5.6 above);

(iii) the letting out of a whole dwelling building comprised in the self-build housing or self-build communal development;

(iv) sale of the self-build housing or self-build communal development.

11.5.8.2 Phasing – when the self-build project involves more than one unit the revised February 2014 Guidance (para. 2.7.5.7) recommends that a phased planning permission is obtained with each unit being a separate phase of the development. One reason for this is so that the commencement of work on the first dwelling will not trigger the CIL liability for all the dwellings. Another reason is so that the occurrence of a disqualifying event only affects one unit and does not trigger the payment of CIL in relation to all the units. This will require each self-builder to assume liability in
relation to the relevant phase which should be possible (see section 11.5.6.2(iii) above).

11.5.8.3 Notification of disqualifying event – the person losing the benefit of the self-build housing exemption due to a disqualifying event (“the relevant person”) must notify in writing the collecting authority within 14 days beginning with the date of the disqualifying event. Failure to do so may result in a surcharge of the lesser of 20% of the chargeable amount or £2,500. Copies of this notice must also be sent to all owners of material interests in the land. Subject to 11.5.8.4 below as soon as practical after notification the collecting authority must notify the relevant person of the amount of CIL payable as a result of the revocation of the self-build housing exemption (reg. 54D(4)).

11.5.8.4 Failure to provide additional evidence required by reg. 54C – if the self-builder fails to submit the prescribed form and supporting documentation in accordance with reg. 54C then before taking any action the collecting authority must first give at least 28 days notice (reg. 54D(5). This notice must state the date at which the collecting authority intends to take any action. Additionally on the expiry of the period specified in reg. 54C the collecting authority must notify the relevant person of the amount of CIL due regardless of receiving notice from the relevant person. This will be another matter for the authority to monitor. The threatened action by the collecting authority can be pre-empted by the submission to the collecting authority of the form and documents required to comply with reg. 54C before the date stated in the collecting authority’s notice (reg. 54D(6)).

11.5.9 Appeals – an appeal to the appointed person against a refusal of an application for self-build housing exemption can be made within 28 days of the decision by the collecting authority (reg. 116B). If the appellant commences the development before a decision is made on the appeal then the appeal will lapse.

11.6 Residential annexes and extensions – having exempted self-builds it was logical to also exempt extensions of dwellings and the construction of annexes in the grounds of homes provided that they satisfy similar requirements to those applying to self-buils. Prior to this an extension which was less than 100 square metres would be exempt under the minor development exemption. The charging of CIL on such works gave rise to considerable complaint and so this exemption removes this thorn from the side of many houseowners.

11.6.1 Exemption (reg. 42A) – the exemption applies in favour of a person who has a material interest in a dwelling which that person occupies as their sole or main residence. It covers a residential extension or residential annexe.

11.6.2 Residential annexes (reg.42A(2)) – this is a new dwelling which is wholly within the curtilage of the main dwelling. The concept of curtilage is an ancient one which the judges have steered clear of defining. It has been used with regard to the law applied to planning permission, listed buildings and the transfer of sewers and lateral drains. There is scope for disputes but the likelihood is that in this context few will arise. A fuller discussion of the topic is contained in the Fourth Appendix.
11.6.3 Residential extensions (reg.42A(3)) – this is an enlargement of the dwelling which is the main or sole residence which does not comprise a new dwelling. This will apply to basement extensions. It could throw up practical issues. Is a detached garage an extension? If not when is a garage detached and when is it an extension of the main dwelling? Some authorities are applying a literal interpretation and requiring the extension to be physical attached whilst others are allowing claims in respect of a detached building ancillary to the main dwelling.

The circumstances giving rise to such a point may have arisen in an appeal against Preston City Council (appeal ref: APP/N2345/L/1200007) but it did not have to be decided. A land owner had obtained planning permission to build a single storey extension to the rear of a dwelling to form a swimming pool. A claim was made for exemption of the extension which was rejected by the Council on the basis that the development had already been commenced. This was upheld on the appeal. It was not clear from the recital of the facts whether the pool was detached from or attached to the house. If it was separate would it qualify for the exemption? It would seem unlikely that it should have been intended that it would lose out from the benefit of the exemption.

In an appeal concerning a single storey garage extension to an existing block the appointed person decided that it was proper to charge this to CIL at the rate applicable to a residential use but then raised the issue whether this residential extension exemption applied although he did not jurisdiction to decide that issue. He raised this point on the basis that if charged as being part of a dwelling then should the extension be treated as an extension of a dwelling?

11.6.4 State aid (reg.42A(5) and (6)) – as with the self-build housing exemption this exemption cannot be granted to the extent that the collecting authority considers that it would constitute State aid which would be required to be notified to and approved by the European Commission but the exemption will be granted to the extent that the amount does not constitute State aid.

11.6.5 Taking effect of exemption – surprisingly there is no provision in the 2014 Regulations stating how it is to take effect with the coming into force of those regulations on 24th February 2014. If a development has commenced on or before that date then the exemption cannot apply as it is excluded by reg. 42B(3) (see section 11.6.6.1 below). In such circumstances an extension will be still be exempt under the minor development exemption if less than 100 square metres. In cases in which planning permission has already been granted by that date but the development has not been commenced then the exemption should be capable of being claimed provided that the necessary steps can be taken before the development commences.

11.6.6 Claim procedure – this is very similar to that relating to the self-build housing exemption.

11.6.6.1 Timing – it is important to comply with the usual CIL timing requirement that steps must be taken before the commencement of the development (reg.42B(2)(a)). The claim must go in and the authority’s decision notified before the start of the development (reg.42B(3)). In addition a commencement notice must be
served before the start of the development and if it is not then the benefit of the exemption will be lost (reg.42B(6)).

11.6.6.2 Form – the claim must be in the prescribed form which is form SB2 Self-build Annex or Extension Claim Form which will be found at either the website of the relevant authority or www.planningportal.gov.uk. It must be submitted to the collecting authority. The particulars specified in that form must be given. These include the name and address of the applicant;

(i) the planning application reference;

(ii) identification of the main dwelling; election for residential annex or extension exemption;

(iii) applicant’s declaration that the applicant

(a) intends to occupy main dwelling as sole or main residence for three years following completion of annex or extension;
(b) received de minimis State aid in last three years less than 200,000 Euros;
(c) appreciates that benefit of exemption will lapse if commence development before receive authority’s decision or if no commencement notice is submitted before developments starts; and
(d) understands what meant by disqualifying event for the purposes of residential annex exemption and required to give notice to collecting authority within 14 days if occurs.

The form makes no mention of any accompanying documents in contrast with an application for self-build housing exemption.

11.6.6.3 Collecting authority’s response – as soon as practicable upon the receipt of a valid claim the collecting authority must grant the exemption subject to any issue concerning State aid and notify in writing the claimant (reg.42B(4)).

11.6.7 Withdrawal of residential annex exemption (reg.42C) –

11.6.7.1 Withdrawal - as with self-build housing exemption it is possible for the residential annex exemption to be lost on the occurrence of a disqualifying event but not the residential extension exemption. This will happen if the disqualifying event occurs during the clawback period which is a period of three years from the issue of the compliance certificate (pursuant to reg. 17 Building Regulations 2010 or section 51 Buildings Act 1984) relating to the annex.

11.6.7.2 Disqualifying event – for the purposes of residential annex exemption such an event is:-

(i) use of main dwelling for any purpose other than as a single dwelling;

(ii) letting of residential annex;
(iii) sale of main dwelling or residential annex unless both sold at same time to same person.

This means that the exemption will not be withdrawn if the main dwelling ceases to be occupied by the claimant as the claimant’s sole or main residence provided that it is still used as a single residence and not let.

11.6.7.3 Notification of disqualifying event – the person benefitting from the residential annex exemption (“the relevant person”) must notify the collecting authority in writing within 14 days of the occurrence of a disqualifying event (reg.42A(4)). This 14 day period begins with the day on which the disqualifying event occurs. Failure to do so may result in a surcharge of the lesser of 20% of the chargeable amount or £2,500. Upon receipt of this notice the collecting authority must as soon as practical notify the relevant person of the amount of CIL due as a result of the withdrawal (reg.42A(5)).

11.6.7.4 No withdrawal of residential extension exemption - This does not apply to the residential extension exemption. With that exemption there has to be a declaration that the claimant intends to occupy the dwelling to be extended for three years from completion of the extension as the main or sole residence. That declaration has to be honest and if it is not then the claimant has committed a criminal offence and the claim is invalid so that the CIL liability avoided could be recovered. However, if the declaration is honestly made then the CIL liability will not be subsequently triggered if the extended house is sold or let during the three year period running from the completion of the extension.

11.6.8 Appeal (reg. 116A) – an appeal can be made to an appointed person in relation to the failure to grant an exemption for residential annexes. The appeal is limited to cases in which the ground of appeal is that the collecting authority’s determination that the annex development is not wholly within the curtilage of the main dwelling is incorrect. Such an appeal must be made within 28 days of the decision of the collecting authority. This is tight time limit when the issue is one which could give rise to a need for considerable factual investigation and be legally difficult. Oddly there is no appeal in respect of the exemption for residential extensions which is confirmed by para. 2.7.6 of the revised February 2014 Guidance.
F. Procedure

12. **Procedural sequence** - the operation of the CIL regime involves the giving of a number of notices. Many of the forms needed will be found on the relevant charging authority’s website. Another useful source for forms relating to CIL can be found at the government’s planning portal website at http://www.planningportal.gov.uk/planning/applications/howtoapply/whattosubmit/cil

12.1 **The anticipated sequence** – dependent on the circumstances it is likely to take the following course:-

12.1.1 Information sharing between charging authority and collecting authority in cases in which they are not the same. This may involve a request for information by collecting authority (reg. 78).

12.1.2 Additional information from applicant – when an application is made for planning permission the authority will request additional information in order to be able to determine the CIL liability. Forms have been prepared for this purpose. Each authority may have a link to a Planning Application Additional Information Form.

12.1.3 Notice of chargeable development in case where no grant of planning permission but reliance on general authority (see section 8.3.2 above);

12.1.4 Assumption of liability notice expected to be given to collecting authority (see section 15.2 below regarding assumption of liability);

12.1.5 Liability notice from collecting authority containing CIL charge and payment details (see section 12.3 below);

12.1.6 Commencement of development notice informing collecting authority when development will start (see section 13 below);

12.1.7 Demand notice from collecting authority setting out payment dates (see section 15.6 below);

12.1.8 Request for suspension if appropriate (see section 15.7 below)

12.2 **Additional Information** - Failure to provide the additional information may prevent the planning application proceeding until it is supplied. When the charging authority and the collecting authority are different the additional information must be passed to the collecting authority on the grant of planning permission. The provision of additional information by the applicant will be particularly important if one or more of the deductions from GIA is being claimed (see section 4.4 above). The onus lies on the applicant to prove the entitlement (reg. 40(9)). It is not for the authority to investigate the matter. If such a claim is to be made then it is preferable that the supporting information is compiled before the planning application is made. Then it can be provided with the application and the authority will be able to make a considered decision. In the event that the authority does not accept the claim provided the development has not commenced the applicant can then ask for a review and if the claim is still refused can appeal. Commencement of the development will cause any
such review or appeal to lapse. Failure by the applicant to provide the full information with the planning application will leave the applicant having to assemble such information after the service of a CIL Liability Notice and with the task of seeking to convince the authority that it should revise its CIL Liability Notice (see section 12.3.6 below). The task will be made even harder if the applicant commences the development. In such circumstances even if the authority is prepared to consider further information the applicant will not be able to pursue the statutory routes of review and appeal to challenge the authority and will need to fall back on the more expensive and protracted route of judicial review. This was the course followed unsuccessfully by the developer in R (oao Hourhope Limited) v Shropshire CC [2015] EWHC 518 (Admin). The lesson for any developer is to investigate the position regarding any deduction which is to be claimed before the planning application is made and to supply the full information to the authority before the CIL Liability Notice is issued.

12.3 Liability notice-

12.3.1 Objective - it is for the collecting authority to issue a CIL liability notice which sets out the CIL liability arising as a result of a proposed chargeable development. This should take account of any applicable reliefs. My understanding is that the notice is a statement of what will be payable when the development commences. The issue of the notice is not expressed to be a pre-condition of the CIL liability. However, a demand notice has to identify the relevant liability notice so unless there is a liability notice issued there can be no complete demand notice. Reg. 65 does refer to the liability notice having effect and this may be a reference to it being prima facie evidence of a continuing CIL liability or to it justifying a demand notice. This point may be particularly relevant to the issue as to when a local land charge can be registered (see para. 15.9 below). I suspect that there will be an automatic reflex action that when a liability notice is issued a local land charge is also registered. As discussed in that section there is a doubt that this is strictly authorised by reg. 66 and it could in some cases pose problems when attempting to deal with the land.

12.3.2 Timing – the collecting authority is required to issue the liability notice “as soon as practicable after the day on which a planning permission first permits development” (reg. 65(1)). This is a mandatory duty. In some cases this will not be the date of the granting of planning permission particularly if the permission is outline or a phased development (see para. 6.2.3 above regarding the operation of reg. 8). For example, an outline phased planning permission may be subject to reserved matters and it is only on the final approval of the last reserved matter that it will first permit development for the purposes of CIL. This may be some time after the original grant of the planning permission. Should the collecting authority wait until then? It is unlikely that authorities will. A similar point arises with regard to phased developments. Will separate CIL Liability Notices be issued in respect of the individual phases and if they are when will they be issued? The failure to issue a liability notice as soon as practical cannot be the subject of or a ground for a reg. 114 appeal (see para. 6.2.6.2 above concerning a case in which the CIL Liability Notice was served twelve months after the grant of planning permission).
For the reasons given in section 12.2 above the requirement that the authority must issue a CIL Liability Notice as soon as practicable must be borne in mind by developers. It is far better to provide to the authority supporting information for any claim which will reduce the CIL liability before the authority issues a CIL Liability Notice.

12.3.3 Monitoring of planning permissions - To wait until all necessary approvals have been given will require the authority to monitor compliance with such conditions. Do authorities have the resources to undertake this? A pragmatic answer that has been suggested is that a liability notice or draft liability notice should be given when planning permission is granted and then a fresh or revised liability notice when the development is “first permitted”. The second “go” at setting out the CIL liability may be needed in any event if there has been a change in the local CIL rate between the grant of the planning permission and the development becoming “first permitted”. It should be noted that this timing issue will not affect the impact of indexation as that is related to the date of the grant of the planning permission and not when the development is first permitted nor when the development actually commences.

12.3.4 Required form – there is a prescribed form for this notice and the notice issued must be in that form or to “substantially the same effect”. It must include

12.3.4.1 a description of the chargeable development;

12.3.4.2 the date of issue;

12.3.4.3 the chargeable amount; whether capable of being payable by instalments (including a copy of the authority’s policy);

12.3.4.4 the amount of any charitable relief or relief for exceptional circumstances or exemption for residential annexes or extensions granted in respect of the chargeable development;

12.3.4.5 where social housing relief or an exemption for self-build housing exemption has been granted then the persons to whom it has been granted and the amount of relief each benefits from;

12.3.4.6 the other information required by the prescribed form.

12.3.5 Service – the liability notice must be served by the collecting authority on

12.3.5.1 any person who has assumed liability;

12.3.5.2. all owners of material interests in the site;

12.3.5.3 any person who has submitted a notice of chargeable development; any person applying for approval of any matter the subject of a condition required before the development can be commenced; in any other case the person who has applied for the planning permission.
12.3.6 Revised liability notices – a collecting authority has the power at any time to issue a revised liability notice (reg. 65(5)). There are no pre-conditions to be satisfied. It means that this is an easy means by which to correct any errors as well as accommodating any change. The collecting authority is only expressly obliged to issue a revised liability notice in specified circumstances. These are if there is a change in the chargeable amount or the availability of a relief or a change in the charging authority’s instalment policy (reg. 65(4)). My reading of this regulation is that the changes have to have occurred subsequent to the CIL Liability Notice in order that the authority can be compelled to revise the existing CIL Liability. Accordingly reg. 65(5) does not impose a general obligation on an authority to revise when appropriate but only in those specified circumstances.

This point becomes material if after the CIL Liability Notice further information is supplied in support of a claim to reduce the CIL liability. Does the authority have to take it into account? There is nothing in the regulations covering this. It seems to me that the practical answer is that at least until the date that the development is commenced the authority should take into account further information. There is no express guillotine on providing information by a specific date and so I would expect that if there is a review or appeal the further information would be taken into account. If this correct then so also should the authority take it into account. It is in any event most unlikely that an authority would refuse to do so.

This point becomes more pressing if the further information is only supplied after the development has commenced. There must be a strong argument that as payment of the CIL liability has been triggered it is too late after that date to provide further information in support of a claim to reduce the CIL liability relating to matters existing before the date the development was first permitted. As regards deductions the onus lies on the person liable to pay the CIL. If that onus has not been discharged before the commencement of the development then an authority may argue that it is too late to attempt to do so after commencement. If this is not the case then it would be possible for further information to be provided at any time in the future and such a possibility would mean that the authority would not have certainty and in particular its budgets could have to be retrospectively varied.

In the Hourhope case supra the first batch of the further information in support of the claim to a demolition deduction was supplied together with the notice of commencement of the development which was to occur a few days after the notice was sent. The point considered above would have arisen but for Shropshire Council stating that it would consider the further information and if appropriate would revise the CIL Liability Notice. The Council never resiled from that position but did not accept that the demolition deduction was available. Had the Council resiled then the developer could have argued that the authority should be required to consider the further information as based on the Council’s statement the developer had a legitimate expectation. This in turn could have raised the issue whether the developer had relied on the statement and if not whether reliance was a necessary element of such a claim. The legitimate expectation point was raised in Hourhope’s case but did not arise for consideration because of the stance adopted by the Council. It is to be expected that in the light of the challenge by way of judicial review in the Hourhope case authorities will be much less willing to accept further information and to consider it after the commencement of development. To do so puts them at risk of a much more
expensive, formal and time consuming challenge and that certainly does not accord with the general approach adopted when formulating the CIL regime.

This serves to emphasise to developers the importance of collating and providing the full information at the right time and certainly before commencing the development.

Any revised liability notice must be served in accordance with para. 12.3.5 above. It will replace any previous liability notice in respect of the chargeable development which will be automatically cancelled (reg. 65(8)). Currently a section 73 permission may result in the need for a revised liability notice (see para. 8.4 below). With the new abatement procedure for subsequent standalone planning permissions (discussed in section 15.8 below) there will not be a need for the service of a revised liability notice in such circumstances. The CIL liability arising from the earlier planning permission will stand but be capable of being set off in part against the subsequent CIL liability. This should not require the authority to revise the earlier CIL liability.

12.3.7 Ceasing to have effect – a collecting authority may at any time withdraw a liability notice as opposed to issuing a revised liability notice (reg. 65(7)). This is carried out by giving notice of the withdrawal to all those persons on whom the liability notice was served. In addition to withdrawal a liability notice ceases to have effect once all CIL has been paid or on the expiry of a clawback period in relation to charitable or social housing relief or an exemption for residential annexes or self-build housing (if applicable) without the occurrence of a disqualifying event or a failure to comply with reg. 54D(2)(b) (provision of additional evidence for purposes of self-build housing relief) regarding which the collecting authority cannot take further action (see section 11.5.8.4). One consequence of it ceasing to have effect is that the local land charge registered in relation to the chargeable development must be cancelled (see section 15.9 below).

12.3.8 Response to liability notice - understandably liability notices are taking some developers by surprise. This is likely to be the case for some time as CIL continues to be introduced into new areas. Some points to be borne in mind on receipt of such a liability notice are:-

(i) The time limit for appeal runs from that notice and not the review decision. It is 60 days and there is no power to extend it.

(ii) It is not possible to appeal once the development has started. However, the 2014 Regulations have relaxed this stringent limitation in the limited case of planning permissions granted after the commencement of development (see section 18.14 below).

(iii) No appeal can be made unless a request for a review has been made.

(iv) The appeal must be made even if the review decision has not been received within the 60 day time limit.

(v) Once an appeal is made if the development is started before a decision the appeal will lapse.
(vi) The liability notice does not trigger the liability to pay CIL. The start of the development does that.

(vii) Notice of intended commencement of development must be given prior to the start.

(viii) Failure to give that notice and/or late payment may result in stiff surcharges.

(viii) Upon receipt it is important to consider whether there is any justification for seeking a reduction in the amount of the CIL liability. If there is and this has not already been done then the supporting information needs to be collated as fully and quickly as possible and certainly before the commencement of the development.

Important point – service of a liability notice triggers the running of a very tight timetable for appeals and developers taken by surprise need to take advice promptly.

13. **Commencement notice** –

13.1 **Commencement** – a crucial event in the context of the operation of the CIL regime is the commencement of development (as to what constitutes commencement see para. 6.3.2 above). It is this event which causes the CIL to become payable whether immediately or by instalments with payment dates determined from the commencement.

13.2 **Giving a commencement notice** - before commencing the development authorised by a planning permission a commencement notice must be served on the collecting authority no later than the day before the commencement (reg. 67)). There is no need to serve such a notice if the development is a minor development within reg. 42 or the chargeable amount is zero or no CIL is payable because it is subject to the exemption for residential extensions. This notice is to inform the collecting authority that the CIL liability is about to fall due. Not only is this to be served on that authority but also on every other owner of a material interest in the land. Such notices can be withdrawn by written notice before commencement of the development. A fresh commencement notice will replace any such earlier notice. The collecting authority must acknowledge receipt of such a notice. However, if the development has commenced then the right to withdraw the commencement notice is lost. The LPA may carry out a site inspection to ascertain whether or not the works have started as occurred in the appeal against a demand notice issued by Preston City Council (appeal ref: APP/N2345/L/14/1200007). In that case the demand notice specified the date given in the commencement notice and Preston Council produced photographs of the half-built swimming pool in support of the contention that the work had started. Consequently the CIL liability was payable.

13.3 **Factors to consider** – it must be appreciated that when the development is commenced the right to have a review of the CIL liability or to appeal is lost. This means that if there is still a live issue regarding the CIL liability at best it can be addressed by judicial review and at worse the right to challenge the liability or the amount will be lost. As discussed in section 12.3 above the only prudent course for a
developer to adopt is to ensure that the full information supporting a claim to reduce CIL is provided to the authority as soon as possible and certainly before the commencement of the development. There will be financial consequences flowing from the deferment of the commencement of the development and these may outweigh the amount of CIL at issue and so mean that commencement is the sensible answer. However, even if this is the case an attempt should be made to put the information in as soon as possible. It may be that as in the Hourhope case it can be agreed with the authority that the information will be put in later although such agreement is much less likely to be given now after that case. The amount of the CIL liability will not be changed dependent on when the development commences. It is an amount which is fixed and will not, for instance, be increased by the application of indexation.

13.4 Failure to give commencement notice – if no such notice is given or it is given late and the chargeable development commences without a notice having been properly given then the collecting authority may determine the date on which the development was commenced (reg. 68 and see section 8.3.3 above). The failure to serve a commencement notice properly may give rise to a surcharge (reg. 83 and see section 17.1.4 below) and the ability to pay the CIL by instalments will be lost.

The failure to serve a commencement notice is one which occurs not infrequently particularly in the case of house extensions. On an appeal there may be sympathy but if the breach has occurred then the appeal against a surcharge will fail. In the appeal against a surcharge imposed by Havant BC (ref: APP/X1735/L/14/1200017) the appellant had paid the CIL liability arising from the conversion of a single house into two houses over the telephone and claimed that they had been told that nothing more was needed. The Council’s answer was that the people that the appellants were talking to at the Council were not part of the Development Control section. The appointed person did not accept this but considered that the Council “have a corporate responsibility to ensure correct information is given out” (para. 5). If they had been given the correct answer or been referred to the correct section of the Council then the commencement notice would have been served on time. However, the relevant information was available on the Council’s website and on the CIL liability notice. In consequence although the appointed person considered that there were mitigating circumstances and had sympathy with the appellants the surcharge was upheld because the commencement notice was not served and there was a breach.

13.5 Authority does not accept commencement notice – a collecting authority may determine that the commencement date is different from that stated in a commencement notice if it has reason to believe that the development commenced earlier than that date (reg. 68(b)). An authority may carry out a site inspection in this regard and take photographs. This is a distinct possibility if a claim for an exemption may be affected by the commencement date.
**G. Computation of CIL**

14. **Calculation of CIL charge** – as state above the focus is on the extent to which the development has resulted in an authorised increased internal area. What is important is the extent that the planning permission authorises development and not the extent to which it is actually carried out. If the full development is not to be carried out or at least not in the short term then to avoid the full CIL liability it would be necessary to vary the planning permission.

Care has to be taken over how this area is determined. This is considered more fully in para. 14.2. The basic formula is set out in para. 14.1 below. To assist with the calculation some authorities have helpfully provided CIL calculators which can be downloaded from their websites. These will operate with the CIL rates applicable to that particular authority and so cannot be used for developments in other areas. One such authority is Waveney DC and the calculator to be used for developments in that area can be found at [http://www.waveney.gov.uk/site/scripts/download_info.php?fileID=3632](http://www.waveney.gov.uk/site/scripts/download_info.php?fileID=3632). It must be borne in mind that it is sensible to check that these calculators take into account any recent changes particularly when matters such as social housing exemption are involved.

14.1 **Formula** - the basic formula for calculating the CIL liability, which has not changed despite the constant amendments, reflects the objective of applying the relevant CIL rate to the increase in the internal floor area subject to indexation. The formula is:

\[
\frac{R \times A \times Ip}{Ic}
\]

Where:

- **R** is the CIL rate in £/m².
- **A** is the net increase in gross internal floor area (see section 14.2 – the formula is contained in 14.2.3 below).
- **Ip** is the All-in Tender Price Index for the year in which planning permission was granted.
- **Ic** is the All-in Tender Price Index for the year in which the charging schedule started operation.

The key element in this formula is the net increase in the gross internal floor area.

14.2 **Increase in gross internal area** – A is the crucial figure because the charge is (subject to cases involving change of use as to which see para. 9.3 above) on the amount by which the gross internal area of the building has been increased bearing in mind that this can in certain circumstances include areas already in existence at the date of the grant of planning permission. The formula to be used to determine this
14.2.1 Measuring the internal area –

14.2.1.1 General test - in measuring the gross internal area all internal parts will be included regardless of use subject to the special position applicable to social housing relief (see para. 11.3.2.3 above). GIA is not defined in the CIL regulations and there is no guidance in the regulations aimed at assisting in determining what space is to be included in the calculation of the internal floor space. However, it is important to bear in mind that it is the gross internal area of the chargeable development. In consequence if the planning permission authorises the construction of a building with a number of units in it then the GIA to be ascertained is the GIA of the building and not the aggregate internal floorspace of the units. This point is made in example 15 of Appendix 1 to the VOA CIL Appeals Guidance Note that in a block of flats the aggregate GIA of the flats may be significant less than the GIA of the block because of the common parts. The chargeable development authorised by the planning permission is the building of the whole block and not just the individual flats so that the common parts need to be included in the determination of the floorspace.

The measuring will be in accordance with the RICS Code of Measuring Practice (currently 6th Edition) (“RICS Code”) and in a CIL appeal decision concerning extensions and erection of detached part open fronted double garage the appointed person stated that “the definition of GIA in the RICS Code is the generally accepted method of calculation and I have therefore applied this definition in considering the extent of the net additional floor space” (para.14 of appeal concerning development for erection of single storey extension and first floor rear extension). This was also the view expressed in an appeal concerning a change of use from office to communal house.

14.2.1.2 Specific inclusions – in the RICS Code there are lists of items which are set out as included and excluded from the core definition of Gross Internal Area. Amongst the items included are communal and service areas and accommodation used for such matters as providing heating or air-conditioning. Fuel rooms will be included even if situate on the roof. Areas such as lifts (both wells and room), stair wells, toilets, showers, changing rooms and underground parking will be included. Also included will be any internal walls or partitions, chimney breasts, columns or piers (whether freestanding or projecting inwards from an external wall). Mezzanine floors with permanent access are included (see section 10.4 above). Voids over stairwells and lift shafts on upper floors are also included as are pavement vaults. Garages, loading bays and conservatories are expressly included. In the CIL guidance provided by Shropshire CC it states that it will include in the GIA the internal area of
attic rooms if there is access by a permanent stairway but not if by means of a pull down ladder.

14.2.1.3 Area not wholly enclosed - areas which are not wholly enclosed may give rise to issues. The RICS Code includes “internal open-sided balconies, walkways, and the like”. It excludes external open-sided balconies, covered ways and fire escapes. In the appeal mentioned in section 14.2.1.1 above one of the issues raised was whether the internal floor area of a garage described as a car port should be taken into account. This garage was enclosed by three walls but with a wholly open front. The appointed person determined that the “car port accommodation” fell within the definition of GIA. The opening to the car port was bounded to either side by a small structural wall which provided a surface up to which the GIA could be assessed (para. 16). The decision is really a determination that the building constitutes a garage. In that case the GIA exceeded 100 square metres and so did not qualify for the minor works exemption. If carried out now it would probably qualify for the residential extension exemption (see section 11.6 above).

A similar issue arose with regard to an appeal concerning a development raising the height to the section of an existing building. There was a roadway with covered loading bays which was enclosed on two sides and had structural columns supporting three storeys above. The appointed person considered that it was originally a covered roadway combined with a loading area. It was referred to as a tunnel. This area was to be developed with more enclosure and the rerouting of the roadway to the north of the building. The appointed person considered both the RICS Code and the VOA Code as regards open sided areas and reached the decision that the original layout of the combined roadway and loading bays was included in the GIA of the building under both codes. It was noted in particular that the RICS Code included internal open-sided walkways and the like and also loading bays both of which were applicable to the case. In consequence the development did not increase the GIA save for a new covered loading bay added to the building. It had roller shutter doors on to the relocated road and so was definitely to be included in the GIA but that area was within the minor works exemption.

14.2.1.4 Specific exclusions - the width of the exterior wall will be excluded as will any external open-sided balconies and fire escapes. In addition the RICS Code excludes canopies, voids over or under structural, raked or stepped floors. Greenhouses, garden stores, fuel stores and the like in residential properties are also excluded.

There is a difference between the RICS Code and the Code of Measuring Guide provided by the Valuation Office Agency for rating purposes which excludes from GIA open balconies, open fire escapes, open-sided covered ways, open vehicle parking areas, terraces and the like, minor canopies, any area with ceiling height of less than 1.5m (except under stairways), and any area under the control of service or other external authorities. The RICS Code in contrast includes any area under the control of service or other external authorities and any area with a headroom of less than 1.5 metres. In the appeal mentioned in section 14.2.1.1 this was remarked on by the appointed person who followed the RICS Code which does not exclude such areas. It was noted that the VOA guide was for the purposes of rating. This is supported by an appeal concerning a two storey/part single storey extension.
incorporating a new garage with accommodation over. One of the grounds for the appeal was that the charging authority had included first floor space which had less than 1.5 metres headroom within the computation of GIA. The appointed person applied the RICS Code which expressly includes such areas. The same approach was adopted in an appeal (concerning a development involving part two storey and part single storey front extension incorporating a new garage).

14.2.1.5 Car parking space – in example 18 of Appendix 1 to the VOA’s CIL Appeals Guidance Notes the question is raised as to how basement car parking is to be dealt with when determining the GIA of a block with mixed office and residential use. Three options are considered. The first is that the basement car park is disregarded. The planning permission will have authorised the whole block including the car park so the GIA should include the basement area as it is part of the chargeable development. This then leads on to the question as to how the internal floor area of the basement is to be charged to CIL. The second option is to include the basement’s internal area and for the purposes of charging CIL apportion the basement area between the office use and the residential use in the proportions that the office and residential areas bear to each other. So that if the residential area is twice that of the office area then the basement area is apportioned one third to the office area to be charged at the office CIL rate and two thirds apportioned to the residential area to be charged at the residential CIL rate. The third option would be to apportion the basement area in the proportion to which the office occupants and the residential occupants are permitted to use the car parking spaces in the basement. If the planning permission includes conditions regarding car parking then there is a justification for this approach rather than that in the second option. For example it could be specified that all the car parking is for the residential occupants rather than the commercial. Account needs to be taken of this condition as it is part of the formulation of the chargeable development. In such circumstances the expectation would be that the whole of the basement area would be charged at the CIL rate applicable to residential use. On the other hand if the division of the use of the basement car park between residential, and commercial occupants is dictated by the landlord then there is less justification to take that into account. A fourth option not suggested by the VOA is that if there is no governing condition attaching to the planning permission then it is open to the LPA to decide on an apportionment which results in the maximum CIL. The reason that this option was not suggested is that the apportionment has to be justified by evidence and in the event there is none then the default position would seem to be the second option using the respective GIA’s of the office and residential areas.

14.2.1.6 The Mayor of London’s Guidance – this states that open-sided covered ways will be excluded but in contrast open-sided covered areas will be included. To be taken into account the area must be comprised in the interior of a building. This would not normally be regarded as, therefore, including, for example, an all weather sports pitch with an overhead cover of tarpaulin. The Mayor of London’s guidance also specifically refers to the exclusion of areas with a ceiling height under 1.5 metres except under a stairway and any area under the control of service or other external authority.

14.2.1.7 Separate buildings – a material point when determining the gross internal area is to ascertain what constitutes a separate building. External walls are excluded
from the internal area but not internal walls. If the structure is not in a uniform type of construction then it should be regarded as a separate building. But if there are contiguous elements and of a similar type of construction then the structure should be treated as a single building providing that more than 50% of the party wall has been removed.

14.2.1.8 Verification – the issue has been aired as to whether authorities should accept the figures for gross internal area provided by the developer or landowner or whether a system should be put in place by which to verify the figures. I have not seen any answer as to how this is to be tackled. A pragmatic approach is likely to be adopted with inspections in the few cases in which the authority considers there is a need. It sounds expensive and if such expenditure is incurred then it is to be expected that there will be a move to shift the incidence across to the payer of CIL.

14.2.2 Deduction of area – there are certain areas which can be deducted from the gross internal area of the building resulting from the development. This may have a significant impact on the amount on which CIL is charged. As indicated below (see section 14.2.5) it will be influenced by whether the building had been in use or was unused prior to the grant of permission and if used whether it was lawful or unlawful user. Prior to the 2014 Regulations two deductions were possible but now there are three:-

(i) retained building satisfying “in lawful use” test (first retained building deduction) – there is a deduction from the GIA of the aggregate gross internal area of the buildings in existence at the completion of the development which existed when the development was first permitted and also qualify as “in-use buildings” (see section 14.2.5 below). The building must have been in lawful use for a continuous period of at least six months in the three year period ending on the date that the permission first permits the chargeable development (previously twelve months). It suffices that it is a use of part only.

(ii) continuing permitted user of retained building (second retained building deduction) – the internal area of a retained building which does not satisfy the “in lawful use” test will still be deductible if the permitted user immediately prior to the date when the development is first permitted continues after that date and is the permitted user for that building within the development not requiring any fresh planning permission (see section 14.2.5.3(ii)).

(iii) demolished buildings (the demolition deduction) - the aggregate gross internal area of buildings on the land when the permission first permits the development but which are demolished before the completion of the development and qualify as “in-use buildings” (see section 14.2.5 below).

These three deductions and what qualifies as an “in-use building” are considered more fully in 14.2.5 below.

14.2.3 Formula for gross internal area – the formula originally in reg. 40(6) and now after the 2014 Regulations in reg. 40(7) for calculating A (GIA) has been replaced twice - once by reg. 5 of the 2012 Regulations and then again by reg. 6 of the 2014 Regulations. These changes have been in order to correct an error which could result
in the overcharging of CIL first when there was both the first retained building
deduction and the demolition deduction and then before that in respect of the
demolition deduction. Coping with existing buildings which are to be retained or
demolished and the phasing of developments has been a real headache. The present
replacement formula is set out immediately below in para. 14.2.3.1. This replacement
formula does not apply in all cases and so both the first replacement formula and the
original formula are set out in para. 14.2.3.4 and para. 14.2.3.5 below respectively.
The final form of the present replacement formula is as a result of amendment after
the original draft set of regulations had been issued because the original form of
words did not solve the problem in all circumstances with mixed user development
schemes and that even with the introduction of the amendment in the original form
there could be an unintended CIL bill larger than it should be when there are
differential CIL rates (see the article headed “New CIL Regulations Don’t Add up” in
Barney’s Blog by Barney Stringer).

14.2.3.1 Current formula – the operation of the formula looks complicated and
appearances do not deceive. When there is a single CIL rate applying to the
chargeable development it is greatly simplified because GR and G will be the same.
This formula seeks to allow not only for the three deductions relating to retained and
demolished buildings but also apportioning the deduction for such buildings between
different phases of development.

\[
G_R - K_R \left( \frac{G_R \times E}{G} \right)
\]

Where—

\(G\) = the gross internal area of the chargeable development (see section 14.2.1 above as
regards measuring the area);

\(G_R\) = the gross internal area of the part of the chargeable development chargeable
at rate R;

\(K_R\) = the aggregate of the gross internal areas of the following—

(i) retained parts of in-use buildings (which are those retained buildings which satisfy
the “in lawful use” test – see section 14.2.5 below); and

(ii) for other relevant buildings, retained parts where the intended use following
completion of the chargeable development is a use that is able to be carried on
lawfully and permanently without further planning permission in that part on the day
before planning permission first permits the chargeable development (see section
14.2.5.3(ii) below);

(as regards \(K_r\) see section 14.2.5 below)

\(E\) = the aggregate of the following—

(i) the gross internal areas of parts of in-use buildings that are to be demolished
before completion of the chargeable development (see section 14.2.2(iii)), and

(ii) for the second and subsequent phases of a phased planning permission, the value Ex (as determined under reg. 40(8)), unless Ex is negative,

provided that no part of any building may be taken into account under both of paragraphs (i) and (ii) above.

(as regards effect of demolition see sections 14.2.5 and 14.2.7 below)

Ex - There is yet another formula in reg. 40(8) to enable the value Ex to be calculated. This is the amount of the demolition deduction in relation to an earlier phase of development to the extent that it has not been fully deducted. This allows it to be carried forward to be deducted from the GIA of chargeable developments comprised in later phases. Ex is calculated using the following formula—

$$Ep - (Gp - Kpr)$$

where—

$$Ep =$$ the value of E for the previously commenced phase of the planning permission;

$$Gp =$$ the value of G for the previously commenced phase of the planning permission; and

$$Kpr =$$ the total of the values of KR for the previously commenced phase of the planning permission.

R is the relevant CIL rate. If the Charging Authority only has one rate or the development only involves one type of use then there will be a single calculation

14.2.3.2 When do the current formulae apply – the formulae in 14.2.3.1 above apply to all developments save those for which a liability notice has been issued before 24th February 2014. It is not intended to upset any calculations by the authority before the 2014 regulations took effect but will apply no matter when the planning permission was granted authorising the development if the liability notice is issued on or after 24th February 2014.

14.2.3.3 First Replacement formula – This formula is not quite so complicated but that is because it does not work in all circumstances. It will only be effective in cases in which a liability notice has been issued prior to 24th February 2014 and then it will have been applied unless the circumstances are such that the original formula applies (see section 14.2.3.5 below). The formula is:

$$G_R - K_R - \left( \frac{G_R \times E}{G} \right)$$

Where—
G = the gross internal area of the chargeable development;

\( G_R \) = the gross internal area of the part of the development chargeable at rate R;

E = an amount equal to the aggregate of the gross internal areas of all buildings which—

(a) on the day planning permission first permits the chargeable development, are situated on the relevant land and in lawful use; and

(b) are to be demolished before completion of the chargeable development; and

\( K_R \) = an amount equal to the aggregate of the gross internal area of all buildings (excluding any new build) on completion of the chargeable development which—

(a) on the day planning permission first permits the chargeable development, are situated on the relevant land and in lawful use;

(b) will be part of the chargeable development upon completion; and

(c) will be chargeable at rate R.

R is the relevant CIL rate

14.2.3.4 Original formula – the original formula will be applied if either there was a grant of planning permission before 29th November 2012 or the development is authorised by a general consent and a notice of chargeable development (including one given by the collecting authority under reg. 64A) was given before 29th November 2012 (reg. 9 2012 Regulations). It is

\[
(C_R \times (C - E)) / C
\]

Where—

Cr = the gross internal area of the part of the chargeable development chargeable at rate R, less an amount equal to the aggregate of the gross internal area of all buildings (excluding any new build) on completion of the chargeable development which—

(a) on the day planning permission first permits the chargeable development, are situated on the relevant land and in lawful use;

(b) will be part of the chargeable development upon completion; and

(c) will be chargeable at rate R.

C= the gross internal area of the chargeable development; and

E= an amount equal to the aggregate of the gross internal areas of all buildings which—
(a) on the day planning permission first permits the chargeable development, are situated on the relevant land and in lawful use; and

(b) are to be demolished before completion of the chargeable development.

14.2.4 **Mixed user developments** – the simplicity is lost and more than one calculation is required if the development involves more than one use and the relevant charging authority has put in place differential rates dependent on the type of use (see Example 2 above in section 14.2.3.3). With such mixed use developments the formula has to be applied separately in relation to each CIL rate applicable to the development. The extent of the gross internal area of the chargeable development for the use which the relevant CIL rate applies to and the extent of the first retained building deduction and the second retained building will be determined by the portion of the development to be put to that use. They will constitute GR and KR in the formula. The internal area of any demolished buildings will be apportioned between the CIL rates by reference to the proportions of the development attributable to the different uses in order to arrive at E.

14.2.5 **Deductions from GIA** -

14.2.5.1 **General** – when calculating the chargeable amount of CIL pursuant to reg. 40 there is in certain specified circumstances three deductions from the gross internal area in relation to existing buildings which exist at the date that the development is first permitted and which are either to be retained upon the completion of the development or demolished during the course of the development. When a deduction is available the internal area of the relevant building is deducted from the GIA thereby reducing the GIA which is to be multiplied by the appropriate CIL rate to arrive at amount of the CIL liability. Such a deduction can make a significant difference to the CIL liability.

The original deduction in the 2010 Regulations related only to buildings which were to be demolished during the course of the development (“the demolition deduction”). In the 2011 Regulations a second deduction was added in relation to existing buildings which were to be comprised in the development on completion (“the first retained building deduction”). Then in the 2014 Regulations a third deduction was added in relation to buildings which were to be comprised in the development upon completion but did not qualify for the first retained building deduction but could have been lawfully used immediately prior to the date on which the development was first permitted for the same use as intended after the completion of the development (“the second retained building deduction”).

Getting the formula right to allow for the appropriate deductions has proved difficult. There have been a number of amendments. Some of the changes in wording have not affected the qualifying requirements as was accepted in the Hourhope case. However there has been an important relaxation of the qualifying requirements by the 2014 Regulations. What is crucial to each of the deductions is whether or not the relevant building qualifies as an “in-use building”. To be entitled to the demolition deduction and the first retained building deduction the relevant building must be an “in-use
building”. To qualify for the second retained building deduction the relevant building must not be one.

To summarise the three deductions are:-

(i) the demolition deduction – applies to a building which is in existence when the development is first permitted, qualifies as an “in-use building” and will be demolished during the course of the development;

(ii) the first retained building deduction – applies to a building which is in existence when the development is first permitted, qualifies as an “in-use building” and will be retained upon the completion of the development;

(iii) the second retained building deduction - applies to a building which is in existence when the development is first permitted, does not qualify as an “in-use building”, will be retained upon the completion of the development and will have a permitted use on completion of the development which is one that it had immediately before the date on which the development was first permitted.

14.2.5.2 Deductions prior to 2014 – as stated above there were two possible deductions available prior to the coming into force of the 2014 Regulations. These were the demolition deduction and the first retained building deduction. To qualify for either deduction a “vacancy test” had to be satisfied. This required that it had to be proved to the authority that the relevant building had been used for a continuous period of six months or more during the twelve month period preceding the day that the planning permission first permits the development (original reg.40 (4) and (10)). It is not the date of the grant of the planning permission which is material but the day when the development is first permitted. This especially needs to be borne in mind when dealing with phased developments. As a result of reg. 6 of the 2014 Regulations those provisions now only apply to developments in respect of which a liability notice had been issued prior to 24th February 2014.

14.2.5.3 New 2014 rules - These apply to any development in respect of which the liability notice is issued on or after 24th February 2014. The changes were made because the time limits in the original exclusion were found to be tight particularly in the context of sites regarding which the planning application was a lengthy process or the site has been vacant whilst a phased development is carried out. The site could be vacant pending the outcome of the planning application and as a result the benefit of the deductions was lost.

(i) Relaxation of period of use - the original vacancy test has been relaxed by allowing a deduction from the gross internal area if the relevant building has been in continuous use for six months in the three year period ending on the day when the relevant planning permission first permits development or if appropriate the relevant phase of the development. This will allow the deduction to be made in a greater number of cases. It should allow time for the building to remain vacant whilst planning permission is being sought or for a long term development with a number of phases to be carried out. The relaxation has been achieved by replacing the original reg. 40(10) by the inclusion of a new definition for “in-use building” in the amended reg. 40(11) which reads
“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;”

For these purposes in reg. 40(11) “relevant building” means a building which is situated on the relevant land on the day planning permission first permits the chargeable development;”

The original proposal for change was that the time limits should be removed altogether and that the deduction would include any unused building unless the planning use had been abandoned.

(ii) No change in permitted use - In addition to this definition relaxing the period during which the relevant building must be in continuous use for six months in order to qualify as an “in-use building” there is also an expansion of the wording as to what constitutes the deduction represented by Kr in the formula for calculating the chargeable internal floor area (for the current formula see section 14.2.3.1). This adds a further deduction – the second retained buildings deduction. The new Kr in reg. 40(7) allows the internal floor area of a retained part of a building which does not qualify as an “in-use building” to be deducted from the gross internal area of the chargeable development if the intended use of that part once the development has been completed is one which could have been lawfully and permanently carried on in that part on the day immediately before the day development is first permitted without the need for a further planning permission. This addition to Kr covers a part of a relevant building which has not been in use or not in use for the necessary six month period of continuous use provided that it could have been used in the same manner as intended under the development project without any need to apply for a further planning permission. If there is no need to obtain a new planning permission in respect of the use of the part once the development is completed then it can be deducted from the area chargeable to CIL.

The effect of this is that if the last permitted use of the relevant part is the same as the intended use after completion of the development then the internal area of that part of the building will be deductible from the GIA unless that last use has been abandoned. It may be that previously the relevant part would have been excluded from the planning permission if there is no need to authorise a change of use in which case it would not comprise part of the chargeable development. Now the relevant part can be included in the area covered by the planning permission without increasing the CIL liability unless the use has been abandoned for the purposes of planning law (as to which see section 7 below).

It is noteworthy that the focus of qualification for this deduction is by reference to the permitted use to which the building can be put rather than the use to which it has been put. This is emphasised by it being provided that an “in-use building” cannot qualify for this deduction. This is a point which HHJ Cooke sitting as a judge of the High
Court considered strongly indicated that to qualify as an “in-use building” required more than that the building has a permitted use under the planning laws but required the building to actually be in such use (para. 23 Hourhope judgment – see further discussion in section 14.2.5.4(i) below).

14.2.5.4 What constitutes an “in-use building”? – in deciding whether a deduction is available when calculating the CIL liability a prime question will be whether the building qualifies as an “in-use building”. It is a crucial element in qualifying for either the demolition deduction or the first retained buildings deduction and needs to be considered when deciding whether the second retained building deduction is available. This is an issue which has caused problems for both developers and authorities operating a CIL regime. There is no definition or guidance as to when a building is in use. The definitions in the Planning Acts are expressly excluded from applying to the CIL regime (section 235 PA 2008) which means in particular that the provision in section 336(1) TCPA 1990 does not apply to CIL.

In Arbuckle, Smith & Co. v Greenock Corp [1960] AC 813 Lords Radcliffe stated ““Use” is not a word of precise meaning, but in general it conveys the idea of enjoyment derived by the user from the corpus of the object enjoyed.” This would indicate that the nature of the building and its function will be major factors in determining whether it is being used.

The question as to what is meant by lawful use in the definition of “in-use building” has been considered by HHJ Cooke sitting as a judge of the High Court in the Planning Court in R (oao Hourhope Limited) v Shropshire CC supra. The dispute arose over the Red Lion public house in Alveley Shropshire which closed for business in May 2011. The manager continued to occupy the living accommodation whilst negotiations continued with the mortgagee. These came to nothing and in the middle of August 2011 the manager complied with a demand by the mortgagee and vacated the premises. Various items of furniture, fixtures and fittings used in the public house trade were left in the premises. The mortgagee took possession on 22nd August 2011 and the premises were marketed for sale. There was a fire in 2012 which partially destroyed the building. Subsequently it was sold for residential development. Planning permission was granted on 12th March 2014 for a residential development which involved the demolition of the Red Lion.

The developer claimed a demolition deduction. The information to support this claim was provided late so that no decision was made by Shropshire Council until after the development had commenced. The Council did not consider the information sufficient to justify the claim and refused to make the deduction. By then it was too late for the developer to request a review of the refusal or to appeal because development had commenced. The challenge had to be made by way of judicial review (see section 12.3 for discussion on this aspect). The claim for a demolition deduction was possible because the planning permission was granted after the coming into force of the 2014 Regulations and so the relevant period for determining whether for the purposes of the demolition deduction the Red Lion was an “in-use building” was a period of three years ending with the grant of planning permission on 12th March 2014 and not the original twelve month period. The issue was whether the Red Lion had been in lawful use for a continuous period of at least six months between 13th March 2011 and 12th March 2014. The pub had closed and the manager left within six months of the start
date of that three year period. This meant that to qualify as an “in-use building” the circumstances existing after the manager had left must be sufficient to justify the deduction if the claim was to succeed.

Two arguments were put forward in support of the claim to a demolition deduction.

(i) **Permitted use alone sufficient** – the principal submission was that it was sufficient for a building to have a permitted use under the planning laws even if the building was not actually being used for that permitted use. If correct a building would only fail to qualify as being in lawful use if the permitted use had been abandoned which is very rare. The Council’s submission was that this was not sufficient and the building had actually to be used for such permitted purpose. It was agree that for these purposes “lawful use” means a use which is lawful for planning purposes and that this was the case with regard to both the original regulations and the amendments effected by the 2014 Regulations.

HHJ Cooke stated at para. 17 that “the question is a normal one of statutory interpretation, starting with the ordinary meaning of the language used, considered in the context of the other provisions of the legislation itself, and the legislative purpose as shown by the terms of the legislation and such external material as it may be permissible for the court to have regard to.” On that basis he considered that all these considerations point in a direction which supported the Council’s position (para. 18). The terms of the second retained building deduction added by the 2014 Regulations (see section 14.2.5.3(ii) above) strongly indicated that this was correct (para. 23).

In consequence when determining whether a building qualifies as an “in-use building” it is necessary to consider whether it has actually been in lawful use and not just whether it has a permitted use.

(ii) **Continued presence of items** – reliance was placed on the continued presence of furniture, fixtures and fittings after the vacation of the premises by the manager as constituting lawful use either because this continued the use of the Red Lion as a public house or because the Red Lion had been used for their storage as an ancillary use whilst open as a public house and such use carried on after closure and was lawful.

Cooke J. stated that whether “a building is “in use” at any time requires an assessment of all the circumstances and evidence as to what activities take place in it, and what are the intentions of the persons who may be said to be using the building.” (para. 25). With buildings having an active use there may be interruptions which will not cause it to cease to be in use (para. 27). An obvious example is closing for a non-working day or a holiday. Another cited by the judge was the emptying of the building in order to refurbish and then resume the same use. He left open the effect of emptying the building to refit and then sell or change the use might be different.

This approach is in line with that suggested by the VOA in example 16 of Appendix 1 to the CIL Appeals Guidance Note which concerned reliance on the storage of chattels in a room in an otherwise unused factory. The VOA indicated that the question whether the chattels in the room constituted a lawful use was one of fact and degree. Amongst the matters to be taken into account it out forward what was stored
in the room; who owned it; whether there were any items of value; how often the
room was visited; whether any items were removed or added; and whether the
premises were treated as occupied for the purposes of business rates.

In the circumstances of this case the judge held that the Council had reached the right
decision that the use had ceased when the public house closed for business “with no
fixed or definable date for reopening” (para. 28). The presence of items of furniture
left behind was not sufficient to continue the business of the public house because the
important characteristic of use as a pub is that it is open to serve drink and food (para.
29). In the absence of circumstances indicating that the closure was only a temporary
expedient the Council was entitled to conclude that the use had ceased when the
trading came to an end. This would appear to exclude the period that the manager
stayed on after the pub closed.

As regards the storage argument the judge accepted the argument that any storage as
part of the business of a public house was not a separate use but ancillary to and part
of the overall permitted use as a public house. Any use of a storage area was not a use
for storage but use as a public house and that use ended when the use as a public
house ended (para. 30).

The judge did not take into account as part of the relevant circumstances the obtaining
of relief from rates on the basis that the premises were vacant. Nor was the judge
influenced by the arguments put forward regarding the treatment of plant, equipment
and machinery in the context of rating by section 65(5) Local Government Finance
Act 1988. For rating purposes if the building is not in use then such items are
disregarded when determining whether the building is occupied. Both sides relied on
this statutory provision. The Council because it showed that a building could be
treated as not being in use even with such items present in the building. The developer
because it showed that there had to be a statutory disregard for rating purposes to
counter the presence of the items. The judge did not draw any assistance from the
position under rating law. If relief from business rates has been obtained in relation to
the building, as it was in this case, then this should be a factor as indicated by the
VOA and the decisions in the appeals mentioned below.

Before the hearing in Hourhope a redacted CIL appeal decision was added to the list
of appeals on the VOA website concerning the first retained building deduction
(change of use from offices to use as a house). The issue was whether the building to
be converted had been in lawful use for a six month period in the three year period
prior to the date when the development was first authorised. Account was taken of t
the premises being treated as vacant for the purposes of rates relief which had been
confirmed by a visit by the Business Rates team. The property was up for sale. In that
case there were items present in the building but this did not cause it to be an in-use
building. HHJ Cooke placed no reliance on this decision but save as regards rates
relief the approach adopted was in line with HHJ Cooke’s in Hourhope. The test as
regards the standard of proof applied by the appointed person was the balance of
probabilities.

In another appeal (concerning a development described as the erection of three
terraced houses following demolition of an existing single storey industrial unit) the
appellant was successful on the appeal in claiming the demolition deduction based on
evidence as to occupation of the existing building which was not detailed. The authority had provided no evidence other than that the building had been treated as vacant for the purposes of business rates. Without any information as to the appellant’s evidence it is difficult to evaluate this decision. There are two points which come out of it. First it seems as if the authority had disputed the claim to the demolition deduction on the basis that the use of the building had been unlawful. It appears that the use of the building changed from a B1 use (office) to a B8 use (storage and distribution). This change did not require a fresh planning permission because it was a change from B1 use to B8 use and so the unlawful issue ceased to be an issue in the appeal. Second the application of the relief from business rates for vacant premises did not appear to be regarded as significant by the appointed person. Without knowing what the appellant’s evidence as to occupancy comprised this aspect cannot be fully understood.

The circumstances in which a building will not be occupied for rating purposes such as those indicated above should also be cases in which the building is not in use for the purposes of CIL. However, it does not follow that because the building is occupied for rating purposes it is in use for the purposes of CIL. The rating system is focused on occupation and it is well established that “occupation” comprises four elements following the Court of Appeal decision in Laing (John) and Son Limited v Kingswood Assessment Area Assessment Committee [1049] 1 KB 344 (recognised by the House of Lords in LCC v Wilkins [1937] AC 362). These four ingredients are:-

(i) actual occupation or possession;
(ii) exclusive for the particular purpose;
(iii) the possession must be of some value or benefit to the possessor;
(iv) the possession must not be transient.

Possession by itself is not conclusive as to whether there is occupation for the purposes of rating or use for the purposes of CIL. Mere intention to occupy will not by itself be sufficient for either purpose (see Du Parque LJ in Associated Cinemas Properties Limited v Hampstead BC [1944] KB 412 at page 415). Equally an intention to let is a strong intention not to occupy (Collins MR in R v Melladew [1907] 1 KB 192 at page 202). However, for rating purposes combine intention with a slight use and that is sufficient for rating purposes. Merely keeping the premises maintained or cleaned will not by itself be sufficient. Supervision by a caretaker of unused sports grounds does not constitute occupation for rating purposes (Sheafbank Property Trust plc v Sheffield Metropolitan DC [1988] 1 EGLR 164). Advertising premises for letting has been held to be insufficient for rating purposes (Crowther-Smith v New Forest Union (Ryders Rat. App. (1886-90) 311)) but if the advertisement relates to facilities in a warehouse this may constitute occupation (Borwick v Southwark Corpn [1909] 1 KB 78). There will be borderline cases. A vacant building available for letting will be unused. An office block with facilities and staff ready for short term serviced lets could be regarded occupied for rating purposes.

What is clear from the Hourhope decision is that the issue is very much fact based. It strongly indicates how important it is for the person claiming the deduction to provide persuasive information in support of the claim. The onus is on that person to provide satisfactory evidence. Consequently it is an issue which needs to be addressed at an early stage and certainly before development is commenced. On the basis of the
Hourhope decision it will not be enough to have a caretaker or security guards looking after the building much as it was not by itself for rating purposes (Sheafbank Property Trust supra).

14.2.5.5 Part of building – when determining whether a building qualifies as an “in-use building” it is not necessary for the whole of the building to have been in lawful use in order to qualify. It is sufficient that part only has been. There are no limits as to the size of what constitutes a part of a building for these purposes. With regard to business rates it has been held in R (Makro Properties Limited) v Nuneaton & Bedworth BC [2012] EWHC 2250 that the occupation of 0.2% of the floor space of a large retail warehouse comprising 140,000 square feet for the purposes of storing documents on pallets constituted rateable occupation. When this user stopped it triggered a second period of grace from unoccupied property rates. On appeal it was held that the storage of the documents was not a trifling user and the de minimis principle did not apply. Although concerned with different statutory regulations albeit both are concerned with raising revenue for local authorities from property the decision indicates that the courts should be slow to find that such a set of circumstances is outside the wording used.

Not only is there no limitation as to area but there is no express requirement that the part must be accessible from other parts of the building. For example, if the building comprises a number of flats or self-contained offices and only one has been lawfully used for the required period that does not stop the building qualifying as an “in-use building”. Although the flats are separate dwellings they each comprise part of the building.

14.2.5.6 Review existing sites – the bringing into force of the 2014 Regulations was an opportunity to review the history of existing development sites in order to consider whether the relaxation of the period of the vacancy test would cause deductions to become available which were not under the regime prior to the 2014 Regulations. An example of this is the Hourhope case as the claim for the demolition deduction would not have been made but for the changes in 2014. The decision in that case now means that it would again be sensible to review the history of development sites in respect of which a claim for a deduction is intended to be made. It will be necessary to assess whether on the facts concerning the particular site the decision will make it harder to obtain a deduction and whether it is possible to obtain further supporting information.

In the Hourhope case the claim had been made by a subsequent purchaser who had no personal knowledge of the circumstances during the six month period focused on and so was at a disadvantage when providing supporting information. At the time of the purchase the relevant period for the vacancy test was twelve months and not three years. In consequence it would not have been a point considered. Now that the period is three years the number of claimants not having personal knowledge of the building at the relevant time will increase significantly. When acquiring the building if it is expected that a deduction will be claimed it would be sensible to obtain from the vendor all such material information as the vendor has and if possible a continuing obligation to co-operate. In such cases purchases may often be from a mortgagee or liquidator and the task of obtaining such information may not be a simple one.
Abandonment of use – the second retained building deduction (see section 14.2.5.3(ii)) will only be available if there is a permitted use of the building which has not been abandoned. This introduces into the CIL regime a planning test which is uncertain. It has been held that the mere interruption of a use will not necessarily constitute abandonment (Fyson v Buckinghamshire CC [1958] 1 WLR 634). Changes of use or the cessation of one use in a mixture of uses can constitute abandonment (Hartley v Min of Housing and Local Government [1970] 1 QB 413). In deciding whether a use has been abandoned account will be taken of (i) the condition of the property; (ii) the period of non-use; (iii) whether there is an intervening use; and (iv) any evidence regarding the owner’s intention (Trustees of the Castelellyn-Mynach Estate v Secretary of State for the Environment [1985] JPL 40). These factors have been repeated in para. 2.3.12 of the revised February 2014 Guidance which emphasises that each “case is a matter for the collecting authority to judge.”

14.3 Examples –

**Example 1** – single use development

Planning permission is granted for the construction of five houses on open land. The LPA’s CIL rate for residential development is £75 psm. The GIA for the five houses is 1000 sqm.

CIL charge = $10000 \times £75 = £75,000$

**Example 2** - mixed use development

In addition to the five houses the planning permission also permits an office building with a GIA of 500 sqm. The LPA’s CIL rate for office development is £40 psm.

CIL charge = $[1000 \times £75] + [500 \times £40] = £75,000 + £20,000 = £95,000$

**Example 3** – Demolition deduction in single use development

As in Example 1 save instead of the land being open there is a building on it with planning permission allowing it to be used as a factory. This building will be demolished to make way for the houses. The GIA of the factory is 600 sqm.

(i) if the factory has not been in use for three years prior to the grant of residential planning permission.

CIL charge is £75,000 as in Example 1 as there is no demolition deduction. The factory does not qualify as an “in-use building”.

(ii) The factory has been in use as a factory up until a year before the grant of residential planning permission. In those circumstances the factory qualifies as an “in-use building” and so there is a demolition deduction.

CIL charge = $[1000 – 600] \times £75 = 400 \times £75 = £30,000$

In an example in Appendix 1 to the VOA’s CIL Appeals Guidance Notes (example 14) an issue is raised as to the calculation of the GIA of existing buildings for the purpose of a deduction which have a mezzanine floor. For example if the factory in this example had a mezzanine with a GIA of 50 sqm should the amount of the GIA
the subject of the demolition deduction be 600 or 650? The RICS Code indicates that the area of a mezzanine floor should be included if there is permanent access to it. This would reduce the CIL liability by £3,750.

**Example 4 – Demolition deduction in mixed use development**

As in Example 2 save instead of the land being open there is a building on it with planning permission for use as a factory. This building will be demolished to make way for the houses. The GIA of the factory is 600 sqm.

(i) The existing office building has not been in use for three years prior to the grant of planning permission.

As in Example 3 there will be no demolition deduction because the factory is not an “in-use building”. Consequently, the CIL charge is £95,000.

(ii) The factory has been in use up until a year before the grant of residential planning permission. In those circumstances the factory is an “in-use building” and so there is a demolition deduction. In consequence the GIA of the existing factory will need to be apportioned between the parts of the authorised development relating to residential use and office use.

CIL charge –

1. **Residential part of chargeable development**
   
   Chargeable GIA of residential part after deduction = 1000 (GIA of five houses) - [600 x 1000/1500] (portion of GIA of existing factory attributed to residential part) = 1000 – 400 = 600
   
   CIL charge on residential part = 600 x £75 = £45,000

2. **Office part of chargeable development**
   
   Chargeable GIA of office part after deduction = 500 (GIA of new office building) – [600 x 500/1500] (portion of GIA of existing factory attributed to office part) = 500 – 200 = 300
   
   CIL charge on office part = 300 x £40 = £12,000

Total CIL = £45,000 + £12,000 = £57,000

**Example 5 - Extensions to buildings**

An office building is to be extended by 130 sqm. The LPA’s CIL rate is £40 psm.

CIL charge on the extension is 130 x £40 = £5200

If the extension had been 95 sqm then there would be no CIL charge

**Example 6 – A further example of the operation of the deductions is as follows.** A owns an empty property in the Royal Borough of Kensington and Chelsea which was originally built as a house but then used for a number of years as an office until three years ago since when it has been unused. It has a gross internal area of 300 square metres. A successfully applies after 6th April 2015 for planning permission to use it as a residence. CIL is chargeable at the rate of £750 because it is situated in the zone
charging the highest CIL rate. There is, therefore, a CIL liability of £225,000 because there is no deduction. The first retained building deduction will not apply as during as during the whole of the three years prior to development first being permitted following the grant of the permission it has not been in lawful use. The second retained building deduction does not apply as there is a change in permitted use.

However, if during the last three years part of the building had been continuously used as an office and the rest of the building had been vacant then the whole of the gross internal area would be available as a deduction (reg. 40(10)). This is because use of part suffices to allow the deduction in full. As discussed above it would seem this would still be the case if the building comprised a number of self-contained offices and only one was occupied prior to the permission first permitting the change from residential to office use. This use of one office should cause the whole building to qualify.

On the other hand if the Kensington building had been used as a house throughout the life of the building until it ceased to be used three years ago then on a successful application to convert it to three flats there would be no charge to CIL due to the specific exclusion in reg. 6(1)(d) (see para. 10.2 below) and there would be no need to be concerned whether it qualifies as an “in-use building”.

14.4 **Extension of unused building** – if it is intended to extend a building which has been unused for three years by say 70 square metres there will be no CIL charge if the planning permission relates only to the extension. The new build will be within the 100 square metres limit (see section 10.3 below). Even if the extension exceeds 100 square metres the CIL will be charged only on the area of the extension unless it is now exempt from CIL due to the application of the exemption for residential extensions (see section 11.6 below). The position would be different if there has been an abandonment of the planning permission so that a fresh planning permission for the whole building is

14.5 **Internal areas deemed to be zero** – the onus is placed on the person liable to CIL to provide to the collecting authority sufficient evidence of sufficient quality as to the use, history or internal areas of retained or demolished buildings for which a deduction is claimed when calculating the net chargeable area of the development (reg. 40(9) and (10)). The importance of collecting and providing such information to the LPA has been emphasised by the decision in the Hourhope case (see section 14.2.5 above). If the collecting authority has insufficient information or the information is not of sufficient quality then it may deem the relevant gross internal area to be zero (reg. 40(10)) which will result in an unnecessary increase in CIL. This will be particularly a risk when there has been unlawful use of the relevant site. For instance, if a building has been demolished without planning permission this would be a course of action the collecting authority would have in mind.

14.6 **Indexation** – the CIL rates are increased or decreased annually by indexation related to the All-Tender Price Index in the manner set out in the formula in para. 14.1 above. These figures are available from the Building Cost Information Service of the RICS but should also be held by the collecting authority. It should be noted that it is the index figure at the relevant November in the preceding year which is used regardless that the figure is subsequently changed as often happens more than once. In
para. 2.3.3a of the revised February 2014 Guidance it is recognised that the figure is revised and finalised periodically. This seems to have resulted in different practices as to which figure to use. It is acknowledged that some authorities use the most recent finalised figure published before the previous November without suggesting that this practice is wrong. What is noticeable is that there is no guidance as to what is the correct practice which seems to be a feature of CIL. If a figure is used which is later revised it raises the issue as to whether the authority should then revise the CIL calculation. There is the further issue that an index has been used which requires a paid subscription to access. With the imposition and determination of tax liabilities the required information should be publicly available and at no charge. If the government wishes to adopt this approach then it should pay for the relevant part of the index to be made available to the collecting authorities and those subject to the CIL charge.

14.7 Demolition –

14.7.1 Prior demolition - care should be taken to ensure that no demolition occurs before the intended commencement of the development. This should not happen because if there is demolition that may constitute the unexpectedly early commencement of the development with adverse CIL consequences. Further it risks the part demolished not being included in the deduction from the chargeable internal floor area as part of figure E in the formula now contained in reg. 40(7) 2010 Regulations (previously reg. 40(6)) because that requires that the demolished building should still be in place on the day that the relevant planning permission first permits development. The deduction from the chargeable gross internal area in respect of demolished buildings is restricted to the internal area of building existing at the date that the development is first permitted which is then demolished (see section 14.2.5 above).

14.7.2 Deduction from gross internal floor area – the deduction allowed from the gross internal floor area when calculating the chargeable amount in relation to demolished parts is after the coming into force of the 2014 Regulations more limited than in respect of retained buildings. Each must be situate on the relevant land at the time that development is first permitted. As regards retained buildings to be deductible one of two tests needs to be satisfied – either lawful user for a continuous six month period during a three year period or no change in authorised user. With regard to demolished parts only the first test will apply. The area will be included in the E figure if the relevant part has been in continuous use for any period of six months in the three years (previously twelve months) preceding the day on which the relevant development is first permitted. The original test applicable to the twelve month period will apply in the case of a development regarding which the liability notice has been issued prior to 24th February 2014. The second test will not apply as regards demolished parts and so if the demolished building did not qualify as an “in-use building” then the demolition deduction is not available and CIL will be charged on the GIA without the area of the demolished building be deducted from it.

14.7.3 Site clearance - It was proposed in the April 2014 consultation that site clearance may be treated as a separate phase which will be neutral for the purposes of CIL but this has not been included in the 2014 Regulations. This could have caused problems when each phase is treated as a separate chargeable development. However,
it would have alleviated cash flow problems that arise when there is a lengthy gap between site clearance and the start of construction.

14.7.4 Evidence – it is important that evidence is retained as to both the nature and use of buildings demolished in the course of the development. There may be subsequent issues as to the size or use or period of user during the three years (previously twelve months) preceding the commencement of the development. The onus is on the developer or owner to provide such evidence. If not satisfied with the evidence the authority can disregard it.

14.7.5 Phased developments – as each phase under a phased planning permission is treated as a separate chargeable development (reg.9(4)) consideration should be given, if possible, as to how the phases are carried out and to which phases the deductions for demolition or existing buildings should be applied. The new figure Ex has been added in reg. 40(8) to cope with the phasing of developments and demolition. The CIL consequences may vary particularly when there are differential rates in the area and mixed user developments. The importance of this has been increased with the extension of the treatment of phased developments to full and hybrid planning permissions as well as outline permission.

14.8 Section 106 agreements – there is no set off against the CIL liability for the costs of discharging the section 106 obligations relating to the site.

14.9 Remediation costs – similarly there is no deduction allowable against the CIL liability in respect of the costs of removing contamination or otherwise remedying a brown field site.
H. Liability for CIL –

15.1 General position - the expectation is that prior to the commencement of the development someone, normally the developer, will assume responsibility for the CIL liability. If no assumption of liability notice is served then a surcharge can be demanded and the CIL liability cannot be paid by instalments. In the absence of such a notice prior to the commencement of the development then the owner or owners of any material interests in the site will be liable for the CIL (reg. 33) which if there is more than one material interest will trigger the more complicated procedure of apportionment (see sections 15.3.3 and 15.4.1). If there is more than one such owner then the CIL liability will have to be apportioned.

15.2 Assumption of liability – this will be an important element in any development and should be covered by agreement between the landowners and the developer. A person can assume liability for CIL “in respect of a chargeable development” (reg. 31(1)) and need not have a property interest in the development site. With a phased development this should mean that different persons can assume liability for different phases as each phase is treated as a separate chargeable development (reg.9(4)).

15.2.1 Effective notice - in order that there should be an effective assumption of liability a valid written notice must be given by the person assuming responsibility in the prescribed form containing the particulars requested. Each charging authority will have such a form on the authority’s website to be downloaded. The correctly completed notice must be given to the collecting authority rather than the charging authority in cases where the two are different authorities (reg. 31) and it must be received before the commencement of the development if it is to prevent the landowners from becoming liable (reg. 33). The assumption of liability notice takes effect on receipt by the collecting authority (reg. 31(4)) but if received after the commencement of the development it will not be effective (reg. 31(7)). The collecting authority must send an acknowledgement to the liable person or persons.

15.2.2 Withdrawal – a person having assumed such responsibility may withdraw provided that this occurs before the commencement of the development (reg. 31(6)). To do so notice of withdrawal must be given to the collecting authority. When there are contractual provisions relating to the assumption of liability these need also to deal with the possibility of withdrawal. Such provision may need only to block the possibility.

15.2.3 Transfer of liability – after the commencement of the development it is not possible to assume liability or to withdraw from assumption of liability. The only manner in which another person may take on such liability is by transfer (reg. 31(7)). It is possible for a person who has assumed liability to transfer that liability to another by giving a liability transfer notice to the collecting authority (reg. 32(1)). This is possible before as well as after the commencement of development and at any time up until the date when the final payment of CIL is due (reg.32(3)). Again there is a prescribed form which can be downloaded from the website of the relevant charging authority. It takes effect on the day received by the collecting authority unless after the date on which the final payment is due in which case it is ineffective even if that payment remains outstanding. From the date of receipt by the collecting authority the named transferee will be liable for so much of the CIL liability as remains outstanding.
The collecting authority cannot object to the transferee and is required to send an acknowledgement to the person liable to pay the CIL and the person applying for the transfer of liability. This means it is open to a person who has assumed liability to transfer to a “man of straw” and the collecting authority can raise no objection. In such circumstances when default occurs the collecting authority will not look to the transferor but to the owners of the site (see para. 15.4 below). When there are contractual provisions regarding the assumption of liability it will be necessary to deal with the possibility of a subsequent transfer of liability.

15.2.4 Obligation to assume liability - an important feature of arrangements regarding a proposed development will be who is to assume liability for CIL and give the required notice. Merely to require a person such as the developer to give such a notice will not be sufficient protection. It may be withdrawn or a subsequent transfer of liability notice be given. Any obligation relating to the giving of an assumption of liability notice needs also to prohibit any withdrawal or transfer of liability or at least require the prior written consent of the owners of material interests in the site. If the person assuming liability is an individual then the possibility of death before the commencement of development will need to be covered as well.

15.2.5 Death of person assuming liability –

15.2.5.1 Prior to commencement of development - that person’s liability will not continue after death if it occurs before the commencement of the chargeable development (reg. 39(2)). The liability can be assumed by another before the commencement by the giving of notice in accordance with the requirements set out in para. 15.2.1 above provided that it is accompanied by a death certificate. There is no express provision stating what happens if there is such a death but no assumption of liability thereafter. As the original assumption of liability has ceased to have effect due to the death reg. 36 will apply on the commencement of the development and the owners will be liable (see para. 15.3 immediately below).

15.2.5.2 After commencement – the deceased’s CIL liability will pass to the personal representatives (reg. 108(2)) but will not arise until notice requiring payment has been served.

15.3 Liability when no assumption of liability notice – in the absence of anyone assuming liability the CIL liability is by default apportioned amongst the owners of the material interests in the site (reg. 33(1)) save if the works are carried out pursuant to the exercise of a statutory right of entry on the land (see para. 15.3.2 below).

15.3.1 Material interests –

15.3.1.1 General - for these purposes a material interest is the freehold estate and any leasehold interest having a term which expires more than seven years after the planning permission first permits the chargeable development (reg. 4(2)). This may operate capriciously if the lease is for a term which is less than seven years but under which the tenant has statutory security of tenure. It means that a business tenant may not be liable for any part of a CIL liability arising from a development the tenant is carrying out even though having a right to occupy the premises for an indefinite period. It emphasises the importance from the landlord’s perspective of having
appropriate provisions in the lease to cover developments carried out by the tenant giving rise to a CIL liability.

15.3.1.2 Jointly owned interests - Jointly owned interests will give rise to a joint and several liability for any CIL liability falling on the owners (reg. 37). This means that for the purposes of apportionment the jointly owned interest is valued and not the individual shares of the joint owners. If the interest is held by a nominee or bare trustees then the beneficiaries are liable (reg. 38(1)) whilst with settlements of such interest (excluding bare trusts) the trustees at the time of the commencement of the development and subsequently will be liable (reg. 38(2) and (3)).

15.3.2 Statutory right of entry – the owners of the material interests in the site will not be liable by default if the development works are carried out on the site by a person who does not have a material interest in the land but has entered pursuant to the exercise of a statutory right of entry without the agreement of the owners (reg. 33(4)). This does not extend to persons who enter pursuant to a right of entry conferred not by statute but by deed.

15.3.3 Apportionment – the owners of the material interests are not jointly and severally liable for the whole of the CIL liability but are solely responsible for the portion of the CIL liability apportioned to them. The apportionment to ascertain the share of the CIL liability of an owner, O, is carried out using the following formula (reg. 34(2)):

\[ \frac{V_o \times A}{V} \]

Where—

VO = the value of the material interest owned by O;

V = an amount equal to the aggregate of the values of each material interest in the relevant land; and

A = the chargeable amount payable in respect of the chargeable development.

Such an apportionment and valuation:-

(i) will be carried out using the evidence provided to the authority and does not involve a procedure akin to arbitration;

(ii) will be based on an open market value as at the date of apportionment;

(iii) on the assumption that the development was completed on the day before the apportionment;

(iv) the open market value will take account of factors unrelated to the development such as hope value for further development;
The value of each material interest is the open market value of that interest assuming that the chargeable development had completed the day before the apportionment. In addition it is not only value which is attributable to the particular development that is taken into account. The land may still have some hope value related to possible future developments. For example, parts of the land may not have been fully developed or may provide an accessway to other land which has yet to be developed. These will be factors to be taken into account when valuing the land for the purposes of apportionment even though they will not have influenced the amount of the CIL liability.

In order to carry out the apportionment the collecting authority may require information to be provided by an owner about the owner’s interest and any other relevant information in the owner’s possession or control by serving an information notice (reg. 35). The owner has 14 days from receipt to comply. It is open to question as to how much care will be put into such apportionments. There is no procedure whereby the owners may have an input into the process save that there is a right to appeal (see para. 18.4 below). The results may be controversial and unfair as between different owners of material interests. There could be further difficulties if the apportionment is delayed. Should the development wait or go ahead without knowing how the liability is to be shared and so face the prospect of a late payment of CIL.

15.3.4 Example – a freehold site is owned by three brothers in equal shares. Planning permission is obtained to build twenty houses on the site. The brothers grant a long lease to a developer but the developer fails to assume liability before the development commences. For the purposes of the apportionment the valuation of the various interests assumes that the development has been carried out. The freehold estate is valued at £500,000 and the leasehold interest at £5,500,000. The CIL liability is £300,000. The developer is liable for £270,000 and each of the brothers is jointly and severally liable for £30,000.

15.4 Default by person assuming liability – for conveyancers there is one aspect arising from the provisions governing liability for CIL which will always have to be borne in mind and which will need to be covered in any arrangements between a developer and landowner. It will be expected that someone, normally the developer, will have assumed liability for the CIL. In the event that the person assuming liability fails to pay the CIL then the liability will revert to the persons who would have been responsible but for the assumption of liability. The landowners will not only be liable if there has been no assumption of liability notice given to the collecting authority but may be liable even though one has been given.

15.4.1 Owners liability - When the collecting authority is unable to recover the full CIL liability from the person who has assumed liability then it can determine that the liability has been transferred to the owners (reg. 36). It can only do so after it has first made all reasonable efforts to recover the CIL liability using the recovery powers contained in Chapter 3 of Part 9 of the 2010 Regulations (see para. 17.4 below) (reg. 36(3)). These recovery methods are extensive but no account is to be taken of the stop notice procedure which is contained in Chapter 2 of Part 9. This does not mean that the collecting authority cannot use this method in these circumstances but there is no obligation on it to do so. It is possible to foresee disputes between collecting authorities and landowners as to whether or not the collecting authority has used
reasonable efforts to recover the outstanding CIL liability. From the landowners point of view it is far better that the collecting authority undertakes such an exercise and incurs the expense of doing so than they have to if in fact they are entitled to.

An apportionment in such circumstances will not necessarily result in the same figures as would have been produced if there had been an earlier apportionment because no-one had assumed liability. The values to be used for the apportionment will be the open market values as at the date of the apportionment and so if the value of a material interest has increased or decreased since the development that will be taken into account. The change in value may be unconnected to the development. For instance, a building completed as part of the development may have subsequently been extended. The resulting increase in value will be taken into account even though wholly unconnected with the development works.

The apportionment is amongst the owners at the time of the default. This requires the person to be the legal owner. A purchaser who has not completed will not be caught. Any apportionment will be to the vendor and not the purchaser. This means that if one house sale has been completed by the time of apportionment but another sale is yet to be completed then the purchaser who has completed will be liable for a portion of the outstanding CIL but not the purchaser who has yet to complete.

15.4.2 Example – a residential development has been carried out by a developer having assumed liability for CIL. One of the houses on the development has been sold. After completion the developer defaults on the payment of a CIL instalment so that that the full outstanding amount of CIL, £100,000, becomes due. The value of the unsold residential estate at that time is £2,250,000 and the value of the house that has been sold is £250,000. On an apportionment of the CIL liability the purchaser of the house will be liable for £10,000 being

the outstanding CIL x [value of house/ aggregate value of unsold residential estate and house]

The developer will be liable for the remaining £90,000. If prior to default the developer has sold the estate then the purchaser will be liable.

If in this example the CIL default had occurred after the exchange of contracts for the sale of the house by the developer but before completion then the purchaser will not be liable for any portion of the CIL as at the time the purchaser is not the legal owner of the house. As with many features of CIL the emphasis is no robustness rather than fairness.

15.4.3 Default of liability notice - in such circumstances the collecting authority must serve a “default of liability notice” and apportion the outstanding CIL liability between the owners. The apportionment is between the various owners of material interests in the site. It will be dealt with in the same manner as an apportionment when no assumption of liability notice is given (see para. 15.3.3 above and reg. 34) Until the expiry of seven days from the service of the default of liability notice no stop notice can be served nor any surcharge levied by the collecting authority.
15.4.4 **Response to default notice** - the service of a default of liability notice is a very important step for the owners and will require some speedy liaison and a fast response. It may occur part way through the development so that the subsequent service of a stop notice by the collecting authority would have substantial adverse financial consequences for the owners. It is to be expected that such a default of liability notice will not have come as a bolt out of the blue but it does emphasise the need for owners to keep a beady eye on the progress of the development and the financial well being of the developer.

15.4.5 **Effect on prior exemption** - there is a further point to be borne in mind. A person may be exempt from primary liability for CIL but that will not protect that person from a CIL liability transferred due to a default by the person who assumed liability. For example if a charity is involved and part of the developed site will be occupied wholly or mainly for charitable purposes it will be exempt but it will still be liable for any unpaid CIL liability transferred to it and attributable to the part not to be used for charitable purposes.

15.4.6 **Appeals** – an owner of a material interest in land who is aggrieved by an apportionment decision may appeal to an appointed person (reg. 115 – see section 18.4). This appeal must be made within 28 days of the issue of the demand notice.

15.4.7 **Warnings** – when acting for a landowner it will be important to give a warning that even if the developer assumes liability for CIL there is a risk that the land owner could be responsible for payment of CIL if the developer later defaults. It is not just the owner as at the date of the grant of planning permission that needs to be warned. Any one acquiring an interest in the land before the discharge in full of the CIL liability can be at risk. In the event of default by a person who has assumed liability for CIL it is the owners at the time of default amongst whom the outstanding CIL liability is apportioned. For example, if there is a residential development and a house is sold then the purchaser will be liable for a portion of the outstanding CIL liability if the developer defaults on the payment of a CIL instalment after the completion of the sale of the house.

The position is made even worse if the purchaser of the house improves it because any increase in value will in turn increase the portion of CIL for which the purchaser is liable notwithstanding that the increase in value has nothing to do with the development works. The apportionment of CIL in such circumstances will come as a complete surprise to the house purchaser. Take a simple example in which three houses are built and sold before the developer defaults leaving £28,000 CIL outstanding. At the date of the default each house is valued at £400,000 save that one has had an extension and is then valued at £450,000. The owners of two will each be liable for £8,960 of the outstanding CIL liability and the owner of the extended home liable for £10,080. The extension will have been exempt from CIL even if greater than 100 sqm but the resulting increase in value will be taken into account when apportioning an outstanding CIL liability. An outcome which is robust but lacking in fairness.

15.5 **Settlements**
15.5.1 **Bare trusts** – if a material interest in a development site is held by a bare trustee then the beneficiary or beneficiaries will be liable for any CIL that would otherwise fall on the bare trustee (reg. 38(1)).

15.5.2 **Trusts** – with any trust other than a bare trust the persons who were trustees on the day that the chargeable development commenced and any subsequently appointed trustees will be liable in relation to any material interest in the development site (reg. 38(3)). Any one or more of the trustees may be pursued (reg. 38(2)).

15.6 **Demand Notice** –

15.6.1 **Requirement** - it is a mandatory requirement that a demand noticed be served by the collecting authority on each person liable to pay CIL (reg. 69(1)).

15.6.2 **Form** – as with the liability notice there is a prescribed form which must be either used or a form which is substantially the same. It must include:-

15.6.2.1 date of issue;

15.6.2.2 identify the liability notice to which relates;

15.6.2.3 state intended commencement date or, if appropriate, the deemed commencement date;

15.6.2.4 state the amount due from the person on whom served (including surcharges and interest) and date when payable;

15.6.2.5 if payable by instalments state the amount and payment date of each instalment;

15.6.2.6 other information required in the prescribed form.

15.6.3 **Attempts to withdraw commencement notice** – having served a commencement notice it is still possible to withdraw it unless the development has commenced. A decision to defer development is particularly likely if a beneficial change is about to be introduced to the CIL regime. For example, it would have been sensible to defer starting work on a house extension before the introduction of the 2014 Regulations so that advantage could be taken of the new exemption for residential extensions. The issue in such circumstances is whether or not it is still possible to defer the triggering of the CIL liability. If the development has commenced then the right to change the commencement date will have been lost and the CIL liability triggered. This point arose in an appeal against Preston City Council (appeal ref: APP/N2345/L/1200007). The demand notice specified the commencement date given in the house owner’s commencement notice but then the owner sought to withdraw it. Preston Council made a site inspection and took photographs showing that the work had started. The demand notice was upheld and the owner remained liable to pay the CIL liability.

15.6.4 **Revised demand notices** – the collecting authority has the ability to serve a revised demand notice at any time so any errors can be quickly corrected. Such a revised demand notice must be served on any person on whom an earlier demand
notice was served if the particulars have changed. Once a revised demand notice is served any earlier demand notice will cease to have effect.

15.7 Suspension of liability –

15.7.1 **Reason for ability to suspend** - it is possible for a person who has received a demand notice to request the collecting authority to declare that the CIL does not have to be paid until the start of works forming part of the chargeable development on the land in which the person has a material interest (reg. 69A(1)). The reason for this provision is to protect owners whose land has been included in a planning application possibly without that person’s consent. There is no requirement that an applicant for planning permission has to be the owner of the land. An application may relate to a larger area than just that person’s land and development work may have started on another area. If no-one has assumed liability for the CIL arising upon commencement of the development then this would be sufficient to cause CIL to be payable by that owner although not involved in either the development or planning application. Reg. 69A seeks to relieve the owner in such circumstances on receipt of a demand notice. However, the conditions are rigid and there is still the prospect that the owner could be liable to pay CIL even though not involved in the triggering development.

15.7.2 **Conditions** - in order to benefit from this provision allowing suspension five conditions have to be satisfied. These are

(a) the CIL liability has been apportioned to the person making the request (P) (whether because there has been no assumption of liability by another or a default by another) and not assumed by P;

(b) no development works have been commenced on the land in which P has a material interest;

(c) P has not agreed to any such works being carried out on the land in which P has an interest;

(d) P has not agreed to transfer all or any part of P’s material interest to any other person under a contract enforceable under section 2 Law of Property (Miscellaneous Provisions) Act 1989;

(e) it is reasonable in all the circumstances that P should not have to pay CIL until development works start on the land in which P has a material interest.

15.7.3 **Development works on P’s land** – these conditions may operate in a harsh fashion and prevent P from claiming the benefit of this right to suspend the CIL liability. This will be most worrying when the owners of other parts of the land being developed may have the right to come on to P’s land and carry out works which are part of the chargeable development. For example, the owner of an adjoining land may have being granted or reserved the right to enter P’s land for the purposes of the development to install services or to construct a road. Will the exercise of this right trigger a CIL liability to be met by P even though no more works will be carried out? It is hard to see how this outcome can be avoided. It is unfair and places P in a vulnerable position. Before the planning application is put in P may be subject to
pressure that unless P agrees to be involved in the development P will be made subject to an unwelcome CIL liability which is outside P’s control. It means that before either granting such rights to come on to land to carry out such works or acquiring land subject to such rights careful thought must be given to the possible future CIL consequences and whether some form of protection is taken against future CIL liabilities arising from permission not approved by this landowner.

15.7.4 Contracts – the existence of a contract to transfer all or part of P’s material interest will prevent P being able to suspend the CIL liability. It seems strange that a contract to transfer to someone who has no involvement with the development should preclude P from being able to suspend the CIL liability. If the transferee is the developer or the adjoining landowner or an associate of either then it is understandable. Further there is a query as to how this will operate. If A the owner of the land has agreed to sell to X then will P be A or X. If A is regarded as the nominee or bare trustee of X then X will be P and so the contract will not be relevant to the question of the satisfaction of this condition.

15.7.5 Effect of suspension – once the collecting authority has made a declaration in response to a request for suspension then until a demand notice is issued under reg. 69A(6) or (7) (see para. 15.7.6 and 15.7.7 below)

(i) P’s liability to pay the CIL liability apportioned is suspended until development works commence on P’s land;

(ii) no interest will accrue on the ground of late payment;

(iii) no recovery methods may be used against P;

(iv) no steps may be taken against P’s personal representatives in the event of P’s death.

15.7.6 Subsequent works – the intended commencement of development works on P’s land will require P to give written notice to the collecting authority no later than the day before the start of works (reg. 69A(5)). If P serves such a notice or the collecting authority believes that such work has started but P has failed to give such notice then the collecting authority may serve a demand (reg. 36(6)). This will remove the suspension of the CIL liability. If the demand is served without P having first given notice of intended commencement the collecting authority may impose a surcharge of 20% of the CIL payable by P or £2,500 (whichever is the lower) (reg.69A(8)).

15.7.7 Subsequent contract – if the collecting authority believes that there is an enforceable contract by P to transfer all or part of P’s material interest to any other person then it must serve a demand notice on that person and not P (reg. 69A(7)).

15.8 Abatement of liability – the CIL regime has been far from clear on issues of abatement and repayments. This was a problem particularly for charging authorities. One concern for such authorities was that any budget relating to the application of CIL receipts could be upset. There has been the lurking worry that monies received would have to be repaid if there was a subsequent change in the development and this would pose a problem if those monies had already been expended on infrastructure.
The new reg. 74B partially addresses this problem but not wholly. This abatement provision does not apply to a subsequent planning permission if granted pursuant to section 73 1990 Act. In those circumstances the provisions relating specifically to section 73 planning permissions including repayment by the authority of an overpayment (see section 8.4 above) will exclusively govern abatement and repayments. Reg. 74B will govern all other subsequent planning permissions.

15.8.1 General Operation – any CIL payment which has been made in respect of a development that has commenced but not been completed can be set against any CIL liability arising from a subsequent planning permission in relation to all or part of the land being developed provided that the subsequent planning permission is not a section 73 planning permission. To qualify for this ability to abate the subsequent CIL liability the charging authority must receive notice from the person who has assumed liability to pay CIL in relation to that subsequent planning permission. The notice must be to the effect that the development in accordance with the earlier planning permission will cease and that the development in accordance with the subsequent planning permission will commence or re-commence. It is open to a developer to revert to the original development and even then revert again to the subsequent development. It is provided that the abatement process can operate more than once in relation to a planning permission (reg. 74B(11)). This could result in some complicated accounting for the purposes of CIL.

15.8.2 Pre-conditions to availability (reg. 74B (3)) – a request for abatement must be made before the commencement of the development in accordance with the subsequent planning permission or if it is the recommencement of a previous development before the recommencement of that development. The request must be accompanied by proof of the amount of the CIL already paid.

15.8.3 Abatement – when a valid notice is given pursuant to reg. 74B the CIL that has been paid in respect of the earlier planning permission can be set off against the CIL liability arising from the commencement of development in accordance with the subsequent planning permission (reg. 74B(2)). It can only be credited to the extent that the CIL to be set off relates to buildings that have not been completed when the request for abatement is made and are not taken into account in reducing the chargeable amount when operating reg. 40 in relation to the subsequent planning permission (reg. 74B(6)(a) and (b)). In the event that the amount of CIL paid in respect of the earlier chargeable development exceeds that due in respect of the later chargeable development that excess will not be treated as an overpayment which is repayable so that the provisions of reg. 75 will not be triggered (reg. 74B(14)). This is in contrast to the CIL consequences flowing from a section 73 planning permission. It means that abatement may not be used as a means of improving the CIL position. For example, if an extension to a home was started which was chargeable to CIL but not completed it will not be possible to make a fresh planning application for a new planning permission which due to the new exemption for residential extensions will be subject to a nil CIL liability and then seek the repayment of the earlier CIL liability.

15.8.4 Phased development – any amount of CIL available for the purposes of abatement in relation to a subsequent phased planning permission will be applied
against the CIL liability arising in respect of the first phase and then against successive phases until fully utilised (reg. 74B(7)).

15.8.5 **Demolished buildings** – it is possible to take into account when operating reg. 40 in respect of the subsequent development authorised by the subsequent planning permission buildings which were demolished and taken into account in reducing the chargeable amount in relation to the earlier planning permission (reg. 74B(13)). This continued availability of the demolition deduction will be possible if had the buildings not been demolished they would have been taken into account when determining the CIL liability arising from the subsequent development. However, this treatment of demolished buildings will only be possible if the request is made within three years of the grant of the earlier planning permission (reg. 74B(12)). With large developments, particularly when the proposed development scheme has been revised, this time limit could pose a problem.

15.8.6 **Completion of building as part of earlier development** – it had been originally proposed that any abatement would be withdrawn if work authorised by the earlier planning permission continued after the grant of an abatement. The draft provision relating to the withdrawal was removed from the draft 2014 regulations. In the amended set of regulations the new reg. 74B(8), (9) and (10) were added. These provisions operate if a building is completed as part of the earlier development but completion occurs after the request for an abatement and whether before or after the commencement of the subsequent chargeable development. In such circumstances if a reduced amount of CIL is paid with regard to the subsequent chargeable development triggering an abatement then the person granted the abatement must pay to the collecting authority an amount equal to the CIL paid in relation to such building completed under the earlier planning permission after the request for the abatement to the extent that it was credited against the subsequent CIL liability. A payment under these provisions is treated as CIL paid by the person liable for the subsequent development (reg. 74(10)) so that it will be included amongst the CIL paid which will be available to be set against any future CIL liability under the abatement provisions.

15.9 **Local land charge** – a collecting authority may register a local land charge in respect of the CIL liability (reg. 66). This is a specific financial charge within section I(1) Local Land Charges Act 1975 and will be registered in Part 2 of the register. Oddly there is no clear statement as to when this local land charge can first be registered. It is provided that the “chargeable amount payable in respect of a chargeable development is a local land charge” (reg. 66(1)). This would suggest that the liability to pay the CIL has been triggered which means that the development must have been commenced. However, a liability notice is triggered not by the commencement of the development but by when the development is first permitted. The use of the term “liability notice” suggests that the payment of the CIL need not have fallen due before the liability is viewed as arising. In practice I would expect local land charges to be registered at the same time as the liability notice is issued. It serves as a warning to third parties. In practice this is likely to be when planning permission is granted rather than when the development is first permitted. The local land charge confers on the collecting authority all the powers of a mortgagee under a deed (see para. 17.4.7 as regards enforcement of a local land charge). The charge must be removed once the CIL liability has been discharged in full or in cases where charitable or social housing relief or an exemption for residential annexes or self-build
housing apply the expiry of any clawback period without the occurrence of any disqualifying event or the occurrence of a failure to comply with reg. 54D(2)(b) (provision of additional evidence for purposes of self-build housing relief) regarding which the collecting authority cannot take further action (as to that inability to take further action see section 11.5.8.4 above).
1 Payment

16.1 When payable in full – if there has been no assumption of liability the owners will be liable to pay the CIL in full on the intended commencement date unless the collecting authority has determined a deemed commencement date which will be the payment date (reg. 71(1) and (2)). In such circumstances it will not be possible to pay by instalments. In contrast when an assumption of liability notice and a commencement notice have been served then the CIL will be payable by the notice server within 60 days of the intended commencement date of the development (reg. 70(7)) unless an instalment policy is available (see para. 16.2 below). This emphasises the importance of there being an assumption of liability. Without it payment by instalments will not be available assuming that it is otherwise available.

16.2 Instalments –

16.2.1 General – Both the availability of the ability to pay CIL by instalments and the terms of the instalments policy will be crucially important as regards a development’s cash flow and possibly even the development’s viability. In order to be able to pay CIL by instalments it is a pre-condition that the relevant charging authority has published on its website an instalment policy (reg. 69B(1)). This will need to state when it is possible to pay by instalments, the number and amount of the instalments and when due. Normally there will be a minimal amount of CIL below which it cannot be paid by instalments. The timing of the instalments will be related to the commencement of the development. I have seen a suggestion that the timing could be linked to the progress of the development but in my view that is not permissible because it is not just deferring payment of the CIL liability but introducing a new contingency for which there is no statutory authority. The instalment policy cannot take effect before the date it first appears on the website. The position in London is complicated by the Mayoral CIL which is payable by instalments but will defer to the instalment policy of the relevant London Borough (see para. 19.6 below). When the CIL liability is discharged in whole or part by payment in kind (whether land or the provision of infrastructure) then this can be by instalments in the same way as money payments.

16.2.2 Examples – Portsmouth has had a CIL charging schedule since 1st April 2012. Payment by instalments is available for all amounts of CIL. If the chargeable amount is less than £250,000 then it is payable by two instalments – 25% of the chargeable amount payable within 90 days of the commencement of the development and the remaining 75% within 270 days of commencement. If the chargeable amount is more than £250,000 then the first instalment of 25% is payable within 90 days of commencement, a further 25% within 180 days of commencement and the final 50% within 360 days of commencement. Redbridge has gone for four levels of CIL. Any amount less than £100,000 is payable in full within 60 days of the commencement. Between £100,000 and £250,000 it is payable in two instalments. Between £250,000 and £500,000 it is payable by three instalments and above £500,000 by four instalments. Huntingdonshire DC has been even more generous with five tranches. The CIL is payable in full only when the chargeable amount is less than £16,000 and even then 120 days from the commencement is allowed. With all the other tranches the CIL can be paid by three instalments. CIL in excess of £500,000 is payable as to 25% within 180 days of commencement then 50% within 450 days and the remaining
25% within 720 days. Although generous there is yet another of those paragraphs which are being put in at the bottom of some authority’s lists. This one speeds up payment by providing that if at any time 25% or more of the chargeable development is occupied then any outstanding amount of CIL will be payable in full within the time under the instalment policy or 60 days whichever is the lesser unless otherwise agreed in writing with the authority before commencement of the development. As is evident from these examples there is a great difference between instalment policies which will be a material factoring in costing and funding a development.

16.2.3 Revision or revocation - it can be replaced by a new policy but not earlier than 28 days from the earlier policy taking effect. If the authority no longer wishes to have an instalment policy then notice has to be given on its website of the date that its instalment policy is to cease to have effect which must be not less than 28 days from the policy having come into effect.

16.2.4 Precautions to take - it will be necessary, therefore, to establish with each development that the relevant charging authority has an instalment policy; that it has not been withdrawn; and the terms of the policy including whether it has an accelerator provision. Each authority will have its own instalment policy. As has been seen from the examples mentioned above there is a need to consider the list carefully and in particular to check if there are any traps set at the bottom of the list which seeks to speed up payment. Whether and to the extent that the payment is spread will normally depend on the amount of the CIL liability. Any default in paying an instalment will cause the whole outstanding CIL to be payable in full immediately (reg. 70(8)) and a fresh demand notice for the full amount of the outstanding CIL must be issued. It is, therefore important to take care to ensure that each instalment is paid in full and by the date for payment.

16.3 Payment in kind –

16.3.1 Land (reg. 73) - it is possible for CIL (including CIL payable by instalments) to be paid in full or part by the acquisition of land but only from the person who has assumed liability to pay the CIL liability and not from any person otherwise liable for the CIL (reg. 73). The land must be acquired by the authority or a person nominated by the authority (provided that person has agreed). The CIL liability is reduced by the value of the land which will not include the value of any works on the land pursuant to a section 106 agreement. The charging authority should seek to use the land for the purpose of providing or facilitating infrastructure but if it does not then it must deem an appropriate cash amount held by it to be CIL. A written agreement regarding the acquisition of the land must be entered into which must be separate from and not form part of any section 106 planning obligations (reg. 73(7)(b)). Care must be taken to ensure that the agreement satisfies the requirements of section 2 Law of Property (Miscellaneous Provisions) Act 1989.

16.3.2 Infrastructure (reg. 73A) – It is now possible in certain circumstances to discharge a CIL liability by the provision of infrastructure (reg. 73A inserted by reg. 9(6) 2014 Regulations). The amount of CIL discharged will be the value of the infrastructure provided. The provision will occur when the agreed funds are applied for that purpose or are subjected to an arrangement securing their application in that manner (reg. 74(3A) – see section 16.3.6(iv) below). This is a significant change
because it will re-introduce the need for negotiation between the authority and the developer not dissimilar to that involved with section 106 planning obligations which the original CIL regime sought to exclude. The advantage for the developer is that it provides certainty that the work is carried out and for the authority that the works are carried out on its behalf without the need to incur the burden.

16.3.3.1 **Availability in area** – before accepting a payment in kind the charging authority must have made the possibility of such payments available in its area. To achieve this the authority must issue a document which gives notice that it is willing to accept either or both land payments and infrastructure payments; state the commencement date from which it is willing to accept them; and as regards an infrastructure payment include a policy statement as to the infrastructure projects or types which it will consider accepting possibly by reference to its reg. 123 list of infrastructure (reg. 73B(1)). This must be published on its website and made available for inspection at its principal office and other appropriate places within the area.

16.3.3.2 **Revision of policy** – to revise either or both the land payment or the infrastructure payment policy the authority must issue a document with a statement of the revised policy and the date from which it is to operate (reg. 73B(2)). This also must be published on the authority’s website and made available for inspection.

16.3.3.3 **Revocation of availability of infrastructure payments** – this must also be effected by a document giving notice of the revocation and stating the last day on which the authority will consider entering an agreement to accept an infrastructure payment (reg. 73B(3)). This date cannot be earlier than 14 days from the publication of this revocation on the authority’s website. The notice must be published on the website and made available for inspection.

16.3.4 **Factors to be considered by authority before accepting infrastructure payment** – there are a number of factors to be taken into account by the charging authority and so anyone negotiating with an authority which accepts infrastructure payments must also bear them in mind and focus on them. These are:-

1. the aim of the authority “must” be to ensure that infrastructure provided in this manner will be used to support the development of the areas. The authority can accept infrastructure which is situated outside the area if it considers that it will provide such support;

2. the person offering the infrastructure payment has sufficient control of the land it is to be constructed on and has obtained or will be likely to obtain any relevant statutory authorisation necessary for the construction;

3. the infrastructure to be provided is a project or type listed on its reg. 123 list assuming it has one;

4. the infrastructure is not needed to make the relevant planning permission acceptable in planning terms. The infrastructure payment must not be something which should be the subject of a section 106 planning obligation or section 278 highway agreement.
16.3.5 Further conditions for payments in kind –

(i) Provider assumed liability - a payment in kind can only be provided by a person who has assumed liability for the CIL and will be liable to pay the CIL upon the commencement of the development. For these purposes as regards an infrastructure payment provision means the completion of the construction and the transfer of ownership. No financial ceiling has been placed on the amount of the infrastructure payment although one had been proposed by reference to the limits in the EU tendering rules. Although there is no cap those rules will still need to be borne in mind by the authority.

(ii) Written agreement - there must be an agreement which must be entered into before the chargeable development is commenced. In the event that the infrastructure is provided to an authority nominated by the charging authority that authority must be a party to the agreement (reg. 73A((7)(c)).

(iii) Provided to charging authority or nominee - the infrastructure must be provided to the charging authority or a person nominated by the authority. If a person is to be nominated the authority can only do so if satisfied that the nominee will use the infrastructure to support the development of the area.

16.3.6 Agreement – there has to be a written agreement relating to the payment in kind which must satisfy (i) and (ii) of the following requirements in relation to a land payment and all of them in relation to an infrastructure payment:

(i) be in writing;

(ii) state the valuation of the payment in kind which must be determined by an independent person;

(iii) the date by which the infrastructure is to be provided and the amount of the CIL payment and the interest to be paid if not the infrastructure is not provided by then or any agreed extension of that date;

(iv) the amount referred to in (iii) must have been used to provide the infrastructure by the agreed date (or any agreed extension) or be held so

(a) it can only be used for the provision of the infrastructure;

(b) cannot be used to secure additional funding by the provider or otherwise benefit that person;

(c) any interest or other benefit accruing belongs to the authority;

(d) any funds remainder after the provision of the infrastructure belongs to the authority;

(e) if the CIL becomes payable then the funds will be used for that purpose.
16.3.7 **Local conditions** – in addition to the national requirements some authorities have imposed local eligibility criteria. For example, Shropshire CC requires that the proposed use of the land or the infrastructure offered is identified within the reg. 123 List as suitable for delivery through payment in kind apart from in exceptional circumstances. Such land or infrastructure will not be accepted as payment in kind if considered necessary to meet planning policy standards or make the application suitable in planning terms or represents an intrinsic element of the design of the scheme. It is further stated that land or infrastructure will not normally be accepted as payment in kind if promoted as part of the scheme in addition to the CIL contribution to the local community or it represents one of the reasons the community has supported the scheme during the planning process without it being proposed instead of CIL unless in either case it is negotiated with the Council in order to meet an agreed community-wide infrastructure need.

16.3.8 **Value of infrastructure payment** – despite the concerns of the British Property Federation the value of such infrastructure is limited to the cost of providing it which includes the design cost but does not include legal or administrative costs (reg. 73A(11)). This has to be determined by an independent person. Such a person must be appointed with the agreement of the authority and any person liable to pay CIL and have appropriate qualifications and experience. It was proposed by the DCLG in the 2013 consultation that there be a cap restricting payments in kind to costs below the EU procurement thresholds. That proposal was dropped but if the threshold will be exceeded by such an infrastructure payment then the procurement rules will need to be complied with which may make it an unattractive prospect.

16.4 **Default in payment** – in the event that a person liable to pay CIL defaults the collecting authority may seek to recover the outstanding CIL liability from other persons. In particular if the default is by a person who assumed the liability then the collecting authority may transfer the liability to the owners of the site (see para. 15.4 above). If the default involves a failure to pay an instalment in full then it will be the full outstanding CIL that is being claimed from any new person who has become liable for the CIL.
17. **General** – the CIL regime confers a considerable array of weapons by which to enforce payment of any CIL liability and compliance with the obligations imposed. The most draconian from the point of view of the development is the stop notice which requires the development to be immediately stopped with obvious dire consequences. Before considering that method of enforcement account has to be taken of the means by which the CIL bill may increase. This may occur due to the imposition of surcharges or the accrual of interest.

17.1 **Surcharges** – surcharges may but do not have to be levied by a collecting authority in a number of different circumstances. The likelihood is that they will be levied. Almost inevitably at present they come as a surprise to the recipient. There is still very much a feeling that everything can be resolved by a telephone call to the authority. The CIL regime is defined to remove such an approach. There is a right of appeal against surcharges (see para. 18.6 below) but it is not general right but only for limited grounds. Grievances caused by a developer or owner being told by an employee of the local planning authority that they are free to proceed with the development without any mention of the need to serve a commencement notice will not be a good ground for an appeal (see, for example the appeal against Havant BC discussed at 13.3 above). Surcharges may be levied in the following circumstances:

17.1.1 **No assumption of liability** (reg. 80) – if no person assumes liability for the CIL before the commencement of development then a surcharge of £50 can be imposed on every person liable for the CIL. This seems more of an irritant and it cannot be administratively cost effective to charge.

17.1.2 **Apportionment of liability** – if required to apportion CIL between different owners of material interests in the development site a collecting authority may impose a surcharge of £500 on each owner (reg. 81).

17.1.3 **Failure to submit notice of chargeable development** – if a chargeable development is commenced under a general consent rather than a planning permission before notice of commencement is given then the collecting authority may impose a surcharge of 20% of the CIL or £2,500 (whichever is the lower) (reg. 82).

17.1.4 **Failure to give notice of commencement** – in the event of such a failure a surcharge may be imposed equal to 20% of the CIL or £2,500 (whichever is the lower) (reg. 83). It has been argued on appeal that there should be a sliding scale which takes account of the expense incurred by the LPA as a result of the failure. This was rejected as there is no provision in reg. 83 for such a sliding scale (appeal against Southampton City Council ref: APP/D1780/L/14/1200010). There was an informal statement by the appellant’s architect in an e-mail to the Council’s planning officer that demolition was to start the following week but the appellant did not realise and was not warned by the planning officer that demolition would constitute the commencement of development. There was a measure of sympathy for the appellant but the full surcharge was upheld. The same was the case in an appeal against a surcharge imposed by Havant BC (see section 13.3).
17.1.5 Failure to notify occurrence of disqualifying event – the surcharge is equal to 20% of the CIL or £2,500 (whichever is the lower) (reg. 84). It applies in respect of the various exemptions from CIL (such as the charitable exemption) the benefit of which will be lost if a disqualifying event occurs within the seven year period running from the commencement of the development. It also applies to the residential annex exemption if withdrawn within three years of completion.

17.1.6 Late payment – when there is a failure to pay the CIL in full within 30 days of the due date for any CIL the collecting authority may impose a surcharge equal to 5% of the full amount of the CIL liability or £200 whichever is the greater (reg. 85). Further surcharges may be imposed for the same amounts save that it is 5% of the amount unpaid if there is CIL due for more than six months and for twelve months.

17.1.7 Failure to comply with an information notice – if a proper response is not given within 14 days then the collecting authority may impose a surcharge equal to 20% or £1000 (whichever is the lower) (reg. 86).

17.2 Late payment interest – interest is payable on any unpaid CIL from the day after the due date until payment in full at the rate of 2.5% above Bank of England base rate (reg. 87) save where social housing relief applicable under Condition 5 (discounted rent letting by private landlord – see section 11.3.1.5) has been withdrawn in which circumstances the interest is calculated from the date of the commencement of the chargeable development (reg. 53(4A)). This will be payable on surcharges as well but not on late payment interest. It is mandatory and may result in more than one demand notice being issued in order to deal with the interest which accrues.

17.3 Stop-notice – this is the means of enforcement most to be feared. It puts an immediate stop to the development.

17.3.1 Preliminary steps –

17.3.1.1 Expediency - not only must there be an outstanding CIL liability but the collecting authority must consider it expedient to stop the development (reg. 89).

17.3.1.2 Warning notice - Having reached this conclusion the authority must first serve a written warning notice on the person liable, any owner of a material interest in the site, any occupier and any other person who will be materially affected. This warning notice will need to state the reason for serving it, the amount unpaid, that the CIL is immediately payable, the period after which a stop notice can be served, the effect of a stop notice and the possible consequences of a failure to comply with a stop notice. As well as serving the warning notice it must be displayed at the development site.

17.3.2 Period for serving stop notice – there must be gap of at least three days between service of the warning notice and the stop notice but not more than 28 days.

17.3.3 Stop notice – this may be served by the collecting authority after a warning notice has been served and all or part of the CIL remains unpaid (reg. 90). It must be served on the same classes of persons as with the warning notice (see para. 17.3.1.2 above). The notice must state the date on which it is to take effect, the authority's
reason for issuing it, the unpaid amount that is due in full immediately, the relevant activity which must cease and the possible consequences of failing to comply. As well as service the notice must be displayed at the site. There is a right of appeal against stop notices (see para. 18.8 below).

17.3.4 Effect of stop notice - any activity connected with the chargeable development specified in the stop notice and any activity associated with such specified activity must cease with effect from the date specified in the notice. Excluded from this prohibition is any activity needed to be carried out in the interests of health and safety. The force of the stop notice will run from the date specified until the notice is withdrawn. To enforce the consequences of the stop notice a collecting authority may apply to either the High Court or the County Court for an injunction to restrain by injunction any breach or apprehended breach (reg. 94). Further any such breach may be a criminal offence (see para. 17.3.5 below). Details of the stop notice must be entered in the register of enforcement and stop notices kept pursuant to section 188 TCPA 1990 as soon as practical and in any event within 14 days (reg. 92).

17.3.5 Criminal offence - Contravention of the stop notice will be an offence unless the person was not served with the notice and was unaware, and could not reasonably be expected to know, of its existence (reg. 93). Causing or permitting a contravention is an offence. More than one offence may be committed by reference to different days or periods of contravention. On summary conviction the fine cannot exceed £20,000 but on conviction on indictment there is no such limit. In determining the amount of the fine account is to be taken of the financial benefit accruing or appearing to accrue to the offender. In addition the possibility of an application under the PoCA 2002 must be borne in mind (see para. 9.6.3 above).

17.3.6 Withdrawal – a stop notice is withdrawn by a withdrawal notice (reg. 91). A withdrawal notice may be served at any time and must be if the CIL is paid in full. Such a notice must be served on the persons on whom the stop notice was served and also be displayed at the site. The stop notice does not cease to have effect once the CIL is paid but only once the withdrawal notice is served (reg. 91(4)).

17.3.7 Warning – failure to pay the CIL liability in full and promptly runs the risk of the collecting authority halting the development until payment in full. Failure to pay an instalment will mean that the full amount will be payable and can be enforced in this manner. Once halted work cannot start again until a withdrawal notice is served and it will not be enough to have paid the CIL in full.

17.4 Recovery of CIL – a number of methods of recovery are contained in Chapter 3 of Part 9. A pre-condition of their use is the obtaining of a liability order first from the magistrates.

17.4.1 Liability order – prior to seeking a liability order a collecting authority must serve a reminder notice on the person with an unpaid CIL liability setting out all the amounts due (reg. 96). If any part remains unpaid after seven days the collecting authority can apply to the magistrates for a liability order which will be for the outstanding CIL and the costs reasonably incurred in obtaining the order (reg. 97). Once the order is made it allows other recovery methods to be used.
17.4.2 Distress – once a liability order has been made a collecting authority may levy distress against the debtor’s goods (other than clothing, bedding, furniture, household equipment or provisions necessary for the basic domestic needs of the debtor and the debtor’s family and any other goods protected by statute from distress) and sell them (reg. 98). Charges connected with the distress will be recoverable as well. Any person aggrieved by the levy or attempted levy of distress may appeal to the magistrates’ court (reg. 99).

17.4.3 Comittal to prison – after distress has not produced sufficient sums to meet the CIL liability and the collecting authority can prove that a charging order will not produce the required sum then the authority may apply to the magistrates’ court for a warrant committing the debtor, if an individual, to prison for a term not exceeding three months (reg. 100). It is for the magistrates to determine whether the failure to pay is due to “wilful or culpable neglect”. If the court forms the view that it is then a warrant can be issued or a term of imprisonment fixed with postponement of the issue of the warrant subject to such conditions as the courts thinks just. The amount due will include the authority’s reasonable costs incurred in respect of the application.

17.4.4 Charging orders – provided that a liability order has been made against a CIL debtor and more than £2,000 is due then a collecting authority may seek a charging order over a debtor’s interest in land but must follow the specified procedure (reg. 103).

17.4.4.1 Notification – before applying for a charging order a collecting authority must serve written notification on the debtor and any person who may be prejudiced by the making of a charging order setting out the authority’s reasons for seeking a charging order; the effect of such an order; the CIL amount due; and the steps that the authority will take if payment is not made. This notification needs also to be displayed on the land concerned.

17.4.4.2 Application – the application can be made if payment of the outstanding CIL is not made within 21 days (reg. 103(7)). The application must be made to the appropriate court in accordance with section 1 Charging Act 1979. In deciding whether or not to make a charging order account must be taken of the personal circumstances of the debtor and whether a charging order will prejudice any other person. If the Court decides to make an order it has the choice whether to make an absolute order or a suspended order (reg. 104(2)(b)). The order will take effect as an equitable charge so that the interest charged can be sold but this will require an order for sale. It will be capable of being protected by a land charge or notice on the registered title. The debtor may at any time apply to vary or discharge the order.

17.4.5 Insolvency petition – it will be open to a collecting authority to issue a bankruptcy petition or winding petition based on a liability order (reg. 105).

17.4.6 Debt proceedings – instead of obtaining a liability order a collecting authority may seek to enforce payment by proceedings in the normal manner (reg. 106).

17.4.7 Local land charge - if the collecting authority wishes to enforce a local land charge imposed under the CIL regime then the debtor and any person who may be prejudiced by enforcement must be notified giving the required particulars (reg. 107).
Enforcement proceedings may wait 21 days from such notification and the CIL liability must be not less than £2,000. The collecting authority entitled to a local land charge has all the powers of a mortgagee under a deed.

17.4.8 Right of entry – a collecting authority may authorise a person at any reasonable time to enter land which is subject to a planning permission to carry out a development to ascertain matters such as whether a development has commenced, whether any power conferred by the CIL regime should be exercised, or whether information supplied is correct (reg. 109). If the land comprises a private dwelling then a warrant from a JP will be required.
K. Reviews and appeals

18.1 Review of chargeable amount – the chargeable amount of CIL must be reviewed if an interested person makes a written request and not later than 28 days after the liability notice was issued (reg. 113). Unless the planning permission in relation to the development was granted after the commencement of the development no request for a review can be made after the commencement of the development (reg. 113(9)). If a request is made before the development has started but before a decision is notified the development commences then the request will lapse (reg. 113(10)). After 23rd February 2014 a request for a review can be made after the commencement of the development if the grant of planning permission in relation to a development is after the commencement.

Written representations can accompany the request. There must be a review if a proper request is made and it must be by a person senior to the person who made the original calculation and consideration must be given to the accompanying representations. A decision made on a review cannot itself be reviewed. Within 14 days of the request a reasoned decision must be given.

18.2 Appeal regarding chargeable amount (reg. 114) – if a person has requested a review of the chargeable amount and is aggrieved by the decision or does not receive a decision within the 14 day period then that person may appeal to the Valuation Office Agency (“VOA”) to appoint an appointed person (a valuation officer or district valuer) on the ground that the chargeable amount is wrong (reg. 114). A person only has standing to appeal if the person had previously requested a review. The right to appeal does not allow other grounds to be considered. In an appeal concerning a development to construct a single storey garage extension to provide six additional bays the authority argued that the appointed person had no jurisdiction to deal with issues other than disputes as to the method of calculation and the quantum thereof. It argued that it was not open to such a person to decide whether there was otherwise a liability to CIL. In that case the issue was whether or not the type of development involved fell in the residential category in the Charging Schedule or the category of “all other types” which was nil rated. The appointed person rejected this argument on the ground that in order to determine whether the CIL calculation under reg. 40 was correct it required a view to be taken as to whether the building should properly be included in the calculation and if it should whether it is nil rated or subject to a higher CIL rate (para. 9). What the appointed person is not allowed to do is decide whether an exemption or relief applies.

Appeals can raise the issue whether the development qualifies for the exclusion in respect of developments for minor developments of less than 100 square metres (see section 10.3.2) or whether the permitted works are excluded from treatment as a development (see section 10.2.1) or whether a development is within a particular class of use (see section 5.4.4.4.2) or whether the Gross Internal Area has been measured correctly (see section 14.2.1). An appointed person has stated (in an appeal concerning a development involving two agricultural buildings) that “I am not generally responsible for deciding whether or not a particular exemption or relief applies to that chargeable amount.”
In an appeal relating to a permission for the erection of single storey self-storage units (see section 6.2.6.2 above) the appointed person pointed out that arguments based on an alleged delay in granted planning permission until after the putting in place of a charging schedule was outside the remit of a reg. 114 appeal. Nor could account be taken of the CIL Liability Notice being served twelve months after the grant of planning permission contrary to reg. 65 (para. 10).

Further the effect of the CIL liability on the viability of the development is not a matter that can be taken into account. If appropriate it is for the appellant to take up the issue with the authority if the relief for exceptional circumstances is available.

18.3 **Timing of reg. 114 appeal** - the appeal must be made within 60 days of the liability notice but not earlier than 14 days from the request for a review. If there is no request for a review then there can be no appeal. An appeal cannot be made if the development has commenced (reg. 114(3)) unless the planning permission in relation to the development was granted after the commencement of the development (reg. 114(3A)). As a result of reg. 11(3) of the 2014 Regulations introducing reg. 114(3A) when a revised development scheme is authorised after the commencement of a development it is now possible to appeal whereas previously such an appeal was not possible due to the earlier commencement of the development. The appeal will lapse if the development commences before the decision on the appeal is notified unless the planning permission in relation to that development was granted after the commencement (reg. 114(4)). Only one appeal can be made in respect of a chargeable development.

18.4 **Appeal against apportionment of liability** (reg. 115) - any owner of a material interest in land subject to a development may appeal to the VOA for the appointment of an appointed person (a valuation officer or district valuer) if aggrieved by the apportionment of CIL liability (reg. 115). The onus will lie on the appellant. The most likely issue in such an appeal will be the market value of the relevant interests and in particular that of the appellant. The decision will be based on the information provided by the parties which will include any valuations, comparables and details of consideration paid in transactions relating to the development site.

A request for a review should first be made. There is a time limit of 28 days from the issue of the demand notice. If the appeal is successful then all demand notices issued before the appeal will cease to have effect, any surcharge imposed will be quashed and the apportionment will be recalculated. There is no requirement that the appeal must be before the commencement of the development as the apportionment may not be made and a liability notice issued until after commencement.

18.5 **Appeal regarding charitable relief** (reg. 116) – after a request for a review an interested person (see section 18.12.3 below) aggrieved by a collecting authority’s decision regarding charitable relief may appeal to the VOA to appoint an appointed person (a valuation officer or district valuer) (reg. 116). An appeal over the value of the qualifying interest is made under reg. 116 but any dispute over the calculation of the amount of the CIL has to be separately appealed under reg. 114. Such an appeal must be made within 28 days of the decision but must be before the development commences. The appeal will lapse if the development commences before the decision is notified.
18.6 **Appeal on surcharge** (reg. 117) – a person aggrieved by a decision to impose a surcharge may appeal to the Planning Inspectorate for the appointment of an appointed person (the Secretary of State or person appointed by that person) on the ground that the alleged breach did not occur or that no liability notice had been served or that the calculation is incorrect (reg. 117). The time limit is 28 days from the imposition of the surcharge and whilst the appeal is on foot the surcharge is not payable. As a first step an aggrieved person is encouraged to contact the collecting authority to seek to resolve the matter without the need for a formal appeal but whilst doing so care has to be taken not to miss the deadline for an appeal.

The issue on appeal will be whether the breach has occurred justifying the imposition of a surcharge. Often the appellant will wish to raise other issues arising from the course of dealings between the Council and the appellants. This may elicit the sympathy of the appointed person but will not cause the appeal to succeed. In an appeal against the imposition of a surcharge by Havant BC for failure to serve a commencement notice the appellants relied on evidence that they had been told that when paying the CIL nothing more was required (see section 13.3 above). The appointed person was sympathetic and considered that there were mitigating factors but upheld the surcharge because there had been a breach.

An appeal against the amount of the surcharge imposed by Southampton City Council for failing to serve a commencement notice on the ground that there should be a sliding scale failed as there was no basis for such a scale in reg. 83 (section 17.1.4).

18.7 **Appeal regarding deemed commencement** (reg. 118) – when a demand notice is served stating a deemed commencement date an appeal may be made to the Planning Inspectorate for the appointment of an appointed person (the Secretary of State or person appointed by the Secretary of State) on the ground that the date is incorrect (reg. 118). It must be made within 28 days of the issue of the demand notice. If successful earlier demand notices will cease to be effective, a revised deemed commencement date will be determined and any surcharge imposed will be squashed. Such an appeal was made against a demand notice issue by Preston City Council (appeal ref: APP/N2345/L/14/1200007) when the Council gave the date stated in a commencement notice served by the owner who then sought to withdraw that notice. The Council inspected the site and the photographs taken resulted in the appeal failing. The point as to whether there was actually jurisdiction under reg. 118 because a commencement notice had been served was not considered.

18.8 **Appeal from stop notice** (reg. 119) – an aggrieved person may appeal to the Planning Inspectorate for the appointment of a person appointed by the Secretary of State against a stop notice on the ground that no warning notice was served or the development had not commenced (reg. 119). The appeal must be made within 60 days of the stop notice taking effect. The stop notice will continue in force pending the outcome of the appeal so it is not a means of suspending the stop notice. The appointed person may correct any defect, error or misdescription in the stop notice or vary it provided that this will not cause injustice to the appellant or any interested person.
18.9 **Appeal against levy of distress or attempted levy** – appeal to magistrates court and authority may be ordered to pay compensation.

18.10 **Appeal regarding residential annexe exemption** (reg. 116A) – an appeal can be made on the ground that the collecting authority has wrongly decided that the annex is not wholly within the curtilage of the main house and no other ground. For example, there is no jurisdiction to determine on an appeal whether the dwelling is occupied as a sole or main residence or whether the annex is one new dwelling. The appeal is to the VOA for the appointment of an appointed person (a district valuer or valuation officer) and made by the interested person who is defined as the person who was granted the exemption (reg. 11(b) 2014 Regulations inserting reg. 112(2)(c)). Presumably this means the person who would be entitled to the exemption if it had been granted. The appeal must be made within 28 days of the authority’s decision and before development commences.

18.11 **Appeal regarding self-build exemption** (reg. 116B) – an appeal can be made on the ground that the collecting authority has incorrectly determined the value of the exemption. This will cover not just the dwelling but also any self-build communal area. It is not for the appointed person to decide whether the development qualifies as self-build housing. The appeal is to the VOA for the appointment of an appointed person (a district valuer or valuation officer) and made by the interested person who is defined as the person who was granted the exemption (reg. 11(b) 2014 Regulations inserting reg. 112(2)(c)). The appeal must be made within 28 days of the authority’s decision and before development commences.

18.12 **Interested person** – an interested person may appeal or put in written representations or the interests of that person may need to be taken into account. The definition of interested person varies dependent upon the particular review or appeal. These are set out in reg. 112. The charging and collecting authority will be included as well as the persons jointly liable for the CIL with the appellant. Also included amongst them is the Mayor of London when a London borough is involved. It has been stated that the policy of the Mayor will be to support the collecting authority when Mayoral CIL is involved.

The interested persons by type of appeal are:-

18.12.1 Reg. 114 appeal (amount of CIL) – the charging authority (which includes the Mayor of London); the collecting authority if not the charging authority; person assuming liability to pay CIL; person served with notice of chargeable development in accordance with reg. 64A(3); person who has served notice of chargeable development if general consent applicable; any person applying for approval if planning condition subject to pre-commencement condition; the applicant for planning permission.

18.12.2 Reg. 115 appeal (apportionment of liability) – the person who has assumed liability for the payment of CIL; a person with a material interest in the land; person who has served notice of chargeable development if general consent applicable; any person applying for approval if planning condition subject to pre-commencement condition[ the applicant for planning permission.
18.12.3 Reg. 116 appeal (charitable relief) – the collecting authority; the charging authority if not the collecting authority (which includes the Mayor of London); person who has claimed charitable relief; person who has assumed liability to pay CIL in respect of chargeable development to which charitable relief applies.

18.12.4 Reg. 116A (exemption for residential annex) – the person who granted the exemption; the charging authority; the collecting authority if different to the charging authority.

18.12.5 Reg. 116B (self-build exemption) – the person who granted the exemption; the charging authority; the collecting authority if different to the charging authority; any person jointly liable to pay the CIL with the appellant.

18.12.6 Reg. 117 appeal (surcharge) – the collecting authority; the charging authority if not the collecting authority (which includes the Mayor of London); any person who is liable for unpaid CIL; any person known to the collecting authority as an owner of a material interest in the land.

18.12.7 Reg. 118 appeal (deemed commencement) – a person on whom a demand notice is served in relation to the chargeable development; the charging authority; the collecting authority if different from the charging authority.

18.12.8 Reg. 119 (stop notice) – the charging authority; the collecting authority if different from the charging authority; any person liable to pay unpaid CIL; any person known to the collecting authority as an owner or occupier of the relevant land; any person who the collecting authority considers may be materially affected by the stop notice.

18.13 Form of appeal – an appeal must be in writing and in the form, or be substantially the same as the form, provided by the Secretary of State (reg. 120(2)). A copy can be downloaded from the website of the Valuation Office Agency or the Planning Inspectorate (as appropriate).

The VOA has a helpful guide to the completion of the form on its website which is to be found at –
http://www.voa.gov.uk/corporate/Publications/Manuals/CommunityInfrastructure Levy/toc.html

There is a similar helpful guide to be found with regard to enforcement appeals at the Planning Portal -
https://www.planningportal.gov.uk/planning/appeals/otherappealscasework/cilappeals

In addition the Planning Inspectorate has issued a Procedural Guide for Enforcement appeals in England (6th March 2014).

18.14 Appeal process - the appointed person must acknowledge the appeal and serve the acknowledgment on all interested parties. The appeal form will contain the appellants written representations. Receipt of the appeal form will start the time limit of 14 days or such longer period as the appointed person in any case may determine within which interested persons may make written representations. Such
representations must be received by the appointed person within that period. Copies of any representations received by the appointed person must be sent to the appellant and any other interested persons. The time limit for comments on the representations originally required that they be sent within 14 days of the end of the representation period but as regards any appeals made on or after 24th February 2014 this has been changed by reg. 11(5) 2014 Regulations so that the comments are received by the appointed person within 14 days of the expiry of the representation period. This is so that there is greater certainty. The appointed person will know when the comments are received but not when they were sent. When received copies of the comments must be sent to everyone else. The representations and comments must be taken into account by the appointed person.

One problem with appeals against CIL decisions is that the building has not been constructed or used. The appointed person will have to do the best that is possible with the evidence provided. For instance the amount of CIL payable may depend on the use to which the building is to be put. In an appeal concerning a development substituting a block of five holiday units into a single nine bedroom holiday unit the issue was whether the new use was within Use Class C3. In a planning context this would be determined by reference to the use to which the particular building has actually been put and the circumstances surrounding that user. This is not possible with a CIL appeal. Instead of evidence as to the characteristics of the use of the holiday accommodation reliance had to be placed on the planning permission and statements as to how it is intended that the building will be used. This included evidence as to e-mails enquiring about availability of the accommodation.

Occasionally the appointed person will inspect the development site. This has happened once in the reported appeal decisions. If this is to happen then the parties should be invited to attend a joint inspection if they wish.

18.15 Commencement of development – prior to 24th February 2014 no appeal could be made after the commencement of development. After 23rd February 2014 it is now possible to make such appeals if the relevant planning permission was granted after the commencement of the development.

18.16 Withdrawal of appeal – the appellant may withdraw the appeal at any time.

18.17 Decision – the appointed person must give a reasoned decision which must be notified to the appellant and the interested parties. The VOA guide (para.7.1) states that the role of the appointed person is similar to that of a first-tier tribunal member and that it is a quasi-judicial one. It must be based exclusively on the evidence provided.

There is no appeal from the decision of an appointed person so any challenge would have to be by way of judicial review. Judicial review is available with regard to a decision by a judge of the Upper Tribunal (R(on the application of Cart) v Upper Tribunal [2011] UKSC 28) but in more restricted circumstances than would be expected as regards decisions by the appointed person.

18.18 Costs – the appointed person has the power to decide which parties’ costs are to be borne and by whom (reg. 121). Guidance as to costs is given in Appendix 8 to the
VOA CIL Guidance Note which in turn makes reference to CLG Circular 03/09 “Costs Awards in appeals and other planning proceedings”. In para. 4(b) of Appendix 8 the conditions for a costs award are set out.

It provides that a costs award will normally be made if

(i) a party has made a timely application for an award of costs;

(ii) the party against whom the award is sought has acted unreasonably;

(iii) the unreasonable behaviour has caused the party applying for costs to incur unnecessary or wasted expense in the appeal process

(iv) whether the whole because there should not have been an appeal or in part because of the manner in which the party has behaved.

A claim for costs was made by an authority in an appeal which failed. The appointed person stated that it had to be shown that the appellant had acted unreasonably (para. 21 of appeal concerning change of use from office to communal house). In that case the authority argued that by introducing grounds on the appeal which had not been raised in the review the appellant had acted unreasonably. The appointed person considered that the preferable course would have been for the grounds regarding lawful use to have been raised earlier but as there would still have been an appeal no award of costs should be made.

If a costs award is made it is not open to the appointed person to determine the amount of the costs. If the parties cannot agree then that is a matter for a Costs Officer of the Supreme Court Costs Office.

18.19 Judicial review –

18.19.1 Availability of judicial review - the availability of a challenge by a review or appeal is very tightly controlled. There is no statutory provision which states that a challenge cannot be mounted by way of judicial review. For so long as it is possible to request a review or appeal then it will not be possible to seek a judicial review because there is an alternative means of challenge. This does not mean that it will never be possible to apply for judicial review in respect of a decision by an authority in relation to CIL. It is the only possible means of challenging decisions by examiners and authorities whilst the procedure is being gone through for the establishment of the CIL regime in an area as in the Fox Strategic case (see section 5.4.3.3). There will be decisions for which no appeal is allowed such as a refusal of a claim for exceptional circumstances relief. In such a case can a challenge to the refusal be mounted by way of judicial review?

Another possible area where judicial reviews may feature is if the development has commenced so that the ability to request a review or appeal is lost. In section 12.3.6 above I have raised the issue whether the loss of the statutory routes by which to challenge a CIL decision automatically precludes a challenge by way of judicial review. There has already been one judicial review with regard to the administration of the CIL regime. It was a challenge to a decision to refuse a claim for a demolition
deduction reached after the relevant development had commenced (R (oao Hourhope Limited) v Shropshire CC supra – see section 14.2.5 above). The authority had stated that it would consider the information in support of the claim even though the development had been commenced so no objection was taken to the use of judicial review proceedings. Such circumstances may occur because both the authority and the developer wish the development to commence as soon as possible.

An alternative argument was put forward in the Hourhope case based on legitimate expectation. This arose from a CIL guide which Shropshire Council had issued on the web. A passage in the guide relating to storage was relied on by the developer as requiring the Council to accept that the circumstances of the case justified a demolition deduction being made. In cases in which legitimate expectation is relied on a CIL appeal to an appointed person will not be able to deal with the issue and judicial proceedings will be needed.

This point is emphasised by an appeal against Southampton City Council in which it was argued that in a number of other similar cases instead of the Council imposing a surcharge for failure to serve a commencement notice the developers were sent reminders by the LPA (Appeal ref: APP/D1780/L/14/1200010). The appointed person sympathised at what appeared to be “a level of inconsistency in the council’s approach to dealing with individual cases. However, the procedures adopted by a planning authority for dealing with such cases are generally a matter for the authority within the context of local government accountability and not something for me to consider in the determination of this appeal.” (para. 5). It is a point which can possibly be advanced in judicial review proceedings in support of a claim that the authority has acted unfairly but is not a valid ground for a CIL appeal.

18.19.2 Wednesbury principle – in the event that a CIL decision is challenged by way of judicial review the Court will not be able to decide the matter as if it were the hearing of an appeal. It will be necessary to show that the particular CIL decision made by the authority is one which no reasonable authority could have made. In R (oao Hourhope Limited) v Shropshire CC supra at para 24 HHJ Cooke stated that it “is accepted that the ………council's decision is susceptible to review only on normal judicial review principles, and in particular whether the council either took into account irrelevant matters or ignored relevant ones, or reached a conclusion unreasonable in the Wednesbury sense. The case was argued before me only on the question whether the council erred in law in concluding that it was not satisfied that the building was "in lawful use"…….”. This means that the task facing the claimant is harder than with an ordinary appeal.

18.19.3 Legitimate expectation – as illustrated by the decision in (R (oao Hourhope Limited) v Shropshire CC supra it will be difficult to convince a court that a CIL decision by a LPA should be reversed due to a legitimate expectation created by the LPA. In that case the claim failed for three separate reasons. First, there must be a clear and unambiguous statement which convinces the court to act. In that case the passage relied on in the Council’s CIL guide could “not be sensibly understood as meaning that the premises would be treated as in use as long as there were chattels present on them” (para. 33). To apply the passage in the guide to the particular circumstances of the case was to stretch their meaning and such a strained construction defeated the claim. Secondly, legitimate expectation cannot be used to
require an authority to act unlawfully. In that case the availability of the demolition deduction was a matter of law and Shropshire Council has no power to modify that law. Thirdly, the Court will take into account whether the expectation has been relied on. In that case there was no evidence of any reliance and so even if there had been any it would not have been unfair for Shropshire Council to change its interpretation of the CIL regulations. Separately as a general comment it will be harder to rely to succeed with a claim based on legitimate expectation if it is alleged to arise from statement made to a wide class as opposed to an individual or small class of persons.
L. Mayoral charge

19. **Mayoral CIL and Crossrail contribution** – there are four methods being adopted to fund the Crossrail project for London. Two of these are the Mayoral CIL and section 106 contributions. Each is intended to raise £300 million. In addition the Crossrail Business Rate Supplement is estimated to raise £4.1 billion and the remainder of the core funding provided by the Mayor will be funded by TfL.

19.1 *Infrastructure funding* – the Mayoral CIL is to fund roads or other transport facilities, including, in particular, for the purpose of, or in connection with, scheduled works as defined within Schedule 1 to Crossrail Act 2008. Education and health have been specifically excluded. The reason for a two tier CIL system in London is so that there is provision for both local and strategic cross London infrastructure. No portion of these CIL receipts will be paid for the purposes of neighbourhood funding.

19.2 **Charges** – the Mayoral CIL charge rates have been in force since 1st April 2012. For this purpose London is divided into three zones. The boroughs comprised in the zones are set out in the Third Appendix. The rates fixed are £50 for zone 1; £35 for zone 2; and £20 for zone 3. They apply to all developments save that there is no Mayoral CIL payable for developments for medical or health uses or which are wholly or mainly for provision of education as a school or college. This Mayoral CIL is in addition to the CIL charged by the relevant borough council so that any chargeable development in London may be charged to both or possibly only one dependent on whether the borough council has established its own CIL regime. In areas in which no local CIL has been established it is important to remember that the Mayoral CIL will still be chargeable and may not show up on a local land charge search. Care needs to be taken particularly when purchasing between grant of planning permission and commencement of development.

19.3 **Exemptions and relief** – the general charitable exemption will apply but not the possible discretionary charitable relief in reg. 44. It was felt that the latter would result in administrative complexity. Similarly a decision has been made that the possible relief for exceptional circumstances in reg. 57 will not apply. The judgment has been made that it is preferable to address the viability of any development by reason of contributions for Crossrail by making adjustments with the section 106 contribution. If the CIL charge equals or exceeds the section 106 contribution then only the CIL is payable and the latter is not payable but if the section 106 contribution exceeds the CIL charge then the CIL is payable and the excess is payable as a “top-up” as a section 106 contribution.

19.4 **Collection** – the collecting authorities for the Mayoral CIL will be the relevant London boroughs or a MDC if established (see para. 19.7 below). The monies collected will be paid to Transport for London.

19.5 **Payment** – the liability to pay the Mayoral CIL will be calculated and paid in accordance with the regulations applicable to the general CIL charge. A calculator can be found on the TfL website. The monies raised must be applied for the purpose for which they have been raised unless otherwise agreed.
19.6 **Instalments** – with effect from 1st April 2013 the Mayoral CIL may be paid by instalments if £500,001 or more. It will be payable by two instalments. The first instalment will be the greater of £500,000 or one half of the CIL liability which will be payable within 60 days of commencement of development. The remainder shall be payable within 240 days of commencement of development. Any CIL liability of £500,000 or less must be paid not more than 60 days after commencement of development. This instalment policy applies if CIL is not chargeable within a borough or it is but there is no borough instalment policy. In a borough which has its own instalment policy that will also apply to the Mayoral CIL. This applies in Brent, Croydon, Redbridge and Wandsworth. In the case of Barnet and the City of London the instalment policy is the same.

19.7 **Mayoral development areas** – the Mayor of London has the power to designate any part of Greater London as a Mayoral development area (section 197 Localism Act 2011). If the Mayor does so then the Secretary of States must establish a Mayoral Development Corporation (“MDC”) for the area (section 198) which corporation will have the object of regenerating the area (section 201). The Mayor may designate the MDC as the local planning authority for all or a portion of the area (section 202). Amongst the powers of a MDC is the power to provide or facilitate the provision of infrastructure (section 205). In April 2012 the first MDC was set up, the London Legacy Development Corporation, to take over the Queen Elizabeth Olympic Park and some surrounding area (but not Stratford Town Centre). The London Legacy DC has introduced CIL for its area with effect from 6th April 2015 (see First Appendix). It is proposed that another MDC, the Old Oak and Park Royal Development Corporation, will be established to cover a 950 hectare site at Old Oak Common in West London with up to 24,000 houses and a railway station the size of Waterloo being built. Such MDCs may act as both the charging authority and the collecting authority for its area (see para. 5.2 above) and will have authority to grant discretionary reliefs and exemptions (reg. 7 of the 2013 Regulations). Each MDC will be able to collect for itself the CIL related to developments in its area as well as collecting the Mayoral CIL.
M. Section 106 agreements and highway agreements

20.1 Funding – the Government’s strongly preferred route for the future funding of infrastructure by local authorities is by using the CIL regime rather than section 106 agreements. This does not mean that section 106 planning obligations are to be wholly replaced but rather that their operation is to be scaled back. In particular a legitimate role for section 106 planning obligations remains whereby they may mitigate the site specific impact of the proposed development enabling the authority to be confident those specific consequences of a proposed development can be overcome. However, the scaling back of the role of section 106 planning obligations may not be as great as anticipated by the government if the hybrid approach being put forward by Torbay DC is taken up by other authorities (see section 20.6.4 below).

To achieve the government’s objective a number of restrictions to section 106 agreements have been introduced to encourage the use of the CIL regime and to avoid “double dipping” whereby developers have to pay twice for infrastructure once through payments of CIL and then a second time through section 106 planning obligations. These restrictions have been extended in part but not wholly to highway agreements by the 2014 Regulations (see section 20.7 below). The overall objective is that once CIL is introduced section 106 planning obligations should be limited to matters which are directly related to the development site and do not appear on the reg. 123 list of infrastructure and to such “pooled” contributions as may still be permitted under the stringent operation of the “pooling restriction” (subject to the possible new hybrid approach).

20.2 Planning conditions – the focus in the CIL regulations is on planning obligations. The objective is to govern the sources of funding for infrastructure available to local authorities. In consequence there is little in the CIL regime which directly concerns planning conditions because notwithstanding the wide statutory power in section 70(1) TCPA 1990 to impose such conditions as the authority thinks fit that power has not been used to require developers to bear what Lord Hoffman in Tesco Stores v Secretary of State for the Environment called “external costs”. Such a use of planning conditions was held to be Wednesbury unreasonable with the consequences for the development of planning law and practice explained by Lord Hoffman in the Tesco case. The only control of planning conditions introduced by the CIL regime concerns conditions relating to highway agreement (as to which see section 20.7 below).

20.3 Relationship between planning obligations and CIL regime - No credit is given against the CIL charge for the financial burden of any planning obligation imposed as a condition of the planning permission nor is any credit for the CIL charge given to be set against the cost of any planning obligation save in the case of the Mayoral CIL (see section 19.3 above). This is the case even if the planning obligations were

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2 Paras 59 and 60 DCLG Community Infrastructure Levy An Overview May 2011
3 [1995] UKHL 22 at para. 32 he described the external costs of the consequences arising from a development “involving loss or expenditure by other persons or the community at large.”
4 Hall & Co. v Shoreham UDC [1964] 1 WLR 240 which resulted in the issue of guidance by the Ministry of Housing and Local Government reflecting the decision (Circular 5/68 subsequently replaced by para. 63 Circular 1/85).
5 Tesco Stores v SSE supra paras 32 to 37.
executed prior to the introduction of CIL in the area and there is then a section 73 planning application after CIL has been introduced. Notwithstanding that no account of each is taken in the operation of the other it is not the intention that the CIL regime will wholly replace the section 106 planning obligations in those areas in which the CIL regime is adopted. There will be a continuing role for such planning obligations and it is intended that the two regimes should complement each other. With developments subject to the CIL regime the section 106 system as regards infrastructure will be limited to management of the development and site specific works and was not intended to relate to the general infrastructure needs of the particular area. The system will also continue to play an important role with regard to affordable housing which currently is outside the CIL regime and to developments which are not subject to the CIL regime. In areas where CIL has not been introduced the section 106 planning obligations system will play an important role even though the pooling restrictions will apply after 6th April 2015 (see section 20.6 below).

20.4 General test for planning obligations – reg. 122 gives statutory effect to what had been previously set out in ODPM Circular 5/2005 Planning Obligations but does so only when the development is capable of being charged to CIL regardless of whether the CIL regime has been adopted by the particular area. The tests in reg. 122 will not apply if the development is not within the CIL regime such as the grant of planning permission for a wind farm, quarries or a golf course without buildings. In such circumstances it will be covered by the guidance in Circular 5/05. This regulation took effect immediately on 6th April 2010 and applies regardless of whether CIL has been introduced in the relevant area. It is aimed at excluding benefits being provided by the developer to secure planning permission which do not relate to the particular development. It seeks to tighten the tests that must be satisfied before a planning permission can properly be granted. One unintended effect seems to be to have increased the number of legal challenges. At present it is not clear whether these new statutory tests impose a tougher hurdle to be overcome and in particular it is not clear what “necessary” in reg. 122(2)(a) means in this context. In part also it is due to the wording used in reg. 122. The requirements set out in reg. 122(2) do not apply to all planning obligations but to a planning obligation which constitutes “a reason for granting planning permission for the development (see section 20.4.4(ii) below). There is scope for argument as to when a planning obligation is a reason for the grant of planning permission.

20.4.1 Planning obligations – such obligations were first introduced by section 34 TCPA 1932 and are now authorised by section 106 TCPA 1990. Any person interested in land in the local planning authority’s area may enter an obligation

(a) restricting the development or use of the land in any specified way;

(b) requiring specified operations or activities to be carried out in, on, under or over the land;

(c) requiring the land to be used in any specified way; or

(d) requiring a sum or sums to be paid to the authority on a specified date or dates or periodically.
Such an obligation may arise by agreement between the local planning authority and usually the developer. The type of obligations that can arise are wide in scope. This will be the normal method adopted prior to the grant of planning permission with the agreement conditional on the grant of planning permission. However, an agreement is not essential and an unilateral undertaking by the developer may have the same effect. Often these are offered on an appeal to overcome a planning objection which has resulted in a refusal of planning permission. One of the advantages of a planning obligation is that such obligations are enforceable against not just the original covenantor but also successors in title by reason of sub-section (3). This covers positive obligations the burden of which will not run with the land under the general law. It also covers all restrictive covenants whereas under the general law the benefit of a restrictive covenant is only enforceable against a successor to the covenantor if the person enforcing it owns nearby land which benefits from the restrictive covenant. There are no hurdles that have to be overcome to justify the creation of such an obligation. In particular the planning obligation does not have to relate to any particular development. Such duties and limitations as are material will arise not from the planning obligation itself but from the context of the planning application which gives rise to it.

The agreement does need to be made between the local planning authority and a person with an interest in land in the area. If there are parties that do not qualify then a statutory power other than section 106 of the 1990 Act will need to be exercised. The agreement may be with the person who is going to purchase the proposed development site rather than the current owner. Authorities other than the local planning authority may be a party. In those circumstances the agreement may be pursuant to a statutory power such as section 111 Local Government Act 1972 or both such a power and section 106.

20.4.2 Position prior to reg. 122 – as explained by Lord Hoffman in the Tesco Stores case planning obligations were the chosen route by which planning authorities and developers could overcome the block on planning conditions being used to place on the developer all or part of the burden of the external costs resulting from the implementation of a planning permission. By means of such obligations it became possible to meet the impact of the development on the local infrastructure by requiring a developer to make financial contributions to the infrastructure costs or discharge other obligations for the purpose of meeting the external costs of the development. Obligations to transfer land are outside the scope of section 106 but can be achieved by means of Grampian provisions requiring a transfer before land can be used for a particular purpose. This permits land to be transferred to be used for

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6 For example, in South Oxfordshire DC v Secretary of State for the Environment (1994) 68 P & CR 551 an obligation to dispose of a site to be developed as a golf course and apply the income from the disposal in improving listed buildings on an estate was held to be valid and enforceable. For these purposes in sub-section(1)(b) “operations” has it long established meaning in planning legislation and “activities” connotes a wide range of behaviour in relation to the use of and occupation of land (Sir graham Eyre QC at page 558).


8 Wimpey Homes Holding v Secretary of State for the Environment [1993] 2 PLR 54
infrastructure such as roads. This is possible because such planning obligations are not subject to the same limitations as a planning condition.9

When considering whether to grant planning permission the local planning authority is required to take account of the provisions of the development plan (so far as material to the application) and any material consideration. This duty is now contained in section 70(2) TCPA 199010. This plan-led system has resulted in four basic principles to be found in the House of Lords decision in Edinburgh City Council v Secretary of State for Scotland.11 These are described by Lindblom J. as uncontroversial and are:

(i) both the relevant provisions of the development plan and other material considerations must be taken into account by the decision-maker;

(ii) the development plan has priority in the determination of planning applications;

(iii) this priority is not a mechanical preference as there is an element of flexibility allowing the possibility of a decision contrary to the provisions of the plan;

(iv) the assessment of the facts and the weighing of the material considerations is a matter for the decision-maker. These are matters for the decision-maker and not the court.

For these purposes a material consideration is a consideration which is relevant to the proposed development and it is for the Court to decide what is relevant.12 Hickinbottom J. described any other material consideration as “any other consideration which serves a planning purpose.”13 If regard is had to the development plan then the decision must be in accord with the development plan “unless material considerations indicate otherwise.”14 There is rebuttable presumption that any refusal or grant of planning permission must accord with the development plan.

A proposed or actual planning obligation relating to the proposed development will be a material consideration for the purposes of the planning application. A planning obligation unrelated to the proposed development will not be a material consideration and so a refusal of planning permission based on a developer being unwilling to provide such a planning obligation would be unlawful.15 Similarly a planning obligation offered “which has nothing to do with the proposed development apart from the fact that it is offered by the developer, will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission.”16

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10 Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires any determination on a planning application to be made in accordance with the development plan “unless material consideration indicate otherwise”.
12 Lord Keith in the Tesco Stores case supra.
13 Para. 5(iv) in R (oao Mid Counties) v Forest of Dean DC [2014] EWHC 3059 (Admin)
14 Section 38(6) Planning and Compulsory Purchase Act 2004
15 Lord Hoffman at para. 41 in the Tesco Stores case supra.
16 Lord Keith at para. 24 in Tesco Stores case supra.
When the planning obligation has more than a de minimis connection with the proposed development regard should be had to it when exercising the discretion on the planning application. The extent to which it is taken into account is “entirely within the discretion of the decision maker” and “it is entirely for the decision maker to attribute to the relevant considerations such weight as he thinks fit and the courts will not interfere unless he acted unreasonably in the Wednesbury sense”. Lord Hoffman made the point forcibly in the Tesco Stores case that if there is to be a test of necessity applied by the courts then how is the court to determine it. How can it decide that without the planning obligation the development would have been unacceptable? It is not able to investigate the planning merits. A point that has been reaffirmed since the CIL Regulations took effect by Bean J. in the Welcome Break case (see 2.4.4(i) below).

Such was the enthusiasm for this route that concerns arose that planning authorities were using it as a means of extracting a share of the planning gain arising from the grant of the planning permission and developers were through the benefits provided in the planning agreement “purchasing” the planning permission to the detriment of other developers. This resulted in circulars from the Department of the Environment (Planning Gain 22/38 and Planning Obligations 16/9) seeking to restrain such use of planning obligations by restricting planning obligations to those which both related to the proposed development and where there is a necessary relationship between the two thereby enabling the grant of planning permission to be made. The policy was making clear that if planning permission could be granted without such a planning obligation or with a less onerous obligation then to refuse planning permission because such an obligation is not given by the developer would be wrong. However, such a test of necessity was held not to be applicable in judicial review proceedings relating to a decision of a local planning authority and that it is open to a local planning authority to accept a planning obligation even if it did not apply the necessity test. Provided that there is a connection between the planning obligation and the proposed development it is open to the local planning authority to attempt “to obtain the maximum legitimate public benefit” as in both the Plymouth case and the Tesco Stores case.

20.4.3  NPPF and PPG - in the National Planning Policy Framework (“NPPF”) it is provided that local planning authorities should consider whether otherwise unacceptable development can be made acceptable through the use of planning obligations. Such planning obligations should only be sought where they:

(i) are relevant to planning

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17 Lord Keith at para 24 and Lord Hoffman at paras 56 and 57 in the Tesco Stores case supra.
18 Lord Keith at para 15.
19 Para. 53 Tesco Stores case supra
20 The Court of Appeal decision in R v Plymouth City Council supra approved by the House of Lords in the Tesco Stores case (see Lord Hoffman at paras 47 and 58 and Lord Keith at para. 23)
21 Lord Hoffman at para. 63 Tesco Stores case supra
22 Para. 203
23 B5 NPPF
(ii) are necessary to make the proposed development acceptable in planning terms. For these purposes necessary means the planning obligation is required “to bring a development in line with the objectives of sustainable development as articulated through the relevant local, regional or national planning policies”\(^\text{24}\);

(iii) directly relate to the proposed development;

(iv) are fairly and reasonably related in scale and in kind to the proposed development;

(v) reasonable in all other respects.

It emphasised that planning obligations should not be used to buy or sell planning permissions or as a means of securing for the local community a share in the profits of the development.\(^\text{25}\)

This is now supplemented by the Planning Practice Guide (“PPG”) which emphasises that a planning obligation should only be taken into account if it satisfies reg. 122\(^\text{26}\) and should not be sought if clearly not necessary to make a development acceptable in planning terms.\(^\text{27}\)

Such central government policies are material considerations as are relevant local policies.\(^\text{28}\)

20.4.4 Reg. 122 – the enactment of this regulation means that it is now the duty of a local planning authority considering a planning application to comply with the requirements found in Circular 5/05. The government stated that by making these tests statutory it was providing a stronger basis from which to challenge a breach. It was seeking “to enforce the purpose of planning obligations in seeking only essential contributions to allow the granting of planning permission rather than more general contributions which are better suited to the use of the levy.”\(^\text{29}\) Regulation 122 provides that a planning obligation or a proposed planning obligation\(^\text{30}\) can only be a reason for the grant of planning permission on or after 6\(^{\text{th}}\) April 2010 if the planning obligation satisfies the following three criteria:-

(a) it is necessary to make the development acceptable in planning terms;

(b) it is directly related to the development;

(c) it is fairly and reasonably related in scale and kind to the development.

(i) Novel? - the tests in reg. 122 are not new but to have them in a statutory regulation is. However, from the decisions so far it does not appear to have caused the Courts to

\(^{24}\) B8 NPPF  
\(^{25}\) B6 and B7 NPPF  
\(^{26}\) Para. 0-93  
\(^{27}\) Section I para. 004.  
\(^{28}\) Paras 5(vi) and 12 in R (oao Mid Counties) v Forest of Dean DC [2014] EWHC 3059 (Admin)  
\(^{29}\) Para. 61 DCLG Community Infrastructure Levy An Overview May 2011  
\(^{30}\) Reg. 122(3)
significantly change the approach adopted to that prior to the coming into force of the CIL Regulations. They have certainly not caused the Courts to adopt a “but-for” approach. Instead whether there has been compliance with the tests is a planning judgment requiring all the relevant considerations to be taken into account with the weight to be attached to each continuing to be a matter for the decision maker. This is probably not what the government wanted or expected.

HHJ Purle QC stated in Persimmon Homes North Midlands v Secretary of State for Communities and Local Government\(^{31}\) that these “provisions reflect what previously had been (and still are) departmental policy and are plainly calculated to stop developers from offering wide-ranging inducements which may amount to the buying of planning permission.”\(^{32}\) This point was reiterated by Turner J. in Telford and Wrekin BC v Secretary of State for Communities and Local Government\(^{33}\) who stated that the “policy behind Regulation 122 is to inhibit developers from “buying” planning permission with the promise of wide ranging largesse.”

Bean J. in R (oao Welcome Break Group and Others v Stroud DC\(^{34}\) considered that there is nothing novel in reg. 122 save that it is contained in a statutory instrument being derived from the wording of Departmental Circular 05/05 which in turn came from previous circulars such as 16/91\(^{35}\). He went on to say that the judgment of Lord Hoffman in the Tesco Stores case supra remained good law under the CIL Regulations as did the ratio of that case (as to which see section 20.4.2 above)\(^{36}\). The judgment of Bean J. then continued in terms which reflect the judgment of Lord Keith in the Tesco Stores case in that he stated that

(a) an offered planning obligation which has nothing to do with the development save that it is offered by the developer will not be a material consideration and “can only be regarded as an attempt to buy planning permission”;
(b) if there is more than a de minimis connection between the proposed development and the planning obligations then it is for the decision maker to determine the extent to which the planning obligations affect the decision.

In Smyth v Secretary of State for Communities and Local Government\(^{37}\) it was submitted that reg. 122 had now overruled the House of Lords decision in Tesco Stores but Paterson J rejected this submission and stated that: “It is clear that the new statutory test in CIL reg. 122 mirrors that which previously existed in policy guidance. The novelty is that those tests are now in statutory form. What difference does that make? In my judgement, the role for the Inspector is to apply the law and to judge whether the obligation before him meets the statutory tests. That is a matter for his planning judgement. The role of the court is to review that judgment on conventional public law principles and no more. It is not to step into the Inspector's shoes and start exercising its own planning judgement on the matters before the Inspector. That would be an impermissible exercise of its powers.”\(^{38}\)

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\(^{31}\) [2011] EWHC 3931 (Admin)
\(^{32}\) Para. 8
\(^{33}\) [2013] EWHC 1638 (Admin) at para.88
\(^{34}\) [2012] EWHC 140 (Admin)
\(^{35}\) Para. 48
\(^{36}\) Para. 50
\(^{37}\) [2013] EWHC 3844 (Admin)
\(^{38}\) Para. 192 agreed by the Court of Appeal in [2015] EWCA Civ 174 in judgment of Sales LJ at para. 117.
Paterson J. then further stated in R (oao Tesco Stores Limited) v Forest of Dean DC\(^{39}\) as regards the reg 122 tests that not only must a local planning authority apply the law set out in the CIL Regulations to its decision making process but as regards planning obligations offered by a developer the approach of the decision-maker to the Assessment of the statutory tests must be with “appropriate vigour” depending on the circumstances of the case.

A slightly different approach was adopted in Oxfordshire CC v Secretary of State for Communities and Local Government\(^{40}\) by Lang J. DBE when pointed out that the heading to reg. 122 is “Limitation on the use of planning obligations” signalling that its purpose is to restrict the use of planning obligations to prevent inappropriate or improper use of them by developers or local authorities.\(^{41}\) Although similar constraints are included in planning policy and guidance there is a distinction “in that reg. 122 must be adhered to” as it is a statutory requirement and not a policy which can be departed from for good reason nor is it guidance which has to be considered but not necessarily followed.

In the Welcome Break case Bean J. considered that it was for the committee to decide whether the planning obligations were necessary to make the development acceptable but for the court to decide whether the planning obligations directly related to the proposed development. He held that obligations to obtain a proportion of stock and produce locally for the proposed motorway service area and to have a local employment and training policy did directly relate to the proposed development.

In the Persimmon Homes case when referring to the Tesco Stores case the learned judge stated that “that was a case which demonstrated the mischief with which regulation 122 might be said to be intended to deal.” The Persimmon Homes case concerned a refusal of planning permission for a residential development of 200 homes on the ground that it was a piecemeal development which was unacceptable as an area action plan was being consulted on to which future developments would need to conform. Although the developer offered some planning obligations it was considered that these only addressed the immediate impact of the proposed development site rather than the overall impact of the development upon the sustainable urban extension as a whole. This was too narrow an approach by the judge\(^{42}\). In deciding whether the necessary requirement of reg. 122(2)(a) was satisfied the judge stated that this meant that it had to be determined what is necessary to make the development acceptable in planning terms which in turn requires consideration of the development plan which in this case bought in the core strategy and emerging area action plan\(^{43}\). No contribution was being offered to mitigate the costs of the infrastructure requirements of the wider area and the judge considered that some contribution to those requirements was necessary to make the development acceptable in planning terms. The Inspector’s decision was upheld on the basis that the refusal was justified because there was no realistic assessment of apportionment of the overall infrastructure costs referable to the area action plan.

\(^{39}\) [2014] EWHC 3348 (Admin) at para. 111
\(^{40}\) [2012] EWHC 186 (Admin)
\(^{41}\) Para. 29
\(^{42}\) Para. 21
\(^{43}\) Para. 18
(ii) **Reason for grant of planning permission** – to trigger the operation of reg. 122 and the application of the statutory tests it now appears that the planning obligation must be a reason for granting planning permission for the development. At the time of the Tesco Stores case there was no obligation on the committee to give reasons for a decision to grant planning permission. Full reasons for a refusal had to be given from 3rd June 1995\(^44\) and from 6th December 2003 it has been required that a summary of the reasons for the grant of a planning permission be given.\(^45\)

Lewison LJ stated in R (oao Savage) v Mansfield DC\(^46\) that reg. 122 “will only be engaged if that particular planning obligation was a reason for granting planning permission. If proposed development is acceptable in planning terms the securing of additional planning benefits by means of planning obligations is not unlawful: Derwent Holdings Limited v Trafford BC.”\(^47\) This reflects para. 62 of the DCLG’s Community Infrastructure Levy An Overview May 2011 it is stated that it is unlawful to take into account planning obligations which do not satisfy the statutory tests in reg. 122 when determining a planning application.

In the Savage case the provision in the planning agreement alleged to be unlawful was originally a provision that if the planning permission was revoked or modified then the developer would not claim compensation from the Council. This was varied to an obligation to repay any compensation received so as to bring it within section 106. It was challenged on the ground that it did not overcome a legitimate planning obligation and was not necessary to do so and thus fell foul of reg. 122. Lewison LJ considered that as the provision could not be invoked if the development was completed it meant that the committee must have thought that the built development would be acceptable in planning terms without regard to the provision. He reasoned that any environmental impact must be caused by the actual development rather than the grant of planning permission and the provision could not operate once the development had been completed so it had not been used to overcome a planning objection. No mention of the provision was made in either the stated reasons for the grant of planning permission or the summary in the officers’ report but from the reasoning in his judgment and the need for such reasoning it appears that Lewison LJ did not consider the absence of any reference to the provision in either summary to be conclusive on this point. In consequence the planning obligation was valid.

The effect of this decision appears to be to create a class of valid planning obligation which is outside the scope of reg. 122. The type of provision considered in the Savage case does not on the facts fall into the type of offer described as an unconnected offer buying the planning permission. In the Derwent Holdings case (considered in (iii) below) the permissible planning obligations were to secure the planning benefits

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\(^{44}\) Town and Country Planning (General Development Procedure) Order 1995/419 article 22(1)(a)

\(^{45}\) Now in the Town and Country Planning (Development and Management Procedure) (England) Order 2010/2184 article 31(1)(a)(i) but this does not need to be a full statement of reasons as with a refusal (R (Siraj) v Kirklees Metropolitan Council [2010] EWCA 1286). However, the court must not conduct a paper chase in order to ascertain the reasons (para. 28 Sullivan LJ in R (oao Macrae) v Herefordshire CC [2012] EWCA 457). Documents that are cross-referred to in the summary may be looked at such as the officers’ report but not documents such as minutes of the committee meeting which are not mentioned.

\(^{46}\) [2015] EWCA Civ 4 at para. 68

\(^{47}\) [2011] EWCA Civ 832 at para. 15
anticipated by the developments and there was regarded to be a direct connection between the planning obligations and the proposed development. This connection between the developments and the planning obligations is crucial. The reference to “additional planning benefits” in the dicta of Lewison LJ quoted above is to planning benefits within the context of the relevant planning application or applications. Any suggestion that such dicta indicate there is no need for such a connection would be incorrect. The Savage decision is not opening the way for valid planning obligations unconnected with the proposed development.

Planning obligations may still be valid even if not satisfying the tests in reg. 122 provided that they are for planning purposes and are not taken into account by the decision-maker. Once the decision is made what is stated on behalf of the committee or the Inspector if on appeal should determine what is taken into account when reaching a decision on a planning application. Reference may be made to the officers’ report to the committee. If the committee refers to the report in the summary of reasons then it will be. If there is no reference then it may be even if perhaps it should not be. What will not happen is that the Court will not substitute its own judgment as to the weight that should be attached to matters.

It has been suggested that there is a difference between a planning obligation which is a reason for the grant of planning permission and one which overcomes a reason for a refusal of grant. Only the former it is suggested should be within the operation of reg. 122. This seems to be a semantic difference which lacks substance. It has not been supported by any of the judgments so far regarding reg. 122. There may be a greater risk that planning obligations offered to overcome a reason for a refusal are not necessary to make a proposed development acceptable in planning terms but are for a planning purpose and so valid. That does not mean that all planning obligations to overcome a refusal are outside the operation of reg. 122.

One point that was not expressly considered in the judgments in the Savage case is that the phrase “constitute a reason for planning permission” appears not only in reg. 122 but also twice in reg. 123 as regards the limitations by reference to the authority’s reg. 123 list of infrastructure (see section 20.5 below) and the limitation on the pooling of infrastructure contributions (see section 20.6 below). If the phrase in reg. 122 has the effect of applying to only some planning obligations then that should also be the case in both instances in reg. 123. At the very least the Savage decision has created uncertainty and given rise to the possibility that certain valid planning obligations will not be caught by either limitation in reg. 123. If so then one would expect that possibility will be regarded by the government as a loophole.

(iii) Cross-subsidy and enabling developments - in Derwent Holdings Limited v Trafford BC [2011] EWCA Civ 832 a challenge had been made to a planning permission granted for a large superstore (“the Tesco site”) and the redevelopment of the nearby Old Trafford Cricket Club following a single joint planning application. The two were linked by a pedestrian walkway. The Tesco site was to be purchased by Tesco from the Council and the purchase price of £21 million was to be applied in the redevelopment of the cricket ground. A planning agreement was proposed in which one of the provisions would prevent the opening of the Tesco superstore until a contract for the works to the cricket stadium had been entered into. This was not an enabling development but treated as one under which there was a cross-subsidy. Both
elements of the application were considered separately and each was regarded as being planning acceptable and the cross-subsidy was not required to justify any objectionable element in the application. The challenge was by another developer which had been refused planning permission for a superstore and the refurbishment of several existing units on a site several hundred metres from the Tesco site. One of the grounds for the challenge was that reg. 122 was not complied with but that was rejected both by Judge Waksman QC\textsuperscript{48} and the Court of Appeal\textsuperscript{49}. The obligations were regarded as a means of securing planning benefits for the area which would result from the development of the Old Trafford Stadium. Carnwarth LJ (as he then was) stated that there “is nothing objectionable in principle in a council and a developer entering into an agreement to secure objectives which are regarded as desirable for the area, whether or not they are necessary to strengthen the planning case for a particular development.”\textsuperscript{50} Similarly Judge Waksman QC had made the point that obligations seeking to bring about the planning benefits linked to the site would not make those obligations illegitimate.\textsuperscript{51} The agreement did not provide the funding as that was achieved through the sale of the Tesco site by the Council. In contrast the committee were advised that an offer of equivalent funding by the challenging developer was not material due to the lack of a sufficient relationship between that developer’s site and the stadium.\textsuperscript{52}

The issue of a subsidy payable pursuant to a planning obligation arising from one development site for the benefit of another site arose again in R (oao Thakeham Village Action Limited) v Horsham DC\textsuperscript{53}. It concerned two sites in Thakeham used by a mushroom growing enterprise. Two planning applications were made - for a residential development on one and for new buildings for mushroom growing on the other site. One ground of challenge by the local action group was that reg. 122 had not been complied with because the planning obligations included an obligation in relation to the residential development site to pay a subsidy and other obligations to support the mushroom growing site and this was to be viewed as an attempt to buy a planning permission and the two applications were not connected. Lindblom J. considered that the requirements of reg. 122 and para. 204 NPPF had been satisfied. A financial contribution whose purpose is to enable another development to proceed can be a material consideration if there is a sufficient connection between the proposal and that other development\textsuperscript{54}. Such a financial contribution may be a decisive factor in a planning decision. It may outweigh factors telling against the grant of planning permission such as conflict with relevant policy in the development plan.

Lindblom J. stated that the principle applied in the Derwent Holdings case did not require that the two sites were been dealt with by a single planning application rather than two.\textsuperscript{55} Nor were the principles of enabling development limited to ventures seeking to protect a heritage asset or a public amenity such as a sports ground as in the Derwent Holdings case.\textsuperscript{56} Rather the judge considered that the scope for an

\begin{footnotesize}
\textsuperscript{48} [2011] EWHC 491 (Admin)
\textsuperscript{49} [2011] EWCA Civ 832
\textsuperscript{50} Para. 15
\textsuperscript{51} Para. 82
\textsuperscript{52} Para. 19 judgment of Carnwath LJ
\textsuperscript{53} [2014] EWHC 67 (Admin)
\textsuperscript{54} Paras 165 and 201applying R v Westminster City Council ex parte Monahan [1989] JPL 107
\textsuperscript{55} Para. 212
\textsuperscript{56} Para. 213
\end{footnotesize}
enabling development is wide ranging provided that there is a real connection between the benefits and the development. In this case the connection was real and in the judge’s view strong because it was a matter of geography and history as well as the two proposals being “mutually dependent” as a matter of economic reality.

Both the Persimmon and Derwent Holdings cases were also referred to in R (oao Hampton Bishop Parish Council) v Herefordshire Council which concerned a planning obligation that the new ground would only be occupied once there had been a transfer of the rugby club’s existing grounds for a nominal sum to the Council. The new grounds was three kilometres from the centre of town for which planning permission was needed. The transfer retained the old grounds as a public amenity. The decision to grant the required planning permission was challenged by the parish council for the area in which the new grounds were located. Again one ground for the challenge was that the obligation was in breach of reg. 122(2) and an attempt to purchase the planning permission for the new grounds. This was rejected because the obligation was held to be directly related to the proposed development and the future use of the old ground was a material consideration in respect of the proposed development. Hickinbottom J. agreed with HHJ Purle QC when he emphasised that what is necessary for the purposes of regulation 122 is defined in terms of what is required “to make the development acceptable in planning terms”; and, therefore, a simple “but for test” is inadequate. What is acceptable in planning terms is dependent upon a complex web of policies and other material considerations and a series of planning judgments.”

If this obligation had not be extracted it could not be stated with certainty what alternative would have been negotiated. However, the judge considered that it “can be said that, in this finely balanced matter, with the s.106 obligations as agreed, the proposal was acceptable in planning terms; and without them, as it stood it would not have been.” In consequence the requirements of reg. 122 were satisfied. In this case the particular planning obligations to which objection was taken were held to be needed to secure the planning permission for the new rugby grounds rather than as in the Derwent Holdings case to secure planning benefits.

(iv) Financial contributions - notwithstanding that the Persimmon Homes decision supported the proposition that pooled costs could in appropriate cases satisfy the requirements of regulation 122 it does not follow that they are bound to do so. In the Telford and Wrekin BC case a planning obligation to pay a highway contribution was held not to be necessary because the calculation of the sum was based on an almost certainly false premise. This meant that the particular planning obligation could not be a reason for granting planning permission but in that case the remaining merits of the application were sufficient for the Inspector to grant planning. This was upheld on the appeal. There was a blue pencil clause in the planning agreement providing that any obligation found by the Inspector not to comply with regulation 122 shall be cancelled but that cancellation will not affect the validity or enforceability of the planning agreement. In consequence the Council lost the highway contribution but failed to defeat the planning permission whilst the developer retained the permission and did

57 Lord Collins in R (oao Sainsburys Supermarkets Limited) v Wolverhampton City Council [2010] UKSC 20
58 Para. 207
59 [2013] EWHC 3947 (Admin)
60 Para. 37
61 Paragraph 15 of the planning agreement set out in para. 85 of the judgment.
not have to pay the highway contribution. This illustrates the risk to an authority in having such a clause in a planning agreement. Turner J. stated that even if there had been a preamble to the planning agreement stating that the obligations in the agreement were compliant with regulation 122 (as in the Derwent case) that would not have changed the result because that was an issue for the Inspector.  

Another example of a planning obligation continuing to be enforceable even though found by an Inspector to not be necessary in planning terms is R (oao Millgate Development Limited v Wokingham BC. Planning permission had been refused for a residential development of 14 dwellings and one ground for the refusal was that the proposed development would have an unacceptable adverse impact upon the amenities of the area. It was indicated on appeal that this could be overcome by an unilateral undertaking which was duly offered containing obligations to make contributions to schools, highways and leisure and library facilities on or before the commencement of development. The Inspector concluded that contributions to the provision of infrastructure were not necessary within reg. 122(2)(a) because there was no evidence to show that they were and the Inspector afforded the unilateral undertakings little weight. Planning permission was granted on the appeal and the development completed but no contributions were paid by the developer. Lord Hoffman in the Tesco Stores case had stated that normally planning obligations are conditional upon the grant of planning permission but once that condition is satisfied the planning obligations are thereafter enforceable and cannot be challenged by the developer or a successor “on the ground that it lacked a sufficient nexus with the proposed development.” In this case the developer argued that although the planning obligations were lawful when given it was unlawful for the Council to attempt to enforce the obligations. Pill LJ stated that “Planning permission without giving weight to the undertaking does not mean that the undertaking was not given for a legitimate planning purpose.” There was no finding by the Inspector that the undertaking was not given for planning purposes and so it could be a “a valid contribution for planning purposes” in accordance with the Tesco Stores case. In consequence it was still open to the Council to enforce the undertaking by a private law action in contract albeit that defences may be put forward by the developer in that action.

The developer could probably have obtained planning permission without offering the planning obligations and so avoided a significant financial liability. The Court of Appeal judgment serves to illustrate that planning obligations can be valid and enforced even if not “necessary” to make the proposed development acceptable in planning terms provided that (i) no account of the obligation is taken by the decision-maker when deciding to grant planning permission; and (ii) it was given for a valid planning purpose in relation to the proposed development.

(v) Out of town developments - planning obligations seeking to mitigate harm to a town centre resulting from an out of town supermarket development were held on the facts of the case to be a breach of reg. 122(2)(a) but not (b) in R (oao Mid Counties

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62 Para. 104
63 [2011] EWCA Civ 1062
64 Supra at para. 49
65 Para. 22(f)
66 Para. 31
Co-operative) v Forest of Dean DC\(^{67}\). The obligations were held to be directly related to the development in that they were capable of encouraging some customers to shop in the main shopping centre in Cinderford Town Centre. However, there was no analysis or information to show how, and the extent to which, the obligations would mitigate the harm. In consequence it could not be shown that the obligations were necessary to make the development acceptable in planning terms. Surprisingly this failure was held not to have been corrected notwithstanding a second officers’ report when a second planning permission was challenged on the same ground of failure to comply with reg. 122(2)(a) (R (oao Mid Counties Co-operative) v Forest of Dean DC\(^{68}\). There was no explanation as to how the planning obligations would or might encourage more visits to the town centre and so no material to satisfy the Council that the contributions would mitigate the harm caused by the out of town development that it had been stated earlier on behalf of the Secretary of State would be substantial.

Paterson J. stated in R (oao Tesco Stores Limited) v Forest of Dean DC\(^{69}\) that the two Mid Counties decisions were authority for the proposition that a local planning authority when presented with a section 106 obligation needs enough information to be able to appraise the contributions on offer and in particular the extent to which the contributions will reduce the identified harm. That case also involved a package of planning obligations aimed at reducing the harm which would be caused by the proposed out of town supermarket development. It was distinguished from the two Mid Counties cases on the basis that there was no prior decision on behalf of the Secretary of State detailing the likely harm and that there was sufficient information upon which to base a decision. It was open to the committee to decide that important benefits such as job provision were sufficient when taking into account the planning obligations so as to enable the statutory tests to be satisfied when deciding that the advantages outweighed the harm to the town centre. Similarly in R (oao Trashorfield Limited) v Bristol City Council\(^{70}\) planning obligations including a contribution to town centre improvement were held to have complied with the tests in reg. 122 on the basis that the adverse impact of the proposed supermarket had been considered as had the mitigation proposals so distinguishing it from the first Mid Counties decision.\(^{71}\)

(vi) Administration and monitoring fees – in Oxford CC v Secretary of State for Communities and Local Government\(^{72}\) Lang J. DBE held that a planning obligation providing for the payment of a fee in relation to the Council’s administration and monitoring costs did not comply with reg. 122(2)(a) as it was not necessary. It had been the standard practice of the Council to include such a requirement. Contrary to other decisions on reg. 122 the judge considered that the “necessary” requirement in reg. 122(2)(a) imposes a high threshold\(^{73}\). She stated that it is not enough that the relevant planning obligation was desirable. Unlike with CIL which allows CIL to be applied in the defrayment of administrative costs (reg. 61) there is no similar provision as regards section 106 obligations. The judge considered that the Inspector was entitled to assume that such costs had been included in the Council’s budget as it

\(^{67}\) [2013] EWHC 1908 (Admin)
\(^{68}\) [2014] EWHC 3059 (Admin)
\(^{69}\) [2014] EWHC 3348 (Admin) at para 25
\(^{70}\) [2014] EWHC 757 (Admin)
\(^{71}\) Para. 67
\(^{72}\) [2015] EWHC 186 (Admin)
\(^{73}\) Para. 52
was part of the Council’s functions to administer, monitor and enforce section 106 obligations and so such an obligation was not necessary to make the development acceptable in planning terms. As there was a blue pencil clause this did not taint the planning permission. Could such an obligation be supported by the decision in the Savage case (see (ii) above)? Is it a planning obligation which is not a reason for the grant of planning permission but which secures a planning advantage in accord with the decision in Derwent Holdings?

(vii) Alternative powers- reg. 122 only applies to planning obligations arising pursuant to section 106 of the 1990 Act. An obligation pursuant to a different statutory provision will not be caught by reg. 122 and cannot infringe it. In consequence just as planning obligations were used to circumvent the limitations placed on planning conditions so other statutory powers may in the future be used to circumvent the limitations imposed by reg. 122. If so the advantage of being able to enforce positive obligations against successors in title may, but will not necessarily, be lost. This is an important point which would need to be carefully considered. On a planning application or appeal the decision maker would need to know whether the burden of any obligation ran with the land as this could affect whether it is a material consideration. It is to be expected that such obligations will still be subject to the fundamental principle that planning permissions should not be purchased by obligations unconnected with the proposed development.

There are a number of statutory provisions which could be considered as alternatives but it will be necessary in each case to determine whether such powers are subject to a limitation which prevents their exercise contrary to reg. 122. Section 111 of the Local Government Act 1972 confers the power on a local authority “to do anything” provided that it is ancillary to a function of the authority and subject to the provisions of this Act and any other enactment passed before or after this Act. The heading to the section refers to “subsidiary powers”. The attraction of this statutory provision, if applicable, is that the exercise does not have to be for a planning purpose. By reason of section 33 Local Government (Miscellaneous Provisions) Act 1982 covenants to carry out work or do any other thing on or in relation to the covenantor’s land may be enforceable against a successor. If applicable section 16 of the Greater London Council (General Powers) Act 1974 and section 609 of the Housing Act 1985 both allow covenants with local authorities to be enforced against successors although in that respect the second provision will only apply to restrictive and not positive covenants.

Interesting points could arise as a result of the exploration of such routes. For example, every local authority in Wales has the power to do anything which it considers likely to promote or improve the economic or social or environmental well-being of the authority’s area. This does not permit an authority to do anything

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74 In Westminster City Council v Secretary of State for Communities and Local Government [2013] EWHC 690 a personal undertaking not to apply for a parking permit which had been wrongly classified as a section 106 planning obligation and which did not run with the land was wrongly taken into account by an Inspector (see para. 23) with the result that the decision was set aside.

75 In R (oao Houghton and Wyton PC) v Huntingdonshire DC [2013] EWHC 1476 (Admin) it was held that neither s11 1972 Act or section 2 LGA 2000 authorised planning guidance which did not comply with section 17 of the Planning and Compulsory Purchase Act 2004.

76 Section 2 Local Government Act 2000
“which they are unable to do by virtue of any prohibition, restriction or limitation on their powers which is contained in any enactment (whenever passed or made)”.

Will the limitation in reg. 122 be such a limitation? Similarly, section 1 of the Localism Act 2011 confers on a local authority “power to do anything that individuals generally may do.” However, this general power is subject to two limitations which may be material in this context. First, restrictions on a pre-commencement power will apply to an exercise of this general power so far as the powers overlap. Second, this general power does not enable a local authority to do anything which it was unable to do by reason of a pre-commencement limitation.

Whether there is an ability to enforce against successors will particularly need to be addressed with regard to any exercise of such provisions.

20.5 Infrastructure list –

20.5.1 Regulation 123 list - a planning obligation may not provide for the funding or provision of relevant infrastructure other than scheduled works within Schedule 1 of Crossrail Act 2008 (reg. 123(2) and para. 5.5 above) and infrastructure which is covered only by CIL receipts dealt with by reg. 59E (which concerns CIL receipts unspent by a local council applied in the local area by a charging authority pursuant to reg. 59E(10)) and reg. 59F (which concerns CIL receipts applied in a local area by a charging authority because there is no local council).

The objective of the restriction is to restrict the scope for double charging and to seek to avoid the situation where the developer pays for infrastructure through the CIL charge but also has to provide or contribute to the infrastructure under a section 106 planning obligation. Relevant infrastructure comprises infrastructure projects or types of infrastructure contained in a list on a charging authority’s website (reg. 123(4) see section 5.5 above). The reg. 123 list of infrastructure will set out that infrastructure which is to be funded exclusively from CIL receipts. If there is no list then subject to one exception the authority cannot take into account a section 106 obligation in relation to any infrastructure when granting planning permission as in those circumstances all infrastructure will be funded by CIL. The exception is highway infrastructure. If there is no reg. 123 list of infrastructure then there will be no restriction with regard to highway agreements.

This restriction is in addition to the pooling restriction (see section 20.6 below). A planning obligation providing for a contribution to infrastructure costs which does not infringe the pooling restrictions can still fall if an infringement of this restriction.

20.5.2 Obligations outside limitation – as discussed in section 20.4.4(ii) and (iii) above in the context of reg. 122 the Savage and Derwent holdings decisions open up the possibility that there can be a valid planning obligation which is not a reason for granting planning permission. If this is correct then in so far as such an obligation relates to the provision or funding of a type of infrastructure or infrastructure project it will not be caught by this prohibition. This probably does not accord with the government’s intention when introducing this restriction.

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77 Section 3(1).
78 see R (oao Houghton and Wyton PC) v Huntingdonshire DC [2013] EWHC 1476 (Admin)
79 Section 2(1)
80 Section 2(2)
The other class of obligation which is outside the scope of this restriction is if imposed by exercising a statutory power other than section 106 of the 1990 Act (discussed in the context of reg. 122 in section 20.4.4(vii) above).

20.5.3 Composition of the reg. 123 list of infrastructure - this restriction applies to a planning determination after the date when the relevant charging authority’s first charging schedule takes effect. Once the charging authority brings into operation the CIL regime in its area then if it publishes a reg. 123 list planning obligations cannot be used to fund any type of infrastructure or infrastructure project contained in that list even if this could be justified as site specific works. If the authority has no such list then no infrastructure can be provided or funded through a section 106 obligation. There is one exception as it will continue to be possible to raise a contribution to the Crossrail project using section 106 agreements (see para. 20.12 below).

This restriction applies to planning obligations “to the extent that the obligation provides for the funding or provision of relevant infrastructure” (reg. 123(2)). Both the provision and funding of infrastructure are caught. Planning purposes are wider than just matters concerning infrastructure and to the extent that a planning obligation is not concerned with infrastructure it will not be affected by this limitation. Some obligations may be on the borderline and give rise to argument.

The definition of relevant infrastructure lacks precision. As regards types of infrastructure is this limited to generic types of infrastructure and if it is how are they to be determined for this purpose? Is it possible to break down generic types of infrastructure into smaller classes of sub-group? For instance, is it possible to limit the reg. 123 list to say secondary education thereby excluding primary education or will the reference to secondary education mean that all education is treated as being covered by the reg. 123 list of infrastructure? Each local planning authority is to be free to decide which types of infrastructure to exclusively fund from CIL receipts. It would seem illogical to limit that freedom to generic types and not allow the freedom to select parts only. Further it would seem to be an unfair trap to encourage authorities to take care in drafting the reg. 123 list and arranging budgets for infrastructure funding for the authorities to then fall foul of such an application of reg. 123(2) particularly as such an approach has not been spelt out. The draft reg. 123 list of infrastructure now has to be taken into account during the examination stage and it would throw that process into chaos if references to a restricted class of infrastructure causes the whole type of infrastructure without limit to be treated as included in the list.

Another risk for authorities with regard to the operation of the limitation in reg. 123(2) that has been highlighted is that infrastructure projects could blur into types of infrastructure. To avoid this it is necessary to use wording which makes clear that an entry concerns a project rather than a type of infrastructure.

It may be preferable to deal with some infrastructure projects by section 106 planning obligations in which case it would be sensible for the relevant charging authority to have a reg. 123 list but to omit the project from the list. This will permit the authority to impose a planning obligation with regard to the project. For example, a large residential development may throw up a need for a new school or an increase in the
capacity of a local school. The CIL charge payable by the residential developer will not fund the whole of this school project. In consequence it is better for the authority to exclude the project from its reg. 123 list and to fund the carrying out of this project through planning obligations imposed on the residential developer. The list could include education infrastructure but expressly exclude the particular local school. A better method would be for the reg. 123 list to only contain infrastructure projects such as a named local school but not include types of infrastructure. However, by itself this will not ensure that a section 106 planning obligation can be imposed in relation to the local school as it will still be necessary to comply with the “pooling restrictions” (see section 20.6 below).

20.5.4 Variation of reg. 123 list of infrastructure - the government has expressed concern that authorities may change the reg. 123 list to allow section 106 obligations to be imposed. However, the suggestion in the 2013 consultation that it would introduce controls has come to nothing and no provision was included in the 2014 Regulations. This may be an issue which it will have to revert to dependent on what practices develop on the part of authorities. The ability to change the list will mean that a careful eye will need to be kept on such published lists to ensure any changes do not go unnoticed.

20.6 Pooling – an important use of section 106 planning obligations has been to obtain financial contributions from a developer to contribute to the wider infrastructure implications of the proposed development.\(^81\) This is on the basis that the costs of wider off-site infrastructure needs should be shared amongst the development sites whose developments will impact on those infrastructure issues. This is the type of infrastructure problem that CIL is designed to meet and CIL is the government’s preferred vehicle for the collection of pooled contributions.\(^82\) In consequence it has introduced a specific limitation with the objective of drastically reducing the ability of authorities to collect financial contributions by means of section 106 planning obligations. The CIL regime has not imposed an absolute across the board prohibition of such contributions which would have had the advantage of certainty. Instead a restriction which is much more cumbersome and uncertain in operation has been opted for. However, the restriction may not be as stringent as believed and it will be interesting to see how this particular issue develops now that more authorities have introduced CIL.

As yet there has been no direct authority on the operation of this restriction but it was considered in general terms by Patterson J. when she stated\(^83\) that

“However, what reg 123 does is to effect an implementation of a new regime for securing pooled contributions. Second, it does not impose an absolute guillotine upon pooled contributions. Rather, they can be provided through a CIL charging schedule which will have to have been established through public examination. Councils seeking to raise money towards community infrastructure through obligations will have to be more transparent about their basis for doing so and to provide evidence for

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\(^{81}\) R v South Northamptonshire DC ex parte Crest Homes plc (1994) 93 LGR 205.

\(^{82}\) Para. 67 DCLG’s Community Infrastructure Levy An Overview May 2011

\(^{83}\) Para 196 Smyth v Secretary of State for Communities and Local Government [2013] EWHC 3844 (Admin) approved by Court of Appeal [2015] EWCA Civ 174
their approach. There is nothing to stop Councils adapting to the new regime and incorporating within that pooled methods of charging. They will simply not be able to employ that approach to more than five pooled contributions in planning obligations other than those that are under the CIL charging Schedule which will ensure that the approach to the future use of pooled contributions is set out at the examination and will be evidence based."

This restriction in reg. 123(4) is a very heavy incentive to encourage authorities to bring into force the CIL regime and explains the accelerating number of authorities carrying forward the process leading to publication of a charging schedule. Despite this there are a number of authorities which have not managed to beat the new deadline of 6th April 2015. These may face infrastructure funding problems. This may in turn result in an increased number of refusals of applications for residential developments if it is not possible to use pooled contributions to mitigate the impact of the proposed development on off-site infrastructure needs. This in turn will lead to a fall in new housing. To overcome this problem authorities which have not introduced CIL may seek to focus on funding new specific infrastructure projects with pooled contributions. This will favour larger developments which can make larger contributions to the pool so squeezing in under the restrictions imposed by the “pooling restriction”.

An example of a residential development giving rise to both a CIL charge and a section 106 planning contribution is the Redrow development in Shifnal, Shropshire which will result in 55 houses and ten affordable properties. The CIL charge is £350,000 and in addition there is a travel contribution of £200,000.

20.6.1 Restriction – the application of this restriction to a planning obligation has to be considered in relation to a planning determination on or after 6th April 2015 (originally 6th April 2014 but extended by reg. 12(c) 2014 Regulations) or if earlier the date when the relevant charging authority’s first charging schedule. A planning obligation cannot provide for the funding or provision of an infrastructure project or type of infrastructure by pooled contributions if five or more separate planning obligations relating to planning permissions granted for development within the charging authority’s area have been entered into on or after 6th April 2010 and already provide for the provision or funding of such infrastructure project or type of infrastructure.

Although it is not clearly spelt out the limitation operates separately as regards types of infrastructure and infrastructure projects. This is an issue on which requests for guidance have been made but none has been given. It means that if five planning obligations providing for a type of infrastructure have been entered into since 6th April 2010 in a planning area then no more can be imposed as the limit has been reached. However, it is still possible to impose planning obligations in relation to a specific infrastructure projects within that type of infrastructure provided that the separate limit in relation to the specific project has not been breached and the project does not appear on the authority’s reg. 123 list.

To take a simple example if since 6th April 2010 an authority has imposed five planning obligations to contribute to the provision of education in the area then no more such planning obligations can be imposed. This does not preclude the authority
from seeking contributions to a specific project relating to education even though none can be sought with regard to the general type of education infrastructure. In consequence it will still be possible to require a contribution to the construction or enlargement of a local school unless that appears on the reg. 123 list. Contributions to such a project will be subject to a standalone limitation. Attempts by authorities to circumvent this by dividing up this single project into a number of projects, such as classrooms, will be likely to cause problems in the future for the authority.

This means that even if a charging authority has not introduced the CIL regime in its area it will not after 5th April 2015 have an unlimited ability to impose planning obligations to fund its off-site infrastructure needs using pooled contributions. From that date there will be a limit of a maximum of five planning obligations to fund any project of infrastructure or type of infrastructure by a section 106 contribution. If the authority introduces the CIL regime earlier then this pooling restriction will apply from that earlier date. It is estimated that the process of introducing the CIL regime takes up to thirty months to complete and even many authorities which had already embarked on it would not have completed by the original April 2014 deadline. The extension will have allowed a number of authorities to meet this deadline but many have not. By the new deadline just over eighty authorities have introduced CIL. Following the giving of the extension some authorities adopted charging schedules but postponed the taking of effect until 5th April 2015 in order to avoid the application of the pooling restrictions for the maximum period and to receive the maximum amount of section 106 funding.

20.6.2 Planning obligations not caught – the pooling limit will not apply to matters which cannot be funded by CIL such as affordable housing (see section 20.11 below) or non-infrastructure items such as training. It will also not apply to highway agreements (amendment to reg. 123(3) introduced by reg. 12(c)(i) 2014 Regulations). Any planning obligation relating to Crossrail is also excluded.

As with the tests in reg. 122 the operation of this restriction is triggered by a planning obligation which is taken into account on the grant of planning permission. The Savage and Derwent holdings decision (discussed in section 20.4.4(ii) and (ii) above) indicate that not all planning obligations will trigger the operation of this restriction. Such a planning obligation would be one which is connected with the proposed development but not taken into account by the committee or Inspector if on appeal. If the pooled contribution is needed to mitigate the anticipated harmful effect of the proposed development on the local infrastructure it is hard to see how the committee could not take it into account. The same would be the case in respect of an unilateral undertaking given on an appeal against refusal. Although it has been suggested that the treatment of unilateral undertakings might be different from that relating to bilateral planning obligations there seems to be no justification for this. The crucial question is whether account was taken of the planning obligation to make a financial contribution (whether bilateral or unilateral) when determining whether a planning permission should be granted.

20.6.3 Planning obligations caught – all planning obligations made after 6th April 2010 relating to planning permissions granted for development within the relevant planning area are to be taken into account. There is no express requirement that these planning obligations should have been taken into account when determining the planning permission.
application or appeal. This is in contrast to the planning obligation which has triggered the operation of the restriction.

Included will be planning obligations attached to a section 73 planning permission varying a planning condition. Account is to be taken of planning obligations even if the planning permission to which they relate has not been implemented. The revised June 2014 Planning Practice Guidance (para.95) emphasises that with staged payments under a section 106 obligation the payments will collectively count as one planning obligation. It will also apply across the whole of the authority’s area regardless of any zoning and zero rates of CIL. The query has been raised whether zones with a zero rate would avoid the pooling restriction but that is not the case because the whole of the area will be subject to the restriction regardless of the CIL rate.

A query has been raised as to whether planning obligations relating to time expired planning permission will be taken into account. To be taken into account the planning permission to which the planning obligation is related there is no need for the planning permission to be implemented. However, the point has been made that once the time limit has expired the planning obligation no longer “provide for” the funding or provision for an infrastructure project or type of infrastructure. Such an argument is encouraged by the use of the words “to the extent that” in reg. 123(3). However, it is the date of entry into such obligations which is important rather than their continuation which in turn requires the obligations to make such provision at the date of entry rather than at a later date.

It has been suggested that a route by which the operation of this restriction can be avoided is for the developer to offer the contribution by way of unilateral undertaking rather than the authority requiring it as a planning obligation. Implementation of this suggestion is high risk. It may be that more unilateral planning obligations will be outside the pooling restriction than bilateral planning obligations but this is not because they are unilateral but because they are more likely to be given on an appeal against refusal and may, therefore, be more likely to not be taken into account as a reason for granting planning permission.

20.6.3.1 **Generic description** - as is pointed out in para 2.6.3.2 of the February 2014 CIL Guidance the pooling restriction will hit hardest authorities that refer to infrastructure by a generic description such as education rather than by specific projects. The permitted limit of five planning obligations will soon be used up and thereafter no more can be imposed once CIL has been introduced to the area or if earlier the 6th April 2015 is reached. Then the authority will have no choice but to rely on specific projects.

20.6.3.2 **Duplication of planning obligations** - it is not clear whether all planning obligations in a section 106 agreement relating to the same infrastructure project or type of infrastructure will be counted when determining whether there are already five in existence or will be counted as one. The point has been made in legal blogs that more than one planning obligations in a section 106 agreement can relate to the same infrastructure project. For example, an obligation to make a contribution can be bolstered by an obligation that the site may not be occupied unless and until the contribution is made. Should these count as two relevant planning obligations towards
the limit of five? The same point arises if there is more than one such planning obligation proposed in the draft section 106 agreement. If not counted as one then not all these planning obligations will be valid if the limit is exceeded. The limitation has been deliberately set by reference not to planning agreements but “separate planning obligations”. Weight is added to this point by official guidance which states that an “agreement entered into for the purposes of section 106 may contain more than one planning obligation to which regulation 123 relates.” (para. 91 April 2013 DCLG Guidance repeated in para. 2.6.2.2 of the February 2014 CIL Guidance). However, in the Mayor of London’s guide it refers to “the pooling of contributions from “five or more separate developments” in a local authority’s area (para. 1.12) which appears to have added an unfounded gloss to the wording of reg. 123.

20.6.4 Hybrid approach – Torbay DC are currently in the process of introducing CIL and in its draft charging schedule have incorporated a new approach as regards the CIL rates to be charged. As regards residential development it differentiates by reference to number of units as do other authorities. However, it goes further and charges no CIL on larger residential developments but instead is going to continue to rely on contributions from section 106 planning obligations. This will have to be subject to compliance with the tests in reg. 122 and the restriction relating to the reg. 123 list. In Torbay’s consultation document it states that it has taken into account development costs including the requirement on large residential sites to provide affordable housing. It recognises that particularly in an economic downturn this has a “significantly detrimental effect on the viability of larger residential development”.

As a result, the Draft Charging Schedule proposes a “hybrid” approach where CIL is levied only on smaller residential developments, whilst section 106 obligations will be sought for larger residential proposals to secure affordable housing and other contributions necessary to make the development acceptable in planning terms.” Brownfield sites with 15 or more new dwellings and greenfield sites with 11 or more new dwellings (six or more if in the South Devon Area of Outstanding Beauty or rural exceptions sites) will be zero rated for CIL. Reliance will be placed on section 106 contributions to cover (i) “direct site acceptability matters (biodiversity, flood prevention, access etc”); (ii) affordable housing; and (iii) “sustainable development contributions necessary to make the development acceptable in planning terms” “(education, lifelong learning, sustainable transport, green infrastructure, recreation, employment (etc))”. Such contributions must comply with the tests in reg. 122 and the pooling restriction.

In contrast with smaller residential developments it is stated CIL will be rated at £70 per square metre and section 106 planning obligations will be limited to “direct site acceptability matters which include “access, direct highway works, flooding and biodiversity”.

The CIL regime does not allow for binding statements to be made in the charging schedule as regards section 106 planning obligations. In principle, therefore, on a future planning application for a small residential development to make the proposed development acceptable in planning terms a contribution under a planning obligation may be needed. What is to happen in those circumstances? Further decisions with regard to such planning applications have to be made on the basis of individual planning applications and the circumstances at the time. This hybrid approach by
Torbay is a considered one and it will be interesting to see how it fares both during the examination stage of the process and if introduced thereafter how it operates in practice so as not to trigger the pooling restriction or increase the number of refusals of planning permission.

20.6.5 Verifying limit - The issue as to how it is ascertained whether the limit has been reached has not been addressed by the current regime. There is no separate register of such planning obligations. Part 1 of the register of planning applications will contain information relating to planning obligations proposed and entered in respect of individual applications. How will a developer be able to gather the necessary information to challenge a planning obligation on the ground that this restriction has been infringed? How will local authorities monitor compliance? Authorities are going to have to carry out an audit of planning obligations since 6th April 2010 in order to ensure that this restriction is complied with. It has the potential to store up problems for the future. Challenges could come sometime after the completion of a development. Trawling back through past grants of planning permission is an inefficient method with no certainty that a complete picture will be achieved.

20.6.6 Infringement of restriction – planning permission which is granted in breach of reg. 123(4) can be challenged by way of judicial review proceedings at the instigation of interested parties. This will include developers owning alternative development sites in the area or those with an existing business which will face competition from the proposed development.

20.6.7 Relationship between pre-CIL section 106 contributions and CIL – there will be cases in which financial contributions are due from developers by reason of section 106 planning obligations entered into before the introduction of CIL in the area which have been calculated on the basis that further contributions will be received from the developers of future developments. Once CIL is introduced such further contributions by way of planning obligations will probably not be permissible. The prospect of reg. 123 taking effect was used to challenge such pre-CIL section 106 contributions on the basis that as future contributions would fall away it was a flawed approach. This was rejected by Patterson J. in the Smyth case because the CIL regime included a means of collecting those contributions as CIL and so the prospect of the introduction of this restriction did not impact on the pre-CIL section 106 planning obligations.

20.6.8 Pooling in practice – It is hard to understand how this restriction will operate in practice. For example, if there have been five planning obligations since 6th April 2010 does that mean that no more planning obligations are possible because the limit of five has been hit? Does it mean that the authority has to break down the type of infrastructure into classes of ever smaller scope? What is a type of infrastructure for these purposes? Can the local authority focus on continually creating new infrastructure projects? If it does will these be free from taking into account earlier planning obligations which do not directly relate to the particular project but do relate to the type of infrastructure it concerns? It has been said that this will not be the case but no formal official guidance to this effect has been given. There seem to be numerous questions as to how this restriction will operate with no real guidance in the

84 Section 69 of the 1990 Act and article 36(3) DMPO 2010
regulations. Some of the suggestions on web sites for breaking up projects into ever smaller elements strike me as dangerous. If the authorities get this aspect wrong and impose unlawful planning obligations then when it comes to light there must be a risk that there will be a considerable number of claims going back many years. A bonanza for lawyers and surveyors but with very worrying implications for local authority finance.

20.7 Highway agreements – in order to obtain a planning permission a developer may need to enter an agreement under section 278 of the Highways Act 1980 with the highway authority. This will require the developer to finance or provide highway works. As a result of concern that this could lead to developers paying CIL to fund such infrastructure work and then having to fund or provide the same infrastructure work through a highway agreement the restriction in reg. 123(2) (reg. 123 list – see section 20.5 above) previously applying only to planning obligations has been extended to cover highway agreements as well (reg. 123(2A)). However, the separate pooling restriction (section 20.6 above) remains applicable only to planning obligations and has not been extended to highway agreements. Similarly the statutory test in reg. 122 (section 20.4.4) will only apply to planning obligations and not to highway agreements.

20.7.1 Restriction (reg. 123(2A) - subject to agreements within reg. 123(2B) (see section 20.7.2 below) it will no longer be possible to impose a condition on the grant of planning permission that a highway agreement shall be required for funding or providing “relevant infrastructure”. The definition of relevant infrastructure is not identical to that in the context of planning obligations. It covers infrastructure projects or types of infrastructure which are included in the reg. 123 list of infrastructure published by the charging authority (as to which list see section 5.5 above). This list of infrastructure is intended to be funded exclusively by the charging authority by CIL receipts and cannot also be the subject of a highway agreement. Whereas with planning obligations generally if the charging authority has no reg. 123 list of infrastructure then all infrastructure will be covered by the restriction in contrast with highway agreements the restriction will not bite. However, the reality is that all charging authorities will have such reg. 123 lists but the list may not include reference to any highway project or type of highway infrastructure. When the charging authority and the highway authority are not the same authority there will be a need for the two authorities to liaise to avoid the inadvertent inclusion of an item covering highway schemes thus preventing the use of highway agreements. It may be that in the future references in such lists to highway infrastructure will be kept to a minimum.

This restriction applies to an obligation requiring entry into a highway agreement and also a condition which prevents or restricts the carrying out of a development until a highway agreement is entered into.

20.7.2 Excluded highway agreements - the restriction on highway agreements imposed by reg. 123(2A) will not apply to highway agreements with the Highway Agency acting for the Secretary of State for Transport, the Welsh Ministers or Transport for London. These will concern projects relating to trunk roads which will not be funded through CIL receipts.
20.7.3 When restriction takes effect - this restriction on highway agreements will take effect on the earlier of 6th April 2015 or the date the charging authority publishes a reg. 123 list of infrastructure after 24th April 2014 (being two months after the 2014 Regulations came into force) (reg. 14(5) and (6) 2014 Regulations). It means that with charging authorities with a reg. 123 list of infrastructure published before the 2014 Regulations came into force the restriction will not apply until 6th April 2015. The same is true for those authorities introducing CIL after the 2014 Regulations came into force but before 25th April 2014. With those authorities bringing in CIL after 24th April 2014 but before 6th April 2015 it will be the date the reg. 123 list of infrastructure is introduced.

20.8 Absence of relief – there is no deduction from the CIL charge in respect of any planning obligation imposed in relation to the development nor is there any reduction in any contribution under a planning agreement other than with a Crossrail section 106 contribution (see 19.3 above).

20.9 Purchase of planning permission – one suggested outcome of the imposition of the statutory test for planning obligations was that it would be harder for the grant of planning permission to be encouraged by the applicant agreeing to generous planning obligations not specific to the development site. This is open to doubt if the applicant offers the incentives. This is exemplified by the appeal decision in Barratt Southern Counties’ Bishopdown Farm scheme (APP/Y3940/A/10/2143011). In that case Barratt’s achieved planning permission in Salisbury for 500 homes by a 51 hectare country park. In the section 106 agreement the housebuilder agreed to contribute to the layout and maintenance of the park and to transfer it to the Council. The Inspector rejected this as not satisfying the test on the grounds that the country park’s relationship with the development was limited and the provision was not fairly or reasonably related to the development. The Secretary of State rejected this objection as misguided as the provision regarding the country park was merely part of the application. Provided such provision is offered by the applicant the test is not triggered. It is not clear whether this has to involve land owned by the applicant. It would appear to circumvent the strictness of the test in reg. 122 and to open another route by which the applicant can offer community benefits with a view to gaining acceptance for the particular development. Allowing a CIL liability to be discharged in whole or part by the provision of off-site infrastructure may be another route by which this type of outcome could be achieved.

20.10 Appeals – a new procedure has been introduced by which an application can be made to revise a section 106 planning obligation relating to affordable housing and to appeal to the Secretary of State any refusal (section 106BA, BB, and BC of the 1990 Act inserted by Growth and Infrastructure Act 2013). This is to allow revisions if the original obligation makes the development unviable. A DCLG guide is to be found at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/192641/Section_106_affordable_housing_requirements_-Review_and_appeal.pdf.

20.11 Affordable housing contribution – the CIL regime does not cover affordable housing which remains to be dealt with by section 106 planning obligations.

20.11.1 Restrictions - on 26th March 2015 the Planning Guidance was revised (para. 204-012) to exclude certain developments from the imposition of planning obligations
in relation to affordable housing. Small residential developments of ten units or less with a combined gross floorspace of no more than 1000 square metres are excluded. In designated rural area the threshold may be lowered by the authority to five or less units. If the development in such a rural area is between six and ten units then the affordable housing obligation and any tariff style contribution has to be in cash which is commuted until completion of units on the development. With such developments of between six and ten units affordable housing units cannot be required. Further a development comprising only a residential annex or an extension of an existing house cannot give rise to an affordable housing or tariff style contribution. Similarly such contributions cannot be sought from developments concerning Starter Homes. With regard to all developments subject to this restriction it will still be possible to impose planning obligations in relation to site specific infrastructure needs.

20.11.2 Vacant Building Credit – in order to encourage the development of brownfield sites with empty and redundant buildings a new credit has been introduced (para. 24 021-023 National Planning Practice Guidance). When a residential development of a brownfield with a vacant building is proposed a credit is given against the affordable housing contribution. The gross floorspace of the existing building whether returned to use or demolished in the course of the development will be deducted when calculating the contribution so that only the increase in floorspace is taken into account for this contribution. The credit will not be available if the building has been abandoned. It is not made clear if this credit will be lost or affected if the building has been vacated for the purposes of redevelopment or if there has been planning permission for a residential use previously or currently applicable.

20.12 Crossrail contribution – as well as the Mayoral CIL charge it is possible for a section 106 Crossrail contribution to be required provided that the proposed development will add to the congestion that is to be eased by Crossrail. Financing this project is excluded from the restriction in reg. 123 on funding infrastructure projects (reg. 123(4)). This means that the Crossrail contributions will run until the required sum is raised. However, the areas in which it operates are not identical to those in which the Mayoral CIL charge operates.

20.12.1 Areas – the areas are limited to those in which it is believed that the completed Crossrail project will ease congestion. A section 106 Crossrail contribution can only be sought in Central London; within approximately a kilometre radius of Paddington and Liverpool Street stations; the Isle of Dogs within approximately a kilometre radius of the new Canary Wharf station; and within approximately a kilometre radius of all other Crossrail stations outside the Central London zone. Maps of the contribution areas are contained in the Second Appendix and are reproduced (with the permission of the Mayor of London) from the Supplementary Planning Guidance issued in April 2013 on behalf of the Mayor.

20.12.2 Test – the intention is that a section 106 contribution to the funding of the Crossrail project is to be imposed if it is considered that it is likely that the development will increase or create congestion in London. The requirements of the test contained in reg. 122 (see para. 20.4 above) must be satisfied but a detailed investigation has been carried out to establish which uses contribute to the congestion and to what degree and in what areas. This has resulted in the Mayor of London deciding to operate through the section 106 system a charging regime similar to the
CIL regime. The relevant local authorities will not need to carry out an examination of the circumstances of individual development. Instead a contribution will be required dependent on the intended use of the completed development and the area in which it is located. The Mayor will impose the section 106 Crossrail contribution if deciding the planning application. If the planning application is being decided by the relevant London Borough then it will be expected to impose such obligation and it if fails to do so the mayor may seek to have the planning decision called in by the Secretary of State.

20.12 Rates - as with CIL it is based on the increase in gross internal area resulting from the development but the rules are not identical and there can be cases in which the contribution is determined by reference to internal space which is not exclusively new additional area. In particular the addition of mezzanine floors requiring planning permission for an area greater than 500 square metres will be taken into account for this obligation whereas for CIL it will not be. There are three different charging zones and within these zones there are different rates applicable to retail, office and hotel uses. The differences are based on the evidence established by the investigation that was carried out into how different types of development in different areas contributed to congestion in London. What is proposed by way of charges is set out in the table taken from the Mayor of London’s supplementary planning guidance. These are subject to the initial reductions (as to which see para. 20.11.4.5 below).

| Indicative Level of Charge per sq. m, by land use and location as at July 2010 |
|---------------------------------|----------------|----------------|----------------|
| Central London | Isle of Dogs | Rest of London |
| Including approximate 1 km indicative radii outwards around Paddington and Liverpool Street Stations | Including approximate 1 km indicative radius outwards around the proposed Canary Wharf station at West India Quay inclusive of and south of the Poplar DLR lands | Including approximate 1 km indicative radius outwards around the proposed Canary Wharf station at West India Quay north of the Poplar DLR lands as well as such radii around all other stations outside the Central Contributions Areas apart from Woolwich Arsenal. |
| Office | £140 | £190 | £31 |
| Retail | £90 | £121 | £16 |
| Hotels | £61 | £84 | - |

The following notes are contained in the table by way of explanation:-

**Indicative contribution levels**

Where indicative contribution areas overlap the starting point for negotiations would be the higher of any rates that could be applicable.
Notes to Table 2
Office is defined as any office use including offices that fall within Class B1 Business of the Town and Country Planning (Use Classes) Order 1987 as amended, or any other order altering, amending or varying that Order. Uses that are analogous to offices which are sui generis, such as embassies, will be treated as offices.

Retail is defined as all uses that fall within Classes A1, A2, A3, A4 and A5 of the Town and Country Planning (Use Classes) Order 1987 as amended, or any other order altering, amending or varying that Order, and related sui generis uses including retail warehouse clubs, car showrooms, launderettes.

Hotel means any hotel use including apart-hotels uses that fall within Class C1 Hotel of the Town and Country Planning (Use Classes) Order 1987 as amended, or any other order altering, amending or varying that Order.

In all cases, contributions should be calculated in respect of developments exceeding 500 sq. m. with a net increase in floor area of the relevant use.

For mixed use developments, contributions will be sought on any increase in floor space for any of the three uses (subject to 500 sq. m. threshold)."

20.12.4 Regime – the manner of calculating the section 106 Crossrail contribution is similar to that with CIL in that it is based on gross internal floor area but there are a number of differences. Amongst the material difference are the following:

20.12.4.1 rates – the differential rates are different as shown by the table immediately above;

20.12.4.2 area – the Crossrail contribution operates in a more limited area than CIL as is apparent from the above table;

20.12.4.3 de minimis threshold – developments with a chargeable area of 500 sq. m. or less will not trigger a Crossrail contribution (para. 5.29 Mayor of London’s Guide);

20.12.4.4 economic viability – if the payment of the Crossrail contribution will affect the economic viability of a development then the Mayor’s guidance encourages financial appraisals to be submitted to justify modification of the contribution. With CIL it depends on whether the charging authority has elected for the exceptional circumstances relief to apply.

20.12.4.5 initial reduction – for developments lawfully commenced before 31st March 2013 there is a reduction of 20%. With phased developments this applies only in respect of such phases as are commenced before that date. For the period of twelve months ending on 31st March 2014 there is a reduction of 10% in relation to developments commencing before that date. In the case of planning permissions granted during a period of reduction but not started within that period the reduction will not apply. After 31st March 2014 the full rate will apply.

20.12.4.6 measurement of internal area – the rules are similar to those applicable to CIL (see para. 14.2 above) but not identical. For example, new mezzanine floors which added more than 500 sq. m. of area will trigger the Crossrail contribution but
not a CIL charge. Existing floor space will only be deductible for the purposes of the Crossrail contribution if it has been used for the use classes covered by the policy (see para. 5.11 Mayor of London’s Supplementary Planning Guide and para. 20.11.5 below). The material date is not when the development is first permitted (as with CIL) but when the grant of planning permission is made.

20.12.4.7 **Indexation** – instead of using the All in Tender Price index for the Crossrail contribution the Consumer Price Index is used and is based on the index figure as at April 2011. It is calculated as at the date that the section 106 payment falls due and not the date when the planning permission is granted.

20.12.5 **Mixed user** – when there is a site with mixed use which is to be redeveloped then the internal areas used for each of the existing class of use will be set against the new internal areas for classes of use. In appendix 4 of the Mayor of London’s earlier guide (not as yet repeated in April 2013 guide although reference is made to Appendix 4) the following example is given for a development in the Central London contribution area:

<table>
<thead>
<tr>
<th>Use</th>
<th>Existing Area sq. m.</th>
<th>Theoretical charge</th>
<th>Proposed Development area sq. m</th>
<th>Crossrail charge</th>
<th>Variation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Residential</td>
<td>10,000</td>
<td>No charge</td>
<td>15,000</td>
<td>No charge</td>
<td>Nil</td>
</tr>
<tr>
<td>Retail</td>
<td>15,000</td>
<td>15,000 x £88 = £1.32 m</td>
<td>5,000</td>
<td>5,000 x £88 = £0.44m</td>
<td>-£0.88m</td>
</tr>
<tr>
<td>Office</td>
<td>15,000</td>
<td>15,000 x £137 = £2.035m</td>
<td>10,000</td>
<td>10,000 x £137 = £0.685m</td>
<td>-£0.65m</td>
</tr>
<tr>
<td>Hotel</td>
<td>0</td>
<td>0</td>
<td>35,000</td>
<td>35,000 x £60 = £2.1m</td>
<td>£2.1m</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>£0.35m</td>
</tr>
</tbody>
</table>

20.12.6 **Charity exemption** – the general charity exemption from CIL will apply also to the Crossrail contribution subject to the same qualifications but will not extend to the discretionary charitable exemption in relation to property held by a charity for investment purposes.

20.12.7 **Payment** – the Crossrail contribution will be payable at the time the development commences. However, by agreement it can be deferred if the viability of the development will be adversely affected by immediate payment or the size or nature of the development is such as to require deferred payment. The payment can by agreement be phased or linked to completion of the development.

20.12.8 **Section 73 permissions** - the position with Crossrail contributions arising from section 73 applications will be in line with the CIL position following the amendments in the 2012 regulations (see para. 8.4 above). This means that a further amount will only be payable if the section 73 permission results in an increase in the
gross internal area and if there is a reduction then a repayment will be due but only if more than £10,000 is repayable and there is sufficient evidence to justify the repayment (para. 5.11 of the Mayor of London’s Guide).

20.12.9 Temporary developments – if the planning permission is for a limited period then consideration should be given as to whether this contribution is reasonable. Account is to be taken of the duration and likely impact of the development on the rail network. If for two or more years then it is likely that such a contribution will be sought.

20.12.10 Reporting – TfL is obliged to provide regular reports regarding the monies Crossrail contributions received and their application. The London Plan Annual Monitoring Report will also refer to the receipts.
N. Impact on contracts

21.1 Contractual provisions – there is not just a need to understand how the CIL regime operates and where the liability will or may fall. In addition there is a need to consider what contractual provisions covering CIL need to be included in development and conveyancing documentation. This is an aspect which will need to be kept under regular review and such contractual provisions will be refined and added to as a better understanding is acquired. This is a tentative stab both at setting out the type of provisions which need to be included and which types of documentation will be affected.

21.2 Pre-CIL documentation – CIL will not just impact the formulation of contractual documentation after the introduction of CIL. It will also have an impact on existing contracts entered into prior to the introduction of CIL and possibly before CIL was even considered a possibility. Landowners may find themselves facing a double whammy in that they will have to deal with an unexpected liability which liability may also have reduced the price to be received for the land under an existing arrangement such as an option or a conditional sale agreement. It will be necessary to carefully consider the terms of the arrangement. In some cases it may be possible to achieve a grant of planning permission before CIL is introduced to avoid an adverse impact.

21.3 Types of transaction

21.3.1 Planning promotion agreements – these are arrangements whereby the owner of land retains ownership whilst planning permission is applied for by the “planning promoter” in return for a payment often related to the increase in the value of the land as a result of obtaining planning permission. Areas which will need to be covered in such arrangements are:-

(i) Assumption of liability – it is important to establish who will assume liability for any CIL and who is responsible for giving the assumption of liability notice. In this respect much will depend on whether the planning promoter is to be involved in the carrying out of the development once the planning permission has been obtained. If the promoter’s involvement cease once the planning permission is obtained then there is no reason for the promoter to assume such a liability and it is a matter for the landowner or any developer taking over once the planning permission has been obtained.

(ii) Indemnity – an indemnity may be required by the party who is not taking responsibility to cover against default in discharging the CIL liability.

(iii) Payment – if the size of the promoter’s payment is determined by the value of the land once the planning permission is obtained then the owner will need to ensure that this value takes into account the CIL liability payable when the development commences. To provide that the CIL liability is deducted in full from the value of the land may result in double accounting as the value of the land may already take that into account.
(iv) **Planning application** – the landowner may wish to have a greater say in the planning application and in particular the type of user of the land for which authorisation may be sought. It depends on whether the resulting CIL liability is a concern to the owner. With the differential rates it may be that the owner will wish to focus on those which result in a smaller CIL liability. This will apply not just to the terms of the original application but also to any subsequent variations during the application.

21.3.2 **Overage arrangements** –

(i) **Overage triggers** - when the land has been sold but the vendor has retained an interest by way of an overage arrangement there will be little reason to add further controls over the planning application just to account for the CIL liability. There will be the usual important issue for the vendor to consider as to whether the arrangement should provide for multiple triggers or just a single trigger but subject to one caveat the answer to that issue will not be decided by the impact of the CIL regime. The caveat is if it is possible that a planning application will be put forward which attracts a zero or lower CIL rate with a view to subsequently seeking a change of use in such a way that it does not attract a CIL liability. In those circumstances it would be important to provide for multiple triggers rather than seek to rely on a single trigger if the maximum benefit is to be derived from the overage. In addition whether there is to be a single trigger or multiple triggers an obligation to use best endeavours for the achievement of maximum value will be an important obligation to impose in the arrangement.

(ii) **Overage payment** – the purchaser will want to ensure that account is taken of any CIL liability. This may be achieved by taking it into account when negotiating the overage payments to be made. Alternatively, a provision may be sought deducting the CIL liability from the value of the land with the benefit of the planning permission but this in turn will give rise to the need to consider whether this will cause any double accounting of the liability. The position may be more complex when there is a phased development with staggered overage. This will need to take account of the possibility that the CIL rates may vary. On the other hand if the overage payment is determined not by reference to the value of the land but to the net proceeds of the realisation of the development then a specific deduction for the CIL payable can be included without regard to double accounting.

(iii) **Existing overage arrangements** – the impact of a CIL charge may be felt by the purchaser or any successor which was not expected when the overage arrangement was entered into but there is nothing in the CIL regime which will vary that overage arrangement. In consequence it will be necessary to review the overage documentation to ascertain whether the CIL charge will be a deduction when computing the overage payment and if not whether it will affect the value of the land in the event that the overage payment is determined by reference to that value.

21.3.3 **Disposal of land** –

(i) **With no planning permission** – when the whole of the land is being disposed of by the owner before planning permission has been granted then there should be no need to consider future CIL charges unless there is an overage arrangement (see para.
...the disposal contains a grant of a right of entry on the retained land to carry out works such as the construction of an access road. The risk for the vendor is that the purchaser could apply for planning permission relating to land which includes not just the part disposed of but the retained part. It is possible to suspend the operation of the CIL regime (see para. 15.7 above). However, in the event that any planning permission granted includes the retained land then a development of the retained land could commence when the purchaser or a successor exercises the right of entry to construct, say, an access way to a residential development on the part of the land disposed of. This risk needs to be guarded against. One possibility would be to make the exercise conditional on the provision of funds to secure payment of any CIL liability triggered. The same will be the case if such rights are reserved over the part of the land disposed of save that in such circumstances it will be the purchaser who will need to consider the CIL risks.

(ii) **With planning permission but before commencement of development** – a number of specific matters relating to CIL will need to be considered.

(a) **Assumption of liability** – it will need to be ascertained whether an assumption of liability notice has been given. If it has not then it will be necessary to establish who is to give it. The purchaser would seem to be the obvious candidate. If such a notice has been given then provided there is time before the commencement of the development there needs to be a withdrawal of that assumption of liability notice and the giving of a new one if the purchaser is to take on liability. In such circumstances an obligation against withdrawal may be required.

(b) **Indemnity** – the vendor will probably require an indemnity against any CIL default.

(c) **Easements** – the grant or reservation of rights will need to be carefully considered if there is a disposal of part only for the reasons given in (i) above.

(iii) **With planning permission and after commencement of development** –

(a) **Assumption of liability** – it is to be expected that an assumption of liability notice will have been given and once the development has commenced this notice cannot be withdrawn. There must be a transfer of liability notice given if the purchaser is to take on responsibility for the CIL (see para. 15.2.3 above). If the responsibility is to remain with the vendor then the purchaser will need to be protected against any future default. This will particularly important with the purchase of a house on a residential estate from the developer (see in section 15.84 above the discussion of the operation of the apportionment provisions in the event of a default).

(b) **Indemnity** – even with the giving of a transfer of liability notice the vendor will probably require an indemnity. If the responsibility to pay all future instalments of CIL remains with the vendor then the purchaser should require an indemnity.

**21.3.4 Options** – an option to buy conditional upon the grant of planning permission needs to include provisions which ensure that the purchaser is wholly liable for any CIL resulting from the grant and wholly responsible for compliance with the local
CIL regime. The person granting the option will want to back this up with an indemnity to cover any default in compliance with that regime. On the other hand the purchaser will want to ensure that the price paid for the land takes the CIL into account. If the land is to be acquired in stages possibly because the permission allows for phased development then it will necessary to ensure that the provisions taking into account the CIL liability allow for any increase in CIL due to changes in the local CIL rate during the course of the phased developments.

21.3.5 Leases – it is a statement of the obvious that the terms of a lease have to govern a relationship throughout the term of years granted and so will be applied to occurrences that were not at the time of the grant expected or at best only in very general terms. It is, therefore, necessary to think ahead as to what may occur during the course of the term. This is important because both the landlord and the tenant may find themselves liable for CIL but have had no involvement with the planning permission or development that has resulted in the CIL charge. In the absence of an assumption of liability notice a CIL liability is apportioned between all those having a material interest in the relevant land. This will include the landlord’s reversionary interest and leasehold interests which were for seven or more years when granted. As already mentioned this could operate harshly when the development is carried out by a 1954 Act tenant with a term for less than seven years with the consequence that the freeholder will be liable in the absence of a contrary agreement under the regulations.

(i) User clause – a change of use can give rise to a CIL charge if additional internal floor area results or the development involves a new dwelling and the premises have not been in lawful use for six months or more in the last three years (previously twelve months). This is likely to encourage tougher restrictions on the making of such a change or the imposition of an indemnity to protect the landlord against such liability arising on the change.

(ii) Planning applications – a similar response of greater restrictions or an indemnity is likely with regard to the tenant’s ability to make planning applications. A further provision that should be considered is to impose an obligation on the tenant that the tenant will give an assumption of liability notice in respect of any development authorised by a planning permission obtained by or on behalf of the tenant. An even wider responsibility would be to apply this to all planning permissions obtained during the term.

(iii) Easements – care will need to be given as to whether any easements reserved in favour of the landlord could if exercised cause the tenant to be liable to a CIL charge. For example, if the landlord obtains planning premises for adjoining land and the demised premises and exercises a reserved right to construct, say, an access road or any services. Easements granted in favour of the tenant are less likely to have this effect but it needs to be borne in mind.

(iv) Alterations/new buildings – an increase in the internal area demised may give rise to a CIL charge and will need to be provided for so that the landlord does not have to bear all or an apportioned part.

(v) Indemnity – it would be prudent to include an indemnity in favour of the landlord to cover all CIL charges attributable to the tenant’s actions including alterations and
the construction of new buildings. It may be that there should be an apportionment if
the development has the effect of improving the value of the landlord’s reversionary
interest.

21.3.6 Development agreement – there are a variety of arrangements by which a
development can be carried out ranging from the grant of an immediate lease to a
construction contract.

(i) Construction contract - A straightforward construction contract will not require
much consideration as regards CIL. The landowner should be the person to deal with
the application of the local CIL regime to the site. More consideration will be required
if the transaction seeks to be the commissioning of a house for a person who will
occupy it as that person’s sole or main residence. Such a transaction will qualify for
the self-build exemption. It will be necessary to structure it so that it comes within the
requirements applicable to the exemption. Provisions will need to be added to ensure
that the necessary compliance procedures are carried out and to cover the risk that the
exemption is either not granted or subsequently withdrawn.

(ii) Licence – licences in favour of developers are still recommended from time to
time with a hoped for sdlt advantage. This can be combined with a consideration
linked to the proceeds of the sale of the development. In such circumstances the
question as to who should be responsible for the CIL may be a little harder to decide.
It is obviously an issue which will need to be considered carefully as responsibility for
giving the assumption of liability notice has to be allocated. Similarly it will be
necessary to provide how the CIL payment is to be taken into account when
calculating the consideration to be paid to the developer.

(iii) Building lease/ Agreement to grant lease on completion of development – from
the point of view of allocating responsibility in relation to the CIL regime it seems to
me that it does not really matter whether the lease is granted immediately or after the
occurrence of the completion date for the development. The substance of the
relationship for this purpose is similar. There is a much stronger argument in either set
of circumstances for the developer/lessee to give the assumption of liability notice.

21.4 Charity/Social housing relief – if the development involves charity exemption or
social housing relief then there may need to be special contractual arrangements put in
place (see relevant parts of section 11 above).
0. Searches and Enquiries

22. **Searches** – in areas in which the CIL regime has been operated it will be necessary to exercise greater care with regard to development sites and developments subsequent to the establishment of the local CIL rates.

22.1 **Warning** - the decision of Montrose Creek Property Limited and Manningtree ("MM") v Brisbane City Council in the Queensland Planning & Environment Court although an Australian decision not based on our CIL regime serves as a warning about the need to make full searches prior to a transaction concerning a development site. MM purchased a completed development with an approved use which had started unaware that there remained outstanding infrastructure contributions amounting to $400,000. The vendor was pursued for these arrears but went into voluntary liquidation. In consequence the City Council went after MM and was successful. A number of defences were rejected. MM had carried out a standard search which did not disclose this information as opposed to a full search which would have done so. It was a requirement in the permission that payment be made before commencement of use but notwithstanding this condition it was held that the failure to comply was not a once and for all breach but a continuing obligation.

22.2 **Searches** – there will be no comprehensive public register kept by the charging authority or collecting authority dealing with the application of the CIL regime to any site. In particular there will be no public details as to the progress of the CIL debt recovery process in respect of a site and the amount outstanding. In consequence the task of ascertaining the position in relation to any particular site will be a combination of enquiries and searches. However, it should be possible to discover much of the CIL position. As regards searches the following may provide information concerning the CIL position:-

22.2.1 **Local authority** – the standard local authority search has been expanded to enquire whether a Charging Schedule has been published for the area. It will not say if one is imminent. A better statement of the authority’s position with regard to the introduction of CIL is likely to be found on its website.

22.2.2 **Planning authority**– it will be possible to ascertain certain information from the planning authority. It will be not just any pending planning applications, plans and planning decisions which will be available to be inspected (whether at the offices or online). In addition it is likely that the authority will retain with these documents the CIL notices such as the liability notice, the assumption of liability notice and the commencement notice. What will not be retained with these will be demands and the current state of the CIL account as these will be regarded as part of the debt recovery process and not the planning process. However, this should provide useful information.

22.2.3 **Charging orders** – if a collecting authority has sought to enforce any outstanding CIL by means of charging orders then these may be protected by an entry on the registered title or by registration of a land charge. Such charging orders will come to light by the usual searches.
22.2.4 **Local land charges** – a CIL liability may be registered as a local land charge by the collecting authority and the likelihood is that all authorities will register a local land charge. It is likely that such registration will occur when the planning permission is granted rather than later when the necessary approvals have been given and a liability notice has been issued. If this is not the practice then there will be a time gap between the grant of planning permission and the registration of a local land charge. In consequence such a search needs to be combined with an investigation of the existing planning permissions and applications. Such searches will probably provide a partial answer to the question whether there is either still CIL due in relation to the property or a potential CIL liability. The presence of a local land charge relating to CIL will mean that there is still some at least outstanding or likely to arise as otherwise the charge would have been removed. The local land charge will remain on the register if there is a chance of a clawback of CIL being triggered. A further problem could be that the authority will be slow to remove the local land charge thus hampering any intended sale. With some authorities there have been delays of five weeks or more in obtaining receipts for a payment of a CIL liability. This may cause loss if the receipt is needed to prove that the CIL liability has been discharged.

22.2.5 **Register of enforcement and stop notices** – details of any stop notice to enforce a CIL liability should be entered on a register kept under section 188 of the 1990 Act.

Such searches will assist in ascertaining whether a CIL liability has arisen and if it has what steps have been taken against the site or an interest in the site. It will not answer the question as to the current state of the particular CIL account and whether there is a risk that a CIL liability may become enforceable against a person acquiring an interest in the site in the event of default by the person who has assumed liability. This will require further enquiries to be made.

22.3 **Enquiries** – on the assumption that planning permission has been granted then copies of all the CIL documentation should be obtained to the extent not available from the planning authority. In addition the up to date position with regard to the payment of the CIL liability needs to be known. This will enable a person acquiring an interest in the developed site to assess the extent of the CIL liability that could subsequently fall on that person and the risk of it doing so.

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First Appendix- Authorities with charging schedules

The authorities are first listed in Part A in the order in which CIL has been established and then in Part B they are listed alphabetically. There is no central register and so reliance has to be placed on web searches and alerts to try to keep up to date. Some may have escaped this net so it is best to check the website of the particular authority if not on this list. Some such as Poole are in the process of reviewing the existing CIL Charging Schedule so that they may be subject to change. There are over 100 authorities in the process of introducing CIL having reached different stages of the process at different paces. It is likely that a number will introduce CIL in the second and third quarters of 2015.

A. In order in which established CIL regime

(i) Newark and Sherwood DC – the charging schedule took effect on 1st December 2011 and divides the area into six zones for the purposes of residential development with varying rates - two £0, two £45, one £55, one £65 and the last £75. Other types of development are divided both by area as there are seven zones and class of development of which there are nine (hotel; residential institution; industrial; offices; retail; community/institutional; leisure; agricultural; and sui generis). Most are at £0 but retail is £100 in six zones and £125 at Newark Growth Point.

(ii) Redbridge - this authority has a single CIL rate applicable to all types of development wherever located in the area. It has been set at £70 per square metre with effect from 1st January 2012.

(iii) Shropshire - with effect from 1st January 2012 new residential development in Shrewsbury, the market towns and key centres is set at £40 whilst it is £80 for new residential development elsewhere. Any other development is at a nil rate.

(iv) Portsmouth – took effect on 1st April 2012 with a basic CIL rate of £105 for any development not specifically mentioned. A CIL rate of £53 applies to in-centre retail of any size, out of centre retail for less than 280 square metres, hotels and residential institutions. A £0 rate applies to office and industrial developments and community uses.

(v) Huntingdonshire – the charging schedule came into force on 1st May 2012. The rates apply across the whole of the area but vary according to the type of development. Retail development with an area of 500 sq. m or less is chargeable at £40 and if greater than 500 sq. m at £100. This differential in size with retail developments is being considered in a number of other areas and has met with opposition from some of the major retailers. The charging authority must justify such a differential with supporting evidence. After the 2014 Regulations the grounds for objection have been removed. Hotel developments are chargeable at £60. Institutional residential developments are charged at £40 whilst for health developments the rate is £65. There is a nil rate for business (B1), general industrial storage and distribution (B2 and B3), community uses (D1 and D2) save for Health uses and agriculture. Any other development is chargeable at £85.
(vi) **Wandsworth** – these took effect on 1st November 2012 and the CIL Rates are determined by four different areas within the borough. The Mayor of London charge will also apply. Dependent on the area
(a) the residential rates are £575; £265; £250; and £0.
(b) office or retail rates are £265; £250; and £0.
(c) all other developments £0.

(vii) **Wycombe** – with effect from 1st November 2012 the area is divided into two charging zones. The rate for residential developments (including sheltered accommodation) is £150 in one zone and £125 in the other. In both zones there is a rate of £200 for convenience based supermarkets (defined as shopping destinations in their own right where weekly food shopping needs can be met and which also include non-food floor space as part of the overall mix of the unit) and retail warehousing (defined as large stores specialising in the sale of household goods (such as carpets, furniture and electrical goods), DIY items and other ranges of goods, catering for mainly car-borne customers) with net retail selling space of over 280 square metres. All other retail and uses akin to retail are chargeable at £125. Any other developments are at £0.

(viii) **Bristol** – these took effect on 1st January 2013. The rates for developments are: residential chargeable at £70 (Inner zone) and £50 (Outer zone); hotels at £70; retail at £120; student accommodation at £100; commercial (classes B1, B2 and B8) £0; other development £50.

(ix) **Poole** – with effect from 2nd January 2013 a simple charging schedule has been introduced. There are three zones with residential developments chargeable at rates of £150, £100 and £75. Any other development is chargeable at £0.

(x) **East Cambridgeshire** – with effect from 1st February 2013. Residential development set for three zones at £40/£70 and £90. Retail is £120 and all other developments at £0.

(xi) **Croydon** – with effect from 1st April 2013 the rates for residential developments are £0 within the Croydon Metropolitan Centre but £120 outside it; £120 for business developments within the Metropolitan Centre but £0 outside that area; £0 for institutions in the whole area; and £120 for any other developments in the whole area. The latter may unexpectedly catch some developments.

(xii) **Elmbridge** – with effect from 1st April 2013 the rates are residential dwellings (class C3) £125; all retail developments (class A1-A5) £50; and all other developments £0.

(xiii) **Barnet** – with effect from 1st May 2013. The rates are £135 Residential (C1 - C4, Sui Generis HMOs) excluding ancillary car parking; £135 Retail (A1 - A5) excluding ancillary car parking; and £0 all other use classes.

(xiv) **Fareham** – with effect from 1st May 2013. The rates are £105 for residential developments (C3(a) and (c)/C4; £60 Care homes (C3(b)/C2); £35 hotels within C1; £0 for comparison retail in zones of town centres shown on maps (there is a long definition of comparison retail including clothing, household appliances, carpets,
furniture, toys, sports equipment and cameras); £120 for all other types of retail; £0 for all other developments.

(xv) Plymouth – with effect on 1st June 2013 most rates are set at £0 so as to encourage development. Residential is £30; purpose built student accommodation is £60 save it is £0 if located within a particular zone within the city; and £100 for superstores and supermarkets with gross internal floor space of 1000 square metres or more including any extensions. Oddly both superstores and supermarkets appear to have the same definition which is that used for supermarkets by Wycombe, namely “shopping destinations in their own right where weekly food shopping needs can be met and which also include non-food floor space as part of the overall mix of the unit.” If this is correct then many retail superstores will not be caught as they will not meet the weekly food needs of their customers. It is noteworthy that Wycombe has a different definition which is applicable to supermarkets.

(xvi) Brent – with effect from 1st July 2013. The rates are; residential, residential institutions, student accommodation, hostels and HMOs £200; hotels £100; retail £40; warehouse clubs £14; assembly and leisure excluding swimming pools £5; remainder including light industrial £0.

(xvii) Broadlands – with effect from 1st July 2013. There are two charging zones for residential developments (C3/C4 excluding affordable housing but including domestic garages excluding shared-use and decked) with rates of £75 and £50. Large convenience goods based stores (at least 50% of net floor space area given over to convenience goods) with floor space of 2000 square metres or more. Such store developments are rated at £135. All other retail and assembly and leisure rated at £35 includes sui generis akin to them such as petrol stations, retail warehouses, nightclubs and amusement centres. Public service development such as fire and police stations (C2; C2A; and D1) are rated at £0. All other developments are rated at £0.

(xxviii) Norwich – with effect from 15th July 2013 the rates are residential development (Classes C3 and C4 excluding affordable housing) including domestic garages but excluding shred-user and decked garages £75; flats in blocks of 6 or more £65; large convenience goods based stores (more than 50% of net floor area is intended for sale of convenience goods) of 2000 sqm or more £135; all other retail uses (A1-A5) and assembly and leisure development plus sui generis uses such as retail warehouse clubs, petrol stations, nightclubs, amusement centres and casinos £25; Class C2, C2A and D1 and sui generis fire and rescue stations, ambulance stations and police stations £0; all other uses covered by CIL regulations (including share-user/ decked garages) £5.

(xix) Havant – with effect from 1st August 2013. The rates are: residential £100 in a defined area and £80 elsewhere; retail out of town centre over 280 sqm £80, under 280sqm £40, town centre £0; and all other developments £0.

(xx) Waveney – with effect from 1st August 2013. There are four residential charging zones and the rates are £150; £60; £45; and £0. For holiday lets the rate is £40. For Supermarkets, superstores and retail warehouses the rate is £130. All other developments are £0.
(xxi) **Southampton** – with effect from 1st September 2013. The rates are £43 for retail developments (A1-A5) and £70 for residential (C3, C4 and houses in multiple occupation) but not C2 (residential institution).

(XXii) **Chorley** – with effect from 1st September 2013. The rates are dwelling houses £65; apartments £0; convenience retail (excluding neighbourhood convenience stores) £160; retail warehouse, retail parks and neighbourhood convenience stores £40; community uses £0; all other uses £0. The use definitions are contained in an appendix to the Charging Schedule.

(XXiii) **South Ribble** – with effect from 1st September 2013 the rates are dwelling houses (excluding apartments) £65; apartments £0; convenience retail (excluding neighbourhood convenience stores) £160; retail warehouse, retail parks and neighbourhood convenience stores £40; community uses £0 and all other uses £0. The various uses are defined in Appendix two to the Charging Schedule.

(XXiv) **Bassetlaw** – with effect from 1st September 2013. There are four residential charging zones and the rates are £55; £20; £5; £0. There are three commercial charging zones as regards industrial developments the rates are £15, £0 and £0 whilst for retail developments they are £100; £25; £0.

(XXv) **Preston** – with effect from 30th September 2013 the rates are dwelling houses (excluding apartments) £65 save for those in the Inner Preston Zone when the rate is £35; apartments £0; convenience retail (excluding neighbourhood convenience stores) £160; retail warehouse, retail parks and neighbourhood convenience stores £40; community uses £0 and all other uses £0. The various uses are defined in Appendix two to the Charging Schedule.

(XXvi) **Harrow** – with effect from 1st October 2013 the rates are residential use within Class C3 £110; Hotel use within Class C1, residential institutions except hospitals (Class C2), student accommodation, hostels and HMO’s (sui generis) £55; Classes A1- A5 (retail, financial and professional services, restaurants and café, drinking establishments, hot food take-aways) £100; all other uses nil).

(XXvii) **Oxford** – with effect from 21st October 2013 uses in Classes A1-A5 (shops, financial and professional services, restaurants and cafes, drinking establishments, and hot food establishments) have a rate of £100; uses in Classes B1 (business), B2 (general industrial), B8 (storage or distribution), C1 (hotels) and C2 and C2A (residential institutions and secure residential institutions) are rated at £20; uses in Classes C3 (dwellinghouses including self-contained sheltered accommodation and self-contained graduate accommodation) and C4 (houses in multiple occupation) and student accommodation are rated at £100; uses in Classes D1 (non-residential institutions) and D2 (assembly and leisure) are rated at £20; all other development uses are rated at £20.

(XXviii) **Exeter** – with effect from 1st December 2013 the rates are £80 residential (excluding Class C2); student housing whose occupation is limited by planning permission or planning obligation £40; retail (A1-A5) outside city centre £125; and all other developments nil rate.
(xxix) Newham— with effect from 1st January 2014. There are two zones for residential developments with rates of £80 and £40. For the whole area the remaining rates are £30 for retail; £120 for hotels; £130 for student accommodation; and remainder £0.

(xxx) Merton – with effect from 1st April 2014 there are two zones for the residential rates which are £220 and £115. There is a single rate of £100 for retail warehouses and superstores (defined in the schedule).

(xxxi) Bedford – with effect from 1st April 2014 there are five zones for residential development with rates of £40; £55; £100; £120; and £125. For these purposes dwelling units are stated to include not just C3 units but also C2 units together with C3 units where the units directly benefit from communal facilities comprising 10% or more of the total gross floor space as part of the overall mix of the unit. Care homes, extra care and other residential institutions have a nil rate. Convenience based supermarkets and superstores and retail warehouses (net retailing space over 280 sqm. are rated at £120. Office, industrial, warehousing and other uses have a nil rate.

(xxxii) Dartford – with effect from 1st April 2014 there are two zones for residential development. In Zone A all residential development is rated at £200. In Zone B residential development of less than 15 homes providing solely market housing is rated at £200 whilst residential development of 15 homes or more providing a housing mix which includes a proportion of affordable housing is rated £100. This seems to provide scope for planning residential development to reduce the CIL liability. It also seems to leave a gap with some residential developments not within either category. There are two different zones relating to retail development. In Zone D all retail development above 500 sqm. is rated at £125 whilst all other retail use is nil rated. In Zone C supermarkets and superstores above 500 sqm are rated at £65 and all other is nil rated. Office, industrial, hotel and leisure developments are rated at £25. Any other developments are nil rated.

(xxxiii) Taunton Deane – with effect from 1st April 2014. There are four zones for residential development (£125, £70 and two at nil rate). For these purposes there is excluded from residential Class C2 use but there is included student housing and similar types of institutional accommodation. Retail development (Classes A1-A5) outside Taunton and Wellington town centres are rated at £140. All other developments are nil rated.

(xxxiv) Sutton - with effect from 1st April 2014. Residential is rated at £100 psm and retail which is wholly or mainly convenience at £120 psm. There is a nil rate for retail which is wholly or mainly comparison; office; hotels; industrial; community uses (schools and hospitals) and all other developments not separately defined. Appendix 2 to the charging schedule sets out what constitutes convenience goods and comparison goods.

(xxxv) Winchester – with effect from 7th April 2014 the area is divided into three zones. In Zone 1 there is a £0 rate. In Zone 2 the rate for residential and retail development is £120. In Zone 3 the residential rate is £80 whilst the retail rate is £120. The rate for all other developments is £0.
(xxxvi) **Waltham Forest** – with effect from 15th April 2014. There are two zones for residential development with rates at £70 and £65. The remainder of the rates apply across the area. Those rates are publicly funded care homes £0; convenience superstores and retail warehouses - £150; hot takeaways and restaurants - £80; betting shops - £90; and hotels - £20.

( xxxvii) **South Norfolk** – with effect from 1st May 2014 there are two zones for residential development (C3 and C4 excluding affordable housing) including domestic garages but excluding shared-user and decked garages £75 and £50. A rate of £135 applies to large convenience goods based stores (more than 50% of net floor area is intended for sale of convenience goods) of 2000 sqm or more; all other retail uses (A1-A5) and assembly and leisure development plus sui generis uses such as retail warehouse clubs, petrol stations, nightclubs, amusement centres and casinos £25; Class C2, C2A and D1 and sui generis fire and rescue stations, ambulance stations and police stations £0; all other uses covered by CIL regulations (including share-user/decked garages) £5.

( xxxviii) **Chelmsford** – with effect from 1st June 2014 the rates are residential £125; convenience retail (A1 food) £150; comparison retail (A1 non-food; A2-5; and sui generis uses akin non-food) £87; and the rest nil.

( xxxix) **Merthyr Tydfil** – with effect from 2nd June 2014. There are three zones for residential development (C3). One is rated at £25 and the other two at nil. Retail (A1) is rated at £100 and retail (A3 –restaurant and cafes) at £25.

( xl) **Purbeck** – with effect from 5th June 2014 the rates are £75 for A1 retail; £20 for A2-5; for C2 (care homes) and C3 (sheltered homes) there are three zones with rates of £100, £30 and nil; for C3 (not sheltered homes) and C4 there are four zones with rates of £180, £100, £30 and £10; for all other developments nil.

( xli) **City of London** – with effect from 1st July 2014. Residential development is charged at a rate of £150 in the “Riverside” zone and £95 elsewhere. Office development is to be charged at £75. Developments for medical, educational and emergency service are at a rate of £0. All other developments have a £75 rate.

( xlii) **Caerphilly** – with effect from 1st July 2014. There are three zones for residential development and the rates are £0, £25 and £40. As regards commercial developments there are no zones. The rates are – retail (A1) £100; restaurant, cafe and drinking establishments (A3) £25; office (B1), industrial (B2-B8), care and nursing home development, non-residential institutions (D1), hotel development (D2) and cinema (D2) all nil.

( xliii) **Epsom and Ewell** – with effect from 1st July 2014. There are no zones. The rates are – residential dwellings (C3) £125; convenience retail (A1) £150; student accommodation (C2) £30; care homes (C2) £20; all other uses nil.

( xlv) **Trafford** – with effect from 7th July 2014. The terminology and approach is a little different from other charging schedules. There are three zones for private market houses – helpfully called cold, moderate and hot. The rates are £20, £40 and £80. For apartments (which include sheltered housing and retirement apartments) the rates in
those zones are £0; £0; and £65. The remainder of the rates are retail warehouses (defined in the Appendix to the Charging Schedule) £75; supermarkets outside town centres (similarly defined) £225; supermarkets in defined town centres £0; public and institutional facilities for education, health, community and emergency services and public transport £0; offices, industry and warehousing £0; leisure £10, hotels £0; all other developments £0.

(xlv) Sevenoaks – with effect from 4th August 2014 the rates are residential (Class C3) £125 and £75 dependent on the zone and a single rate for supermarkets and superstores primarily selling convenience goods of £125; retail warehousing £125; and other forms of development £0. The uses have their own definitions in the schedule.

(xlvi) Islington – with effect from 1st September 2014. There are two zones for four types of development. These are (i) residential dwellings (C3 and C4); residential institutions (C2 and C2A) not including public health facilities and public care facilities - £300 and £250; (ii) retail (A1, A2, A3, A4, and A5) - £175 and £125; (iii) hotels (C1) and apart-hotels - £350 and £250; office (B1a) - £80 and nil. Borough wide student accommodation is rated at £400 and £80 for conference centres, nightclubs, private members clubs, amusement centres and assembly and leisure (D2) not including public leisure facilities. There is a long list of uses which are nil rated.

(xlvii) West Lancashire – with effect from 1st September 2014. There are two zones. In zone B the rate is nil for all developments. In zone A the rates are – residential dwelling house (C3a,b,c) £85; apartments (defined as dwellings with shared access and communal areas on more than one floor) (including retirement apartments) nil; agricultural workers dwellings (dwelling in which the occupancy is limited usually by condition to those employed in agriculture) nil; comparison retail Any building selling mainly comparison goods such as clothing, footwear, household and recreational goods) nil; convenience retail (any building selling mainly everyday essential items, including food, drink, newspapers/magazines and confectionery. In the case of a mixture of convenience and comparison goods the rate will be based on the main use) £160; food and drink (A3/A4/A5) £90; all other uses nil.

(xlviii) Lambeth – with effect from 1st October 2014. There are three zones for residential, hotel and office developments. Residential rates are £225; £150; and £50. Hotel rates are £100 in one zone and nil in the other two. Office rates are £125 in one zone and nil in the other. For the whole borough rates are – industrial nil; large retail development (retail warehouses and superstores/supermarkets using standard definitions) £115; other retail nil; student accommodation £215; all other uses not identified nil.

(xlix) Teignbridge – with effect from 13th October 2014. Retail is rated at £150 outside identified town centres and nil within them. There are five rates for residential development dependent on the location of the development site (£70, £85, £125, £150 and £200). But there is no CIL rate on affordable housing. All other development or uses are rated at nil.

(l) Haringey – with effect from 1st November 2014. There are three zones for residential and student accommodation and for each use the rate is the same in each
zone starting at £15 then £165 and lastly £265. For supermarkets the rate is £95 whilst retail warehousing is £25. Standard definitions are used for these terms and there is no express area limitation. Office, industrial, warehousing and small scale retail (Use Class A1-A5) are nil rate as are health, school, higher education and all other uses.

(li) Richmond – with effect from 1st November 2014. There are two zones for residential development with rates of £250 and £190. The rate for office development outside Richmond Town Centre is £25. Borough wide the rate for retail (wholly or mainly convenience) is £150. The schedule provides that convenience retail is a shop or store where the planning permission allows selling wholly or mainly everyday items, including food, drinks, newspapers/magazines and confectionary. The same rate of £150 applies for wholly or mainly comparison retail in Richmond Town Centre. Comparison rates is stated by the schedule to be a shop or store selling wholly or mainly goods which are not everyday essential items such as clothing, footwear, household or recreational goods. Hotels and Care homes in the area known as the lower band are rated at £25. All other uses not expressly covered are nil rated.

(lii) Hertsmere – with effect from 1st December 2014. For residential development there are three zones with rates of £120, £180 and nil. As regards commercial development there are no zones. The rates are – hotel (C1) £120; specialist accommodation for the elderly and/or disabled including sheltered and retirement housing and nursing homes, residential homes and extra care accommodation £120; retail (A1) £80; and office (B1) and industrial (B2) nil.

(liii) Surrey Heath with effect from 1st December 2014. There are zones but different ones for residential (C3) developments and retail development other than supermarkets/superstores and retail warehousing. One of the zones for residential development is rated at nil. With each of the other two zones the rate varies dependent on whether the residential development does or does not provide its own open space in the form of Suitable Accessible Natural Greenspace as avoidance for European Sites. The rates in one zone are £189 without such provision and £55 with. In the other zone the rates are £220 and £95. Borough wide the rates for retail warehousing and supermarkets/superstores (defined in the schedule) are £200. Other retail (A1-A5) are rated at nil in one zone and £100 in the other zone. All other developments are rated at nil.

(liv) Tandridge – with effect from 1st December 2014. All residential development excluding sheltered/retirement housing and extra care accommodation (defined as grouped units, usually flats, specially designed or designated for older people encompassing communal non-saleable facilities over 25% gross floorspace) is rated at £120. Convenience retail including convenience based supermarkets and superstores (which are defined in the schedule as shopping destinations in their own right where weekly shopping needs are met and which can also include non-food floorspace as part of the overall mix of the unit) is rated as £100. Comparison retail, offices and all other uses are nil rated.

(lv) Rhondda Cynon Taf – with effect from 31st December 2014. There are three zones for residential development rated at nil, £40 and £85. Retail (A1) is rated at £100 and all other development types are nil rated.
(lv) West Berkshire – with effect from 1st April 2015. There are two zones for the residential (C3 and C4) rate (£125 and £75) whilst the retail (A1-A5) rate is £125 in both. The rate for business, hotel and residential institutions is £0 across the area.

(lvi) Camden – with effect from 1st April 2015. The area is divided into three zones. Residential development below 10 houses or 1000 sqm are charged at £500 in each zone. Residential development above that limit and private residential homes with a degree of self-containment is charged at varying rates of £150, £250 and £500 dependent on the zone. Retail (including bar/restaurant/entertainment and other town centre uses) is chargeable at £25 in each zone. Office is £45 or £25 dependent on the zone. Student housing is chargeable at £175 or £400. Hotel development (including tourist hostels) is chargeable at £40 or £30. Industry, warehousing, research and development are nil whilst other commercial uses are £25. Health, community meeting spaces, police, fire, water, waste management and related infrastructure, care homes with no self-containment subsidized by the public sector are chargeable at nil rate.

(lvii) Sandwell – with effect from 1st April 2015. The rates are – retail units (this covers A1-A5 excluding superstores/supermarkets and retail warehouses) at West Bromwich Strategic Centre £50; borough wide supermarkets/superstores and retail warehouses (defined in the schedule) over 280 sqm £60; residential developments for 14 or less units £30; residential developments for 15 or more units £15; all other uses nil. Residential developments exclude residential institutions (C2).

(lviii) Sedgemoor – with effect from 1st April 2015. The rates are – residential development in urban areas £40; residential developments in all other areas £80; supermarkets and retail warehouses (defined in the schedule) £100; hotel developments £10; all other developments nil.

(lx) Tower Hamlets – with effect from 1st April 2015. For residential developments there are three zones rated at £200, £65 and £35. In addition there are identified large allocated sites which are nil rated for all developments including residential, hotel, retail, student housing (whether let at market rent or not) and office developments. Office development in the zone described as the City Fringe is rated at £90 but elsewhere is rated at nil. Convenience supermarkets/superstores and retail warehousing (defined in the schedule) is rated at £120 borough wide except for the large allocated sites. Other retail is rated at £79 in two zones and nil elsewhere. Hotel development is rated at £180 borough wide apart from large allocated sites. Student housing let at market rent is rated at £425 borough wide apart from large allocated sites. Student housing let at below market rents is rated at nil. To qualify as student housing let at below market rent it must be (i) university led development with the university having at least one teaching facility in the area; (ii) the developer must have entered a nomination agreement or equivalent; (iii) the housing must be to meet an identified need secured by a section 106 planning obligation; (iv) the below market rent must be in place for a minimum of seven years; (v) the rent discount must as a minimum equate to the amount of CIL not paid by reason of it being student housing let at a market rent; and (vi) there must be a valuation supporting the discount by an independent valuer at the cost of the applicant. Unless the student housing qualifies as let at below market rent it will be rated as student housing let at market rent. All other uses are rated at nil.
(lx) Eastbourne – with effect from 1st April 2015. The rates are simple. Dwellings (C3) other than residential apartments are rated at £50. Retail (A1-A5) is rated at £80. All other uses are zero rated.

(lxi) Dacorum – with effect from 1st April 2015. There are four zones for residential development rated at £250, £150, £100 and nil. Three of zones are nil rated for retirement homes and the other is rated at £125. The schedule provides that retirement housing is housing which is purpose built or converted for sale to elderly people with a package of estate management services and which consists of grouped, self-contained accommodation with communal facilities amounting to less than 10% of the gross floor area. Such premises are stated to often have emergency alarm services and/or wardens but would not be subject to significant levels of residential care (C2) as would be expected in care homes or extra care premises. Convenience based supermarkets and superstores and retail warehousing (net retail space of over 280 sqm) rated borough wide at £150. Other uses are nil rated.

(lxii) Lewisham – it is anticipated that it will be effective 1st April 2015 but that has yet to be confirmed. There are two zones for CIL rating purposes. With residential (C3) development the rates are £100 and £75. For Use Class B developments (commercial office and industrial (including storage and distribution) the rates are nil. For all other use classes the rates are £80. This last set of rates is very wide as it is a catch all that has not been dealt with expressly. I wonder whether this will throw up unintended CIL liabilities.

(lxiii) Woking – with effect from 1st April 2015. With regard to residential development there are two zones rated at £125 and £75. For these purposes residential means either use as a dwelling house (whether or not a main residence) by (a) a single person or by persons to be regarded as forming a single household; (b) not more than six residents living together as a single household where care is provided for residents; or (c) not more than six residents living together as single household where no care is provided to residents (other than use within Class C4) or use of a dwelling house by three to six residents as a house in multiple occupation. All types of retail are rated at £75. All other commercial and non-residential use is nil rated.

(lxiv) Reading – with effect from 1st April 2015. Borough wide there is a rate of £120 for residential, hotels, sheltered housing, and private rented accommodation (including student accommodation). Care homes providing nursing care and fully catered are nil rated. A1 retail is nil rated in Central Reading (defined in the Reading Central Action Plan (2009)). Elsewhere if 2000 sqm or over (including foodstores) the rate is £150 and if under 2000 sqm is nil rated. Offices in the Central core (walk time catchment of Reading Rail Station) are rated at £30. All other chargeable developments are nil rated.

(lxv) Watford – with effect from 1st April 2015. All developments in Major Developed Areas (as shown on the map attached to the Schedule) are nil rated. Residential developments are rated at £120. Hotels and specialist accommodation for the elderly and/or disabled including sheltered and retirement housing and nursing homes, residential care homes and extra care homes (excluding registered not for profit care homes) within Class C2 and C3 are rated at £120. Retail (A1-A5) in the
Primary shopping Area is rated at £55 and elsewhere £120. There is a nil rate for offices, industrial and other uses.

(lxvii) Hackney – with effect from 1st April 2015. There are four zones for residential development rated at £190, £55, £25 and nil. Office development is rated at £50 in the City Fringe and nil elsewhere in the borough. Large format retail is rated at £150 and is defined in the schedule as convenience based supermarkets and superstores and retail warehousing. Superstores/supermarkets are shopping destinations in their own right where weekly food shopping needs are met and which can also include non-food floorspace as part of the overall mix of the unit. Retail warehouses are large stores specialising in the sale of household goods (such as carpets, furniture and electrical goods), DIY items and other ranges of goods, catering for mainly car borne customers. Other retail development is rated at £65 in the City Fringe and nil elsewhere in the borough. Hotel development is rated at £80 in the City Fringe and £55 elsewhere in the borough. Student housing is rated at £373 borough wide. All other developments including the development of operational buildings for emergency services is nil rated.

(lxviii) Spelthorne – with effect from 1st April 2015. There are three zones for residential development (C3). If for a scheme with fewer than 15 units to which Policy HO3 Affordable Housing does not apply the rates are £100, £140 and £160. If the scheme is 15 or more units to which policy HO3 Affordable Housing scheme applies the rates are nil, £40 and £60. Purpose built student housing is rated at £120. Out of centre larger convenience based supermarkets and superstores and retail warehousing (net retail selling space of more than 280 sqm) is rated at £120. Hotels, care homes, offices, commercial and all other uses are nil rated.

(lxix) Southwark – with effect from 1st April 2015. There are three zones for a number of uses. Office is rated at £70 in zone 1 and nil rated in zones 2 and 3. Hotel is rated at £250 in zone 1 and £125 in zones 2 and 3. Residential is rated at £400, £200 and £50. Student housing which is directly rented is £100 in all zones and student housing by nomination (let below average weekly rent of £168 per week and this is secured by a section 106 planning obligation) is nil rated. All retail (A1-A5 and sui generis which includes petrol stations, shops selling or displaying cars and retail warehouse clubs) are rated at £125 in all zones. Nil rating applies to town centre car parking (available to all visitors), industrial, warehousing, public libraries, health, education and all other uses.

(lxx) Three Rivers – with effect from 1st April. Residential development (Use Class C3) is rated at £180 psm in Area A; 3120 psm in Area B and nil in Area C. Retail development (Use Class A1) in Areas A and B are rated at £60 psm and nil in Area C. Hotels (Use Class C1) are rated at nil boroughwide as is Residential Housing (Use Class C3. For these purposes it is stated that Retirement Housing is housing which is purpose built or converted for sale to elderly people with a package of estate management services and which consists of grouped, self-contained accommodation with communal facilities. These premises often have emergency alarm systems and/or wardens. These properties would not however be subject to significant levels of residential care as would be expected in care homes or extra care premises (C2). It is further provided that for the avoidance of doubt this excludes registered not for profit care homes. Other non-residential development is nil rated boroughwide.
(lxxi) **Barking and Dagenham** – with effect from 3rd April 2015. Residential development is rated at £70 psm in Barking Town Centre, Leftley and Faircross; £25 psm in Barking Riverside; and £10 psm in the rest of the borough. These areas are defined in the schedule but there is no definition of residential. Boroughwide supermarkets and superstores of any size are rated at £175. For these purposes supermarkets are self-service stores selling mainly food, with a trading floorspace less than 2,500 square metres, often with car parking whilst superstores are self-service stores selling mainly food, or food and non-food goods, usually with more than 2,500 square metres trading floorspace, with supporting car parking. Also boroughwide office uses (B1a) are nil rated; Business (research and development (B1b); light industrial (B1c); general industrial (B2); and storage and distribution (B8) is rated at £5 psm; municipal leisure is nil rated; health (development used wholly or mainly for the provision of any publicly funded medical or health services except the use of premises attached to the residence of the consultant or practitioner); education (development used wholly or mainly for the provision of education as a school or college under the Education Acts or as an institution of higher education) is nil rated; all other non-residential uses are rated at £10 psm.

(lxxii) **New Forest DC** – with effect from 6th April 2015 the CIL rates are dwelling houses (C3) £80; £0 retail (A1), industry and offices (B1, B2 and B3), hotels (C1), residential institutions (C2) and any other uses.

(lxxiii) **Bracknell Forest** – with effect from 6th April 2015. For residential (Use Class C3) development there are six strategic sites five of which are chargeable at the rate of £159 and one at £220. In addition there are four zones. One, Central Bracknell, is nil and with the other three there are two different rates for each dependent on whether the net increase in houses is 14 or less or over 14. The minimum rates is £25 and they go up to a maximum of £300. Separate from residential development is specialist residential accommodation for older people including sheltered housing, retirement housing, Extra Care Housing and residential care accommodation. There are four zones which induce the strategic sites and the rate starts at nil and goes up to £100. Convenience based supermarkets and superstores and retail warehousing (which terms are explained in the charging schedule) which have a net retailing space over 280 sqm gross internal floorspace (taken from the definition of a large store in the Sunday Trading Act 1994) are chargeable at a nil rate in Central Bracknell and £100 elsewhere. The rate is levied on the full gross internal floorspace and not just excess over 280 sq. m. All other types of development are chargeable at nil.

(lxxiv) **Leeds** – with effect from 6th April 2015. Residential developments covers five zones at rates of £90, £23, £45, £5 and £5. Supermarkets (using the standard definition) over 500 sqm are rated at £110 in the City Centre and £175 outside. Comparison retail over 1000 sqm is rated at £35 in the City Centre and £55 outside. Offices in the City Centre are rated at £35. Zero rating applies to development by a publicly funded or not for profit organisation including sports and leisure centres, medical or health services, community facilities and education. All other uses not mentioned are rated at £5.

(lxxv) **London Legacy Development Corporation** – with effect from 6th April 2015. The rates are – all residential development £60; convenience supermarkets and
superstores and retail warehouses (over 1000 sqm) £100; hotels £100; student accommodation £100; comparison and all other retail (A1-A5) in Stratford Retail Area £100 and nil outside; education and healthcare nil; all other uses nil. In addition there will be the Mayoral CIL of £20 if the development site is within Newham and Waltham Forest and £35 if within Tower Hamlets or Hackney. There is no Mayoral CIL on education or healthcare.

(lxxvi) Wokingham – with effect from 6th April 2015. There are four rates applicable for residential development (excluding sheltered housing, extra care housing and residential institutions) which are £300, £320, £340 and £365. These relate to four strategic development locations (“sdl”) and the rest of the borough. As regards sheltered housing the rate is £365 in the four sdl and £150 in the rest of the borough. For these purposes sheltered housing is self-contained accommodation for older people, people with disabilities and/or other vulnerable groups which include some shared/communal facilities and where a degree of support is offered. As regards residential institutions and extra care housing the rate is £100 in the four sdl and £60 in the rest of the borough. For these purposes “extra care housing” means “purpose built accommodation in which varying amounts of care and support can be offered and where some services and facilities are shared (including a minimum of 30% of GIA provided as communal facilities). For retail use the rate is nil for existing town/small town and district centres identified on attached maps and a named sdl and for the rest of the borough it is £50. All other development types are nil borough wide.

(lxxvii) Kensington and Chelsea – with effect on 6th April 2015. There are seven zones. Zone G described as Earl’s Court is nil rated for all uses as is a strategic site. For residential use (C3 and short terms lets) the rates are £750, £590, £430, £270, £190 and £110. For extra care housing the rates are £510, £230, £300, £160 and two zones are nil rated. Hotels in six zones are rated at £160 and student accommodation at £125. Industrial/warehousing, offices, retail uses, D1 and D2 uses and all other uses are nil rated.

(lxxviii) Bath and North East Somerset – with effect from 6th April 2015. There are three different areas for residential development (C3 including specialised, extra care and retirement accommodation unless these types of accommodation provide non-saleable floorspace in excess of 30% of Gross Internal Area) which are rated at £100, £50 and nil. Hotel development (C1) is rated at £100 in Bath and nil elsewhere. In-centre and high street retail development (as defined in the Core Strategy) is rated at £150 in Bath but nil elsewhere. Supermarkets (large format convenience-led stores) /superstores and retail warehouses (over 280 sqm) are rated at £150 district wide save for the Bath Western Riverside area which is nil rated. Offices (B1) and industrial and warehousing are nil rated district wide. Student accommodation development involving schemes with market rents are rated at £200 unless in the Bath Western Riverside area. Student accommodation provided under a scheme with submarket rents set in a section 106 planning agreement will be nil rated. To be submarket rent it must be no more than 89% of the local market rent (including any service charge). Although not expressly stated if the student accommodation is not provided under a scheme with submarket rent then it will be a scheme with market rents.

(lxxix) Swindon with effect from 6th April 2015 there are two residential zones rated at zero for Swindon’s New Communities and £55 for the rest of the borough. For this
purpose residential is any use within Class C3 including ancillary development such as garages. As regards retail use the Town Centre and New Communities are zero rated and the rest of the borough is rated at £100. For these purposes retail is any use within A1-A5 including sui generis uses that are shops and premises selling and or displaying motor vehicles, retail warehouse clubs, launderettes, taxi or vehicle hire businesses, amusement centres, petrol filling stations. All other uses are zero rated.

(lxxx) Greenwich with effect from 6th April 2015. There are two zones which are the same for all rateable uses. Supermarkets, superstores and retail warehousing which are 280 sqm and over are rated at £100 in both. Supermarkets and superstores are shopping destinations in their own right where weekly food shopping needs are met and which can also include non-food space as part of the overall mix and retail warehousing. Retail warehouses are large stores specialising in the sale of household goods (such as carpets, furniture and electrical goods), DIY items and other ranges of goods, catering for mainly car-borne customers. Ancillary car parks (including undercroft parking) for supermarkets, superstores and retail warehousing which are 280 sqm and over are nil rated in both. Hotels are rated at £100 in both. Student housing is rated at £65 in both. Residential (excluding extra care housing which is defined in the CIL Viability Assessment) is rated at £70 in Zone 1 and £40 in Zone 2. All other developments are zero rated and includes all retail uses less than 280 sqm and retail uses 280 sqm or more not within the definitions of supermarket, superstore or retail warehouse; all B and D uses; all sui generis uses.

(lxxxi) Hambleton – with effect from 7th April 2015. The rates are district wide. For private market housing (excluding apartments) the rate is £55. Retail warehouses is rated at £40. For these purposes it is stated that retail warehouses are usually large stores specialising in the sale of household goods (such as carpets, furniture and electrical goods), DIY items and other ranges of goods. They can be stand-alone units but are also often developed as part of retail parks. In either case, they are usually located outside of existing town centres and cater mainly for car-borne customers. As such, they usually have large adjacent, dedicated surface parking. Supermarkets are rated at £90. It is stated in the schedule that supermarkets are large convenience-led stores where the majority of custom is from people doing their main weekly foodshop. As such, they provide a very wide range of convenience goods, often along with some element of comparison goods. In addition to this, the key characteristics of the way a supermarket is used include (a) they are used for the sale of goods will generally be above 500sq. m; (b) the majority of customers will use a trolley to gather a large number of products; (c) the majority of customers will access the store by car, using the large adjacent car parks provided; and (d) servicing is undertaken via a dedicated service area, rather than from the street. Public/institutional facilities covering education, health, community and emergency services are nil rated. Similarly agricultural related development is nil rated. This will not include agricultural workers dwellings which will be within residential. All other chargeable developments as identified in Regulations and Guidance are nil rated.

(lxxxii) Peterborough – with effect from 24th April 2015. With residential development on all sites with 500 dwellings or more there is a nil rate (required by the examiner). There are then three zones for other types of residential development. If the development produces less than 15 market houses the rates are £140, £120 and £100. With developments of 15 or more market houses the rates are £70, £45 and £15. With
developments comprising apartments on sites of less than 15 units the rates are £70, £45 and £15. City wide supermarkets (500 sqm or more) are rated at £150; retail warehouses (500 sqm or more) at £70 and neighbourhood convenience stores (less than 500 sqm) at £15. All other developments are nil rated. More definitions will be added in response to the examiner but will not be known until the final charging schedule is published.

(lxxxiii) Bexley – it was anticipated that the CIL regime will take effect on a date to be fixed in April 2015 but that is now going to be later. There are two zones for residential, hotel and student housing development (excluding C2 and C3 developments) which are rated at £60 and £40. Supermarkets, superstores and retail warehouse developments over 280 sqm are rated at £100. The examiner required the word convenience to be removed from this category. Medical, health and emergency services which are publicly funded are nil rated. The nil rating also applies to developments used wholly or mainly for the provision of education as a school or college under the Education Acts or as an institution of higher education. All other uses including C2 and C3 are rated at £10. Therefore, class A uses under 280 sqm, care homes, sheltered homes, extra care, assisted care and similar accommodation are rated at this lower rate.
B. Alphabetically

**Barnet** – with effect from 1st May 2013. The rates are £135 Residential (C1 - C4, Sui Generis HMOs) excluding ancillary car parking; £135 Retail (A1 - A5) excluding ancillary car parking; and £0 all other use classes.

**Bassetlaw** – with effect from 1st September 2013. There are four residential charging zones and the rates are £55; £20; £5; £0. There are three commercial charging zones as regards industrial developments the rates are £15, £0 and £0 whilst for retail developments they are £100; £25; and £0.

**Bath and North East Somerset** – with effect from 6th April 2015. There are three different areas for residential development (C3 including specialised, extra care and retirement accommodation unless these types of accommodation provide non-salable floorspace in excess of 30% of Gross Internal Area) which are rated at £100, £50 and nil. Hotel development (C1) is rated at £100 in Bath and nil elsewhere. In- centre and high street retail development (as defined in the Core Strategy) is rated at £150 in Bath but nil elsewhere. Supermarkets (large format convenience-led stores) /superstores and retail warehouses (over 280 sqm) are rated at £150 district wide save for the Bath Western Riverside area which is nil rated. Offices (B1) and industrial and warehousing are nil rated district wide. Student accommodation development involving schemes with market rents are rated at £200 unless in the Bath Western Riverside area. Student accommodation provided under a scheme with submarket rents set in a section 106 planning agreement will be nil rated. To be submarket rent it must be no more than 89% of the local market rent (including any service charge). Although not expressly stated if the student accommodation is not provided under a scheme with submarket rent then it will be a scheme with market rents.

**Barking and Dagenham** – with effect from 3rd April 2015. Residential development is rated at £70 psm in Barking Town Centre, Leftley and Faircross; £25 psm in Barking Riverside; and £10 psm in the rest of the borough. These areas are defined in the schedule but there is no definition of residential. Boroughwide supermarkets and superstores of any size are rated at £175. For these purposes supermarkets are self-service stores selling mainly food, with a trading floorspace less than 2,500 square metres, often with car parking whilst superstores are self-service stores selling mainly food, or food and non-food goods, usually with more than 2,500 square metres trading floorspace, with supporting car parking. Also boroughwide office uses (B1a) are nil rated; Business (research and development (B1b); light industrial (B1c); general industrial (B2); and storage and distribution (B8) is rated at £5 psm; municipal leisure is nil rated; health (development used wholly or mainly for the provision of any publicly funded medical or health services except the use of premises attached to the residence of the consultant or practitioner); education ( development used wholly or mainly for the provision of education as a school or college under the Education Acts or as an institution of higher education) is nil rated; all other non-residential uses are rated at £10 psm.

**Bedford** – with effect from 1st April 2014 there are five zones for residential development with rates of £40; £55; £100; £120; and £125. For these purposes dwelling units are stated to include not just C3 units but also C2 units together with C3 units where the units directly benefit from communal facilities comprising 10% or
more of the total gross floor space as part of the overall mix of the unit. Care homes, extra care and other residential institutions have a nil rate. Convenience based supermarkets and superstores and retail warehouses (net retailing space over 280 sqm. are rated at £120. Office, industrial, warehousing and other uses have a nil rate.

**Bexley** – it was anticipated that the CIL regime will take effect on a date to be fixed in April 2015 but this is now going to be later. There are two zones for residential, hotel and student housing development (excluding C2 and C3 developments) which are rated at £60 and £40. Supermarket, superstores and retail warehouse developments over 280 sqm are rated at £100. The examiner required the word convenience to be removed from this category. Medical, health and emergency services which are publicly funded are nil rated. The nil rating also applies to developments used wholly or mainly for the provision of education as a school or college under the Education Acts or as an institution of higher education. All other uses including C2 and C3 are rated at £10. Therefore, Class A uses under 280 sqm, care homes, sheltered homes, extra care, assisted care and similar accommodation are rated at this lower rate.

**Brent** – with effect from 1st July 2013. The rates are; residential, residential institutions, student accommodation, hostels and HMOs £200; hotels £100; retail £40; warehouse clubs £14; assembly and leisure excluding swimming pools £5; remainder including light industrial £0.

**Bristol** – these took effect on 1st January 2013. The rates for developments are: residential chargeable at £70 (Inner zone) and £50 (Outer zone); hotels at £70; retail at £120; student accommodation at £100; commercial (classes B1, B2 and B8) £0; other development £50.

**Bracknell Forest** – with effect from 6th April 2015. For residential (Use Class C3) development there are six strategic sites five of which are chargeable at the rate of £159 and one at £220. In addition there are four zones. One, Central Bracknell, is nil and with the other three there are two different rates for each dependent on whether the net increase in houses is 14 or less or over 14. The minimum rates is £25 and they go up to a maximum of £300. Separate from residential development is specialist residential accommodation for older people including sheltered housing, retirement housing, Extra Care Housing and residential care accommodation. There are four zones which induce the strategic sites and the rate starts at nil and goes up to £100. Convenience based supermarkets and superstores and retail warehousing (which terms are explained in the charging schedule) which have a net retailing space over 280 sqm gross internal floorspace (taken from the definition of a large store in the Sunday Trading Act 1994) are chargeable at a nil rate in Central Bracknell and £100 elsewhere. The rate is levied on the full gross internal floorspace and not just excess over 280 sq. m. All other types of development are chargeable at nil.

**Broadlands** – with effect from 1st July 2013. There are two charging zones for residential developments (C3/C4 excluding affordable housing but including domestic garages excluding shared–use and decked) with rates of £75 and £50. Large convenience goods based stores (at least 50% of net floor space area given over to convenience goods) with floor space of 2000 square metres or more. Such store developments are rated at £135. All other retail and assembly and leisure rated at £35 includes sui generis uses akin to them such as petrol stations, retail warehouses,
nightclubs and amusement centres. Public service development such as fire and police stations (C2; C2A; and D1) are rated at £0. All other developments are rated at £0.

Caerphilly – with effect from 1st July 2014. There are three zones for residential development and the rates are £0, £25 and £40. As regards commercial developments there are no zones. The rates are – retail (A1) £100; restaurant, café and drinking establishments (A3) £25; office (B1), industrial (B2-B8), care and nursing home development, non-residential institutions (D1), hotel development (D2) and cinema (D2) all nil.

Camden – with effect from 1st April 2015. The area is divided in to three zones. Residential development below 10 houses or 1000 sqm are charged at £500 in each zone. Residential development above that limit and private residential homes with a degree of self-containment is charged at varying rates of £150, £250 and £500 dependent on the zone. Retail (including bar/restaurant/entertainment and other town centre uses) is chargeable at £25 in each zone. Office is £45 or £25 dependent on the zone. Student housing is chargeable at £175 or £400. Hotel development (including tourist hostels) is chargeable at £40 or £30. Industry, warehousing, research and development are nil whilst other commercial uses are £25. Health, community meeting spaces, police, fire, water, waste management and related infrastructure, care homes with no self-containment subsidized by the public sector are chargeable at nil rate.

Chelmsford – with effect from 1st June 2014 the rates are residential £125; convenience retail (A1 food) £150; comparison retail (A1 non-food; A2-5; and sui generis uses akin non-food) £87; and the rest nil.

Chorley – with effect from 1st September 2013. The rates are dwelling houses £65; apartments £0; convenience retail (excluding neighbourhood convenience stores) £160; retail warehouse, retail parks and neighbourhood convenience stores) £40; community uses £0; all other uses £0. The use definitions are contained in an appendix to the Charging Schedule.

City of London – with effect from 1st July 2014. Residential development is charged at a rate of £150 in the “Riverside” zone and £95 elsewhere. Office development is to be charged at £75. Developments for medical, educational and emergency service are at a rate of £0. All other developments have a £75 rate.

Croydon – with effect from 1st April 2013 the rates for residential developments are £0 within the Croydon Metropolitan Centre but £120 outside it; £120 for business developments within the Metropolitan Centre but £0 outside that area; £0 for institutions in the whole area; and £120 for any other developments in the whole area. The latter may unexpectedly catch some developments.

Dacorum – with effect from 1st April 2015. There are four zones for residential development rated at £250, £150, £100 and nil. Three of zones are nil rated for retirement homes and the other is rated at £125. The schedule provides that retirement housing is housing which is purpose built or converted for sale to elderly people with a package of estate management services and which consists of grouped, self-contained accommodation with communal facilities amounting to less than 10% of
the gross floor area. Such premises are stated to often have emergency alarm services and/or wardens but would not be subject to significant levels of residential care (C2) as would be expected in care homes or extra care premises. Convenience based supermarkets and superstores and retail warehousing (net retail space of over 280 sqm) rated borough wide at £150. Other uses are nil rated.

**Dartford** – with effect from 1st April 2014 there are two zones for residential development. In Zone A all residential development is rated at £200. In Zone B residential development of less than 15 homes providing solely market housing is rated at £200 whilst residential development of 15 homes or more providing a housing mix which includes a proportion of affordable housing is rated £100. This seems to provide scope for planning residential development to reduce the CIL liability. It also seems to leave a gap with some residential developments not within either category. There are two different zones relating to retail development. In Zone D all retail development above 500 sqm. is rated at £125 whilst all other retail use is nil rated. In Zone C supermarkets and superstores above 500 sqm are rated at £65 and all other is nil rated. Office, industrial, hotel and leisure developments are rated at £25. Any other developments are nil rated.

**East Cambridgeshire** – with effect from 1st February 2013. Residential development set for three zones at £40/£70 and £90. Retail is £120 and all other developments at £0.

**Eastbourne** – with effect from 1st April 2015. The rates are simple. Dwellings (C3) other than residential apartments are rated at £50. Retail (A1-A5) is rated at £80. All other uses are zero rated.

**Elmbridge** –with effect from 1st April 2013 the rates are residential dwellings (class C3) £125; all retail developments (class A1-A5) £50; and all other developments £0.

**Epsom and Ewell** – with effect from 1st July 2014. There are no zones. The rates are – residential dwellings (C3) £125; convenience retail (A1) £150; student accommodation (C2) £30; care homes (C2) £20; all other uses nil.

**Exeter** – with effect from 1st December 2013 the rates are £80 residential (excluding Class C2); student housing whose occupation is limited by planning permission or planning obligation £40; retail (A1-A5) outside city centre £125; and all other developments nil rate.

**Fareham** – with effect from 1st May 2013. The rates are £105 for residential developments (C3(a) and (c)/C4; £60 Care homes (C3(b)/C2); £35 hotels within C1; £0 for comparison retail in zones of town centres shown on maps (there is a long definition of comparison retail including clothing, household appliances, carpets, furniture, toys, sports equipment and cameras); £120 for all other types of retail; £0 for all other developments.

**Greenwich** with effect from 6th April 2015. There are two zones which are the same for all rateable uses. Supermarkets, superstores and retail warehousing which are 280 sqm and over are rated at £100 in both. Supermarkets and superstores are shopping destinations in their own right where weekly food shopping needs are met and which
can also include non-food space as part of the overall mix and retail warehousing. Retail warehouses are large stores specialising in the sale of household goods (such as carpets, furniture and electrical goods), DIY items and other ranges of goods, catering for mainly car-borne customers. Ancillary car parks (including undercroft parking) for supermarkets, superstores and retail warehousing which are 280 sqm and over are nil rated in both. Hotels are rated at £100 in both. Student housing is rated at £65 in both.

Residential (excluding extra care housing which is defined in the CIL Viability Assessment) is rated at £70 in Zone 1 and £40 in Zone 2. All other developments are zero rated and includes all retail uses less than 280 sqm and retail uses 280 sqm or more not within the definitions of supermarket, superstore or retail warehouse; all B and D uses; all sui generis uses.

**Hackney** – with effect from 1st April 2015. There are four zones for residential development rated at £190, £55, £25 and nil. Office development is rated at £50 in the City Fringe and nil elsewhere in the borough. Large format retail is rated at £150 and is defined in the schedule as convenience based supermarkets and superstores and retail warehousing. Superstores/supermarkets are shopping destinations in their own right where weekly food shopping needs are met and which can also include non-food floorspace as part of the overall mix of the unit. Retail warehouses are large stores specialising in the sale of household goods (such as carpets, furniture and electrical goods), DIY items and other ranges of goods, catering for mainly car-borne customers. Other retail development is rated at £65 in the City Fringe and nil elsewhere in the borough. Hotel development is rated at £80 in the City Fringe and £55 elsewhere in the borough. Student housing is rated at £373 borough wide. All other developments including the development of operational buildings for emergency services is nil rated.

**Hambleton** – with effect from 7th April 2015. The rates are district wide. For private market housing (excluding apartments) the rate is £55. Retail warehouses is rated at £40. For these purposes it is stated that retail warehouses are usually large stores specialising in the sale of household goods (such as carpets, furniture and electrical goods), DIY items and other ranges of goods. They can be stand-alone units but are also often developed as part of retail parks. In either case, they are usually located outside of existing town centres and cater mainly for car-borne customers. As such, they usually have large adjacent, dedicated surface parking. Supermarkets are rated at £90. It is stated in the schedule that supermarkets are large convenience-led stores where the majority of custom is from people doing their main weekly foodshop. As such, they provide a very wide range of convenience goods, often along with some element of comparison goods. In addition to this, the key characteristics of the way a supermarket is used include (a) they are used for the sale of goods will generally be above 500sq. m; (b) the majority of customers will use a trolley to gather a large number of products; (c) the majority of customers will access the store by car, using the large adjacent car parks provided; and (d) servicing is undertaken via a dedicated service area, rather than from the street. Public/institutional facilities covering education, health, community and emergency services are nil rated. Similarly agricultural related development is nil rated. This will not include agricultural workers dwellings which will be within residential. All other chargeable developments as identified in Regulations and Guidance are nil rated.
Haringey – with effect from 1st November 2014. There are three zones for residential and student accommodation and for each use the rate is the same in each zone starting at £15 then £165 and lastly £265. For supermarkets the rate is £95 whilst retail warehousing is £25. Standard definitions are used for these terms and there is no express area limitation. Office, industrial, warehousing and small scale retail (Use Class A1-A5) are nil rate as are health, school, higher education and all other uses.

Harrow – with effect from 1st October 2013 the rates are residential use within Class C3 £110; Hotel use within Class C1, residential institutions except hospitals (Class C2), student accommodation, hostels and HMO’s (sui generis) £55; Classes A1-A5 (retail, financial and professional services, restaurants and café, drinking establishments, hot food take-aways) £100; all other uses nil).

Havant – with effect from 1st August 2013. The rates are: residential £100 in a defined area and £80 elsewhere; retail out of town centre over 280 sqm £80, under 280sqm £40, town centre £0; and all other developments £0.

Hertsmere – with effect from 1st December 2014. For residential development there are three zones with rates of £120, £180 and nil. As regards commercial development there are no zones. The rates are – hotel (C1) £120; specialist accommodation for the elderly and/or disabled including sheltered and retirement housing and nursing homes, residential homes and extra care accommodation £120; retail (A1) £80; and office (B1) and industrial (B2) nil.

Huntingdonshire – the charging schedule came into force on 1st May 2012. The rates apply across the whole of the area but vary according to the type of development. Retail development with an area of 500 sq. m or less is chargeable at £40 and if greater than 500 sq. m at £100. This differential in size with retail developments is being considered in a number of other areas and has met with opposition from some of the major retailers. The charging authority must justify such a differential with supporting evidence. After the coming into force of the 2014 Regulations a ground of objection based on the size of internal area is no longer possible. Hotel developments are chargeable at £60. Institutional residential developments are charged at £40 whilst for health developments the rate is £65. There is a nil rate for business (B1), general industrial storage and distribution (B2 and B3); community uses (D1 and D2) save for Health uses and agriculture. Any other development is chargeable at £85.

Islington – with effect from 1st September 2014. There are two zones for four types of development. These are (i) residential dwellings (C3 and C4); residential institutions (C2 and C2A) not including public health facilities and public care facilities - £300 and £250; (ii) retail (A1, A2, A3, A4, and A5) - £175 and £125; (iii) hotels (C1) and apart-hotels - £350 and £250; office (B1a) - £80 and nil. Borough wide student accommodation is rated at £400 and £80 for conference centres, nightclubs, private members clubs, amusement centres and assembly and leisure (D2) not including public leisure facilities. There is a long list of uses which are nil rated.

Kensington and Chelsea – with effect on 6th April 2015. There are seven zones. Zone G described as Earl’s Court is nil rated for all uses as is a strategic site. For residential use (C3 and short terms lets) the rates are £750, £590, £430, £270, £190 and £110. For extra care housing the rates are £510, £230, £300, £160 and two zones are nil
rated. Hotels in six zones are rated at £160 and student accommodation at £125. Industrial/warehousing, offices, retail uses, D1 and D2 uses and all other uses are nil rated.

**Lambeth** – with effect from 1st October 2014. There are three zones for residential, hotel and office developments. Residential rates are £225; £150; and £50. Hotel rates are £100 in one zone and nil in the other two. Office rates are £125 in one zone and nil in the other. For the whole borough rates are – industrial nil; large retail development (retail warehouses and superstores/ supermarkets using standard definitions) £115; other retail nil; student accommodation £215; all other uses not identified nil.

**Leeds** – with effect from 6th April 2015. Residential developments covers five zones at rates of £90, £23, £45, £5 and £5. Supermarkets (using the standard definition) over 500 sqm are rated at £110 in the City Centre and £175 outside. Comparison retail over 1000 sqm is rated at £35 in the City Centre and £55 outside. Offices in the City Centre are rated at £35. Zero rating applies to development by a publicly funded or not for profit organisation including sports and leisure centres, medical or health services, community facilities and education. All other uses not mentioned are rated at £5.

**Lewisham** – it is anticipated that it will be effective 1st April 2015 but that has yet to be confirmed. There are two zones for CIL rating purposes. With residential (C3) development the rates are £100 and £75. For Use Class B developments (commercial office and industrial (including storage and distribution) the rates are nil. For all other use classes the rates are £80. This last set of rates is very wide as it is a catch all that has not been dealt with expressly. I wonder whether this will throw up unintended CIL liabilities.

**London Legacy Development Corporation** – with effect from 6th April 2015. The rates are – all residential development £60; convenience supermarkets and superstores and retail warehouses (over 1000 sqm) £100; hotels £100; student accommodation £100; comparison and all other retail (A1-A5) in Stratford Retail Area £100 and nil outside; education and healthcare nil; all other uses nil. In addition there will be the Mayoral CIL of £20 if the development site is within Newham and Waltham Forest and £35 if within Tower Hamlets or Hackney. There is no Mayoral CIL on education or healthcare.

**Merthyr Tydfil** – with effect from 2nd June 2014. There are three zones for residential development (C3). One is rated at £25 and the other two at nil. Retail (A1) is rated at £100 and retail (A3 – restaurant and cafes) at £25.

**Merton** – with effect from 1st April 2014 there are two zones for the residential rates which are £220 and £115. There is a single rate of £100 for retail warehouses and superstores (defined in the schedule).

**New Forest DC** – with effect from 6th April 2015 the CIL rates are dwelling houses (C3) £80; £0 retail (A1), industry and offices (B1, B2 and B3), hotels (C1), residential institutions (C2) and any other uses.
Newark and Sherwood DC – the charging schedule took effect on 1st December 2011 and divides the area into six zones for the purposes of residential development with varying rates - two £0, two £45, one £55, one £65 and the last £75. Other types of development are divided both by area as there are seven zones and class of development of which there are nine (hotel; residential institution; industrial; offices; retail; community/institutional; leisure; agricultural; and sui generis). Most are at £0 but retail is £100 in six zones and £125 at Newark Growth Point.

Newham - with effect from 1st January 2014. There are two zones for residential developments with rates of £80 and £40. For the whole area the remaining rates are £30 for retail; £120 for hotels; £130 for student accommodation; and remainder £0.

Norwich – with effect from 15th July 2013 the rates are residential development (Classes C3 and C4 excluding affordable housing) including domestic garages but excluding shred-user and decked garages £75; flats in blocks of 6 or more £65; large convenience goods based stores (more than 50% of net floor area is intended for sale of convenience goods) of 2000 sqm or more £135; all other retail uses (A1-A5) and assembly and leisure development plus sui generis uses such as retail warehouse clubs, petrol stations, nightclubs, amusement centres and casinos £25; Class C2, C2A and D1 and sui generis fire and rescue stations, ambulance stations and police stations £0; all other uses covered by CIL regulations (including share-user/ decked garages) £5.

Oxford – with effect from 21st October 2013 uses in Classes A1-A5 (shops, financial and professional services, restaurants and cafes, drinking establishments, and hot food establishments) have a rate of £100; uses in Classes B1 (business), B2 (general industrial), B8 (storage or distribution), C1 (hotels) and C2 and C2A (residential institutions and secure residential institutions) are rated at £20; uses in Classes C3 (dwellinghouses including self-contained sheltered accommodation and self-contained graduate accommodation) and C4 (houses in multiple occupation) and student accommodation are rated at £100; uses in Classes D1 (non-residential institutions) and D2 (assembly and leisure) are rated at £20; all other development uses are rated at £20.

Peterborough – with effect from 24th April 2015. With residential development on all sites with 500 dwellings or more there is a nil rate (required by the examiner). There are then three zones for other types of residential development. If the development produces less than 15 market houses the rates are £140, £120 and £100. With developments of 15 or more market houses the rates are £70, £45 and £15. With developments comprising apartments on sites of less than 15 units the rates are £70, £45 and £15. City wide supermarkets (500 sqm or more) are rated at £150; retail warehouses (500 sqm or more) at £70 and neighbourhood convenience stores (less than 500sqm) at £15. All other developments are nil rated. More definitions will be added in response to the examiner but will not be known until the final charging schedule is published.

Plymouth – There are due to take effect on 1st June 2013 with most rates are set at £0 so as to encourage development. Residential is £30; purpose built student accommodation is £60 save it is £0 if located within a particular zone within the city; and £100 for superstores and supermarkets with gross internal floor space of 1000
square metres or more including any extensions. Oddly both superstores and supermarkets appear to have the same definition which is that used for supermarkets by Wycombe, namely “shopping destinations in their own right where weekly food shopping needs can be met and which also include non-food floor space as part of the overall mix of the unit”. If this is correct then many retail superstores will not be caught as they will not meet the weekly food needs of their customers. It is noteworthy that Wycombe has a different definition which is applicable to superstores.

Poole – with effect from 2nd January 2013 a simple charging schedule has been introduced. There are three zones with residential developments chargeable at rates of £150, £100 and £75. Any other development is chargeable at £0.

Portsmouth – took effect on 1st April 2012 with a basic CIL rate of £105 for any development not specifically mentioned. A CIL rate of £53 applies to in-centre retail of any size, out of centre retail for less than 280 square metres, hotels and residential institutions. A £0 rate applies to office and industrial developments and community uses.

Preston – with effect from 30th September 2013 the rates are dwelling houses (excluding apartments) £65 save for those in the Inner Preston Zone when the rate is £35; apartments £0; convenience retail (excluding neighbourhood convenience stores) £160; retail warehouse, retail parks and neighbourhood convenience stores £40; community uses £0 and all other uses £0. The various uses are defined in Appendix two to the Charging Schedule.

Purbeck – with effect from 5th June 2014 the rates are £75 for A1 retail; £20 for A2-5; for C2 (care homes) and C3 (sheltered homes) there are three zones with rates of £100, £30 and nil; for C3 (not sheltered homes) and C4 there are four zones with rates of £180, £100, £30 and £10; for all other developments nil.

Reading – with effect from 1st April 2015. Borough wide there is a rate of £120 for residential, hotels, sheltered housing, and private rented accommodation (including student accommodation). Care homes providing nursing care and fully catered are nil rated. A1 retail is nil rated in Central Reading (defined in the Reading Central Action Plan (2009)). Elsewhere if 2000 sqm or over (including foodstores) the rate is £150 and if under 2000 sqm is nil rated. Offices in the Central core (walk time catchment of Reading Rail Station) are rated at £30. All other chargeable developments are nil rated.

Redbridge - this authority has a single CIL rate applicable to all types of development wherever located in the area. It has been set at £70 per square metre with effect from 1st January 2012.

Rhondda Cynon Taf – with effect from 31st December 2014. There are three zones for residential development rated at nil, £40 and £85. Retail (A1) is rated at £100 and all other development types are nil rated.

Richmond – with effect from 1st November 2014. There are two zones for residential development with rates of £250 and £190. The rate for office development outside
Richmond Town Centre is £25. Borough wide the rate for retail (wholly or mainly convenience) is £150. The schedule provides that convenience retail is a shop or store where the planning permission allows selling wholly or mainly everyday items, including food, drinks, newspapers/magazines and confectionary. The same rate of £150 applies for wholly or mainly comparison retail in Richmond Town Centre. Comparison rates is stated by the schedule to be a shop or store selling wholly or mainly goods which are not everyday essential items such as clothing, footwear, household or recreational goods. Hotels and Care homes in the area known as the lower band are rated at £25. All other uses not expressly covered are nil rated.

Sandwell – with effect from 1st April 2015. The rates are – retail units (this covers A1-A5 excluding superstores/supermarkets and retail warehouses) at West Bromwich Strategic Centre £50; borough wide supermarkets/superstores and retail warehouses (defined in the schedule) over 280 sqm £60; residential developments for 14 or less units £30; residential developments for 15 or more units £15; all other uses nil. Residential developments exclude residential institutions (C2).

Sedgemoor – with effect from 1st April 2015. The rates are – residential development in urban areas £40; residential developments in all other areas £80; supermarkets and retail warehouses (defined in the schedule) £100; hotel developments £10; all other developments nil.

Sevenoaks – with effect from 4th August 2014 the rates are residential (Class C3) £125 and £75 dependent on the zone and a single rate for supermarkets and superstores primarily selling convenience goods of £125; retail warehousing £125; and other forms of development £0. The uses have their own definitions in the schedule.

Shropshire - with effect from 1st January 2012 new residential development in Shrewsbury, the market towns and key centres is set at £40 whilst it is £80 for new residential development elsewhere. Any other development is at a nil rate.

South Norfolk – with effect from 1st May 2014 there are two zones for residential development (C3 and C4 excluding affordable housing) including domestic garages but excluding shared-user and decked garages £75 and £50. A rate of £135 applies to large convenience goods based stores (more than 50% of net floor area is intended for sale of convenience goods) of 2000 sqm or more; all other retail uses (A1-A5) and assembly and leisure development plus sui generis uses such as retail warehouse clubs, petrol stations, nightclubs, amusement centres and casinos £25; Class C2, C2A and D1 and sui generis fire and rescue stations, ambulance stations and police stations £0; all other uses covered by CIL regulations (including share-user/decked garages) £5.

South Ribble – with effect from 1st September 2013 the rates are dwelling houses (excluding apartments) £65; apartments £0; convenience retail (excluding neighbourhood convenience stores) £160; retail warehouse, retail parks and neighbourhood convenience stores £40; community uses £0 and all other uses £0. The various uses are defined in Appendix two to the Charging Schedule.
**Southampton** – with effect from 1st September 2013. The rates are £43 for retail developments (A1-A5) and £70 for residential (C3, C4 and houses in multiple occupation) but not C2 (residential institution).

**Southwark** – with effect from 1st April 2015. There are three zones for a number of uses. Office is rated at £70 in zone 1 and nil rated in zones 2 and 3. Hotel is rated at £250 in zone 1 and £125 in zones 2 and 3. Residential is rated at £400, £200 and £50. Student housing which is directly rented is £100 in all zones and student housing by nomination (let below average weekly rent of £168 per week and this is secured by a section 106 planning obligation) is nil rated. All retail (A1-A5 and sui generis which includes petrol stations, shops selling or displaying cars and retail warehouse clubs) are rated at £125 in all zones. Nil rating applies to town centre car parking (available to all visitors), industrial, warehousing, public libraries, health, education and all other uses.

**Spelthorne** – with effect from 1st April 2015. There are three zones for residential development (C3). If for a scheme with fewer than 15 units to which Policy HO3 Affordable Housing does not apply the rates are £100, £140 and £160. If the scheme is 15 or more units to which policy HO3 Affordable Housing scheme applies the rates are nil, £40 and £60. Purpose built student housing is rated at £120. Out of centre larger convenience based supermarkets and superstores and retail warehousing (net retail selling space of more than 280 sqm) is rated at £120. Hotels, care homes, offices, commercial and all other uses are nil rated.

**Surrey Heath** with effect from 1st December 2014. There are zones but different ones for residential (C3) developments and retail development other than supermarkets/superstores and retail warehousing. One of the zones for residential development is rated at nil. With each of the other two zones the rate varies dependent on whether the residential development does or does not provide its own open space in the form of Suitable Accessible Natural Greenspace as avoidance for European Sites. The rates in one zone are £189 without such provision and £55 with. In the other zone the rates are £220 and £95. Borough wide the rates for retail warehousing and supermarkets/superstores (defined in the schedule) are £200. Other retail (A1-A5) are rated at nil in one zone and £100 in the other zone. All other developments are rated at nil.

**Sutton** - with effect from 1st April 2014. Residential is rated at £100 psm and retail which is wholly or mainly convenience at £120 psm. There is a nil rate for retail which is wholly or mainly comparison; office; hotels; industrial; community uses (schools and hospitals) and all other developments not separately defined. Appendix 2 to the charging schedule sets out what constitutes convenience goods and comparison goods.

**Swindon** with effect from 6th April 2015 there are two residential zones rated at zero for Swindon’s New Communities and £55 for the rest of the borough. For this purpose residential is any use within Class C3 including ancillary development such as garages. As regards retail use the Town Centre and New Communities are zero rated and the rest of the borough is rated at £100. For these purposes retail is any use within A1-A5 including sui generis uses that are shops and premises selling and ort
displaying motor vehicles, retail warehouse clubs, laundrettes, taxi or vehicle hire businesses, amusement centres, petrol filling stations. All other uses are zero rated.

Tandridge – with effect from 1st December 2014. All residential development excluding sheltered/retirement housing and extra care accommodation (defined as grouped units, usually flats, specially designed or designated for older people encompassing communal non-saleable facilities over 25% gross floorspace) is rated at £120. Convenience retail including convenience based supermarkets and superstores (which are defined in the schedule as shopping destinations in their own right where weekly shopping needs are met and which can also include non-food floorspace as part of the overall mix of the unit) is rated as £100. Comparison retail, offices and all other uses are nil rated.

Taunton Deane – with effect from 1st April 2014. There are four zones for residential development (£125, £70 and two at nil rate). For these purposes there is excluded from residential Class C2 use but there is included student housing and similar types of institutional accommodation. Retail development (Classes A1-A5) outside Taunton and Wellington town centres are rated at £140. All other developments are nil rated.

Teignbridge – with effect from 13th October 2014. Retail is rated at £150 outside identified town centres and nil within them. There are five rates for residential development dependent on the location of the development site (£70, £85, £125, £150 and £200). But there is no CIL rate on affordable housing. All other development or uses are rated at nil.

Three Rivers – with effect from 1st April. Residential development (Use Class C3) is rated at £180 psm in Area A; 3120 psm in Area B and nil in Area C. Retail development (Use Class A1) in Areas A and B are rated at £60 psm and nil in Area C. Hotels (Use Class C1) are rated at nil boroughwide as is Residential Housing (Use Class C3. For these purposes it is stated that Retirement Housing is housing which is purpose built or converted for sale to elderly people with a package of estate management services and which consists of grouped, self-contained accommodation with communal facilities. These premises often have emergency alarm systems and/or wardens. These properties would not however be subject to significant levels of residential care as would be expected in care homes or extra care premises (C2). It is further provided that for the avoidance of doubt this excludes registered not for profit care homes. Other non-residential development is nil rated boroughwide.

Tower Hamlets – with effect from 1st April 2015. For residential developments there are three zones rated at £200, £65 and £35. In addition there are identified large allocated sites which are nil rated for all developments including residential, hotel, retail, student housing (whether let at market rent or not) and office developments. Office development in the zone described as the City Fringe is rated at £90 but elsewhere is rated at nil. Convenience supermarkets/superstores and retail warehousing (defined in the schedule) is rated at £120 borough wide except for the large allocated sites. Other retail is rated at £79 in two zones and nil elsewhere. Hotel development is rated at £180 borough wide apart from large allocated sites. Student housing let at market rent is rated at £425 borough wide apart from large allocated sites. Student housing let at below market rents is rated at nil. To qualify as student housing let at below market rent it must be (i) university led development with the
university having at least one teaching facility in the area; (ii) the developer must have entered a nomination agreement or equivalent; (iii) the housing must be to meet an identified need secured by a section 106 planning obligation; (iv) the below market rent must be in place for a minimum of seven years; (v) the rent discount must as a minimum equate to the amount of CIL not paid by reason of it being student housing let at a market rent; and (vi) there must be a valuation supporting the discount by an independent valuer at the cost of the applicant. Unless the student housing qualifies as let at below market rent it will be rated as student housing let at market rent. All other uses are rated at nil.

Trafford – with effect from 7th July 2014. The terminology and approach is a little different from other charging schedules. There are three zones for private market houses – helpfully called cold, moderate and hot. The rates are £20, £40 and £80. For apartments (which include sheltered housing and retirement apartments) the rates in those zones are £0; £0; and £65. The remainder of the rates are retail warehouses (defined in the Appendix to the Charging Schedule) £75; supermarkets outside town centres (similarly defined) £225; supermarkets in defined town centres £0; public and institutional facilities for education, health, community and emergency services and public transport £0; offices, industry and warehousing £0; leisure £10, hotels £0; all other developments £0.

Waltham Forest – with effect from 15th April 2014. There are two zones for residential development with rates at £70 and £65. The remainder of the rates apply across the area. Those rates are publicly funded care homes £0; convenience superstores and retail warehouses - £150; hot takeaways and restaurants - £80; betting shops - £90; and hotels - £20.

Wandsworth – these took effect on 1st November 2012 and the CIL Rates are determined by four different areas within the borough. The Mayor of London charge will also apply. Dependent on the area (a) the residential rates are 575; £265; £250; and £0. (b) office or retail rates are £265; £250; and £0. (c) all other developments £0.

Watford – with effect from 1st April 2015. All developments in Major Developed Areas (as shown on the map attached to the Schedule) are nil rated. Residential developments are rated at £120. Hotels and specialist accommodation for the elderly and/or disabled including sheltered and retirement housing and nursing homes, residential care homes and extra care homes (excluding registered not for profit care homes) within Class C2 and C3 are rated at £120. Retail (A1-A5) in the Primary shopping Area is rated at £55 and elsewhere £120. There is a nil rate for offices, industrial and other uses.

Waveney – with effect from 1st August 2013. There are four residential charging zones and the rates are £150; £60; £45; and £0. For holiday lets the rate is £40. For Supermarkets, superstores and retail warehouses the rate is £130. All other developments are £0.
West Berkshire – with effect from 1st April 2015. There are two zones for the residential (C3 and C4) rate (£125 and £75) whilst the retail (A1-A5) rate is £125 in both. The rate for business, hotel and residential institutions is £0 across the area.

West Lancashire – with effect from 1st September 2014. There are two zones. In zone B the rate is nil for all developments. In zone A the rates are – residential dwelling house (C3a,b,c) £85; apartments (defined as dwellings with shared access and communal areas on more than one floor) (including retirement apartments) nil; agricultural workers dwellings (dwelling in which the occupancy is limited usually by condition to those employed in agriculture) nil; comparison retail Any building selling mainly comparison goods such as clothing, footwear, household and recreational goods) nil; convenience retail (any building selling mainly everyday essential items, including food, drink, newspapers/magazines and confectionery. In the case of a mixture of convenience and comparison goods the rate will be based on the main use) £160; food and drink (A3/A4/A5) £90; all other uses nil.

Winchester – with effect from 7th April 2014 the area is divided into three zones. In Zone 1 there is a £0 rate. In Zone 2 the rate for residential and retail development is £120. In Zone 3 the residential rate is £80 whilst the retail rate is £120. The rate for all other developments is £0.

Woking – with effect from 1st April 2015. With regard to residential development there are two zones rated at £125 and £75. For these purposes residential means either use as a dwelling house (whether or not a main residence) by (a) a single person or by persons to be regarded as forming a single household; (b) not more than six residents living together as a single household where care is provided for residents; or (c) not more than six residents living together as single household where no care is provided to residents (other than use within Class C4) or use of a dwelling house by three to six residents as a house in multiple occupation. All types of retail are rated at £75. All other commercial and non-residential use is nil rated.

Wokingham – with effect from 6th April 2015. There are four rates applicable for residential development (excluding sheltered housing, extra care housing and residential institutions) which are £300, £320, £340 and £365. These relate to four strategic development locations (“sdl”) and the rest of the borough. As regards sheltered housing the rate is £365 in the four sdl and £150 in the rest of the borough. For these purposes sheltered housing is self-contained accommodation for older people, people with disabilities and/or other vulnerable groups which include some shared/communal facilities and where a degree of support is offered. As regards residential institutions and extra care housing the rate is £100 in the four sdl and £60 in the rest of the borough. For these purposes “extra care housing” means “purpose built accommodation in which varying amounts of care and support can be offered and where some services and facilities are shared (including a minimum of 30% of GIA provided as communal facilities). For retail use the rate is nil for existing town/small town and district centres identified on attached maps and a named sdl and for the rest of the borough it is £50. All other development types are nil borough wide.

Wycombe – with effect from 1st November 2012 the area is divided into two charging zones. The rate for residential developments (including sheltered accommodation) is £150 in one zone and £125 in the other. In both zones there is a rate of £200 for
convenience based supermarkets (defined as shopping destinations in their own right where weekly food shopping needs can be met and which also include non-food floor space as part of the overall mix of the unit) and retail warehousing (defined as large stores specialising in the sale of household goods (such as carpets, furniture and electrical goods), DIY items and other ranges of goods, catering for mainly car-borne customers) with net retail selling space of over 280 square metres. All other retail and uses akin to retail are chargeable at £125. Any other developments are at £0.

Woking – with effect from 1\textsuperscript{st} April 2015. With regard to residential development there are two zones rated at £125 and £75. For these purposes residential means either use as a dwelling house (whether or not a main residence) by (a) a single person or by persons to be regarded as forming a single household; (b) not more than six residents living together as a single household where care is provided for residents; or (c) not more than six residents living together as single household where no care is provided to residents (other than use within Class C4) or use of a dwelling house by three to six residents as a house in multiple occupation. All types of retail are rated at £75. All other commercial and non-residential use is nil rated.

Second Appendix

Contribution areas in London for Cross rail contributions through section 106 obligations
(with the permission of the Mayor of London reproduced from the Supplementary Planning Guidance April 2013)

1. Central London contribution area
2. Isle of Dogs contribution area

3. Rest of London contribution area – West London
4. Rest of London contribution area – East London
Third Appendix

Zones for Mayoral CIL

Zone 1

Camden, City of London, City of Westminster, Hammersmith and Fulham, Islington, Kensington and Chelsea, Richmond-upon-Thames, Wandsworth

Zone 2

Barnet, Brent, Bromley, Ealing, Greenwich, Hackney, Haringey, Harrow, Hillingdon, Hounslow, Kingston upon Thames, Lambeth, Lewisham, Merton, Redbridge, Southwark, Tower Hamlets

Zone 3

Barking and Dagenham, Bexley, Croydon, Enfield, Havering, Newham, Sutton, Waltham Forest
Fourth Appendix

**Curtilage**

There is no certain and precise definition of what is a “curtilage”. On the contrary the Courts have considered it ill-advised to attempt to provide a comprehensive definition. \(^{85}\) Inevitably when an issue arises in a case consideration of the term goes back to the fifteenth century and there is the citation of numerous definitions from dictionaries starting with the Oxford English Dictionary.

In Sheppards Touchstone it is defined (page 94) as a “little garden, yard, field, or piece of void ground, laying near and belonging to the messuage and house belonging to the dwelling-house and the close upon which the dwelling-house is built at the most”\(^{86}\). It indicates that there has to be a connection with the “messuage” but it is no more than a starting point and does not tackle a number of the issues which have been raised subsequently or the complexity of the factual matters that the Courts have had to consider.

The concept is relied on in other statutory areas concerning property including the ownership of sewers and drains. Changes within a curtilage may not require planning permission or listed building consent when they would if outside the curtilage. A property will be exempt for unoccupied property rates if part of a listed building. A tenant’s right to buy under the relevant Housing Acts may be excluded if within the curtilage of a building used for purposes other than housing. An application for enfranchisement will cover everything within the curtilage of the dwelling. Although the statutory contexts are different the decisions as to whether or not buildings or land are within the curtilage of another building have been accepted as being relevant when the issue arises in the context of a different statute.

It is clear that the concept has changed. Originally it was a small area enclosed by walls or buildings but over time the need for physical enclosure has disappeared. \(^{87}\) However, the same degree of connection has been retained albeit not requiring physical enclosure. Buckley LJ stated that “one must be as intimately associated with the other as to lead to the conclusion that the former in truth forms part and parcel of the latter”. \(^{88}\) Similarly, Sir Richard Tucker stated that to be within a curtilage “connotes a building or piece of land attached to a dwelling-house and forming one enclosure with it. It is not restricted in size but it must fairly be described as being part of the enclosure of the house to which it refers.” \(^{89}\) They must constitute an integral whole.

In determining whether there is a sufficient degree of connection between a building and another building or piece of land a number of points arise from the numerous decisions on the subject:-

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\(^{85}\) Sir David Croom-Johnson in Barwick v Kent CC [1992] 24 HLR 341 at page 346
\(^{86}\) Vol. 1 94
\(^{87}\) Nourse LJ in Dyer v Dorset [1989] 1 QB 346 at page 358.
\(^{88}\) Methuen-Campbell v Walters [1979] 1 QBD 525 at pages 543/544
\(^{89}\) Lowe v First Secretary of State [2003] 1 PLR 81 at para 21
1 Fact - The issue is one which is a factual question in each case and is heavily dependent on the individual facts;

2 Not limited to house - It is permissible to refer to the curtilage of a building and not just a house.\(^{90}\)

3 Ancillary – To be within the curtilage of a building the other building or land must be ancillary to it and not independent of it. The House of Lords emphasised this in Debenhams plc v Westminster.\(^{91}\) The case involved Hamley’s toy shop which is a listed building. Exemption from unoccupied property rates was claimed for a building on the opposite side of a street to it on the basis of it being fixed to the listed building. Previously the two buildings had been linked by a bridge at second floor level and a tunnel at basement level. The other building was held not to be within the curtilage of Hamley’s because it was not ancillary to the toy shop. This was contrasted with the terrace of cottages being ancillary to the mill in the Calderdale case (see 11.4 below) although Lord Mackay did say that the Calderdale case was a very special case. It was not overruled but it was said that the width of the judgment of Stephenson LJ was not accepted.

4 General factors - Three general factors are of particular importance when considering the issue. In the Calderdale case they were spelt out by Stephenson LJ\(^{92}\) and have been followed in later cases

(i) physical layout;
(ii) ownership past and present;
(iii) use or function of the property past and present

The decision in the Calderdale case was unusual and surprising. The context it arose in was whether the Secretary of State’s consent was required before a terrace of cottages could be demolished. The specific issue was whether the terrace was within the curtilage of a mill which was a listed building. The mill had been built in 1820 and the terrace in 1870 to house the mill workers. The terrace was connected to the mill by a bridge which provided access to three cottages and the only means of access to one. The first cottage was used for storage and offices. The mill was listed in 1971. Subsequent to that all but one of cottages were conveyed to the housing authority. Notwithstanding the severance of ownership and of use, as the cottages were not occupied by mill workers, it was held that the terrace was still within the curtilage of the mill as the terrace remained “so closely related physically and geographically as to constitute single unit”\(^{93}\). The substantially unchanged layout of the area was considered to be the strongest indication.

Were this decision to be applied in the context of the ownership of sewers and drains it would mean that all the drains serving only the mill and terrace would remain in private ownership until they left the curtilage.

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\(^{90}\) Nourse LJ in Dyer v Dorset CC supra at page 358
\(^{91}\) (1961) 178 EG 221
\(^{93}\) Stephenson LJ at page 409
5 **Ownership** - The expectation would be that the curtilage of a property would not exceed the property’s boundaries but might be smaller. The Calderdale case shows that, surprisingly, curtilage can straddle different ownerships albeit that it will be much less easy to find that properties within different ownerships are within the same curtilage. In those cases where it arises it will mean that ownership may be vested in more than one property owner which will leave plenty of scope for disputes between them.

6 **Separation** - If the physical circumstances are such as to suggest that the two are separate from each other then they will not be part of the same curtilage.

This can be illustrated by what is within the curtilage of a country house which has featured regularly in the decisions because of their conversion to other uses. Nourse LJ regarded such a curtilage as including stables, outbuildings, gardens up to the ha but not the surrounding park land. In Dyer v Dorset CC a college lecturer had applied to enfranchise a cottage on the boundary of an agricultural college which had previously been a manor house in a park. It was held that the cottage was not within the curtilage of the manor house or any other building and so could be enfranchised. The park and any building within it was not part of the main house’s curtilage.

Sir Richard Tucker in Lowe v First Secretary of State supra stated that the curtilage of a country hall would include stables, outbuildings, gardens (whether walled or not) and accommodation land such as a small paddock close to the hall but would not include the whole of the parkland setting or a driveway. In that case a chain link fence had been erected along a 650 metre drive to the hall. The hall was listed and if this was within the curtilage consent was required. It was held that it was not. The reason for the fence, to define the boundary, and the drive being in common ownership was held to be irrelevant. However, when a wall is erected to bring more land into the garden of a house then that additional land and the wall will become part of the curtilage of the house.

In Skerritts of Nottingham v Secretary of State for the Environment the issue was whether the stables of a country house converted to a hotel which was a grade II listed building were within the curtilage of the hotel. Double glazing windows had been installed in the block and if within the curtilage of the hotel consent was needed. It was held that the curtilage of a substantial listed building is likely to extend to what are or have been in terms of ownership and function ancillary buildings but that such satellite buildings are bound to be relatively limited.

A similar approach to that in Dyer v Dorset CC was adopted with regard to houses built near a fire station to accommodate firemen. The houses were separated by a wall from the fire station and had their own addresses and own access to the public highway. It was held that the houses were not within the curtilage of the fire station building.

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94 Stephenson LJ at page 408
95 Dyer v Dorset CC supra at page 358
96 Sumption v Greenwich LBC [2008] 1 PCR 336
97 4th June 1999 – CO/1912/98
98 Barwick v Kent CC [1992] 24 HLR 341
With less grand buildings it is a question of looking at the particular layout to see whether there are physical features separating or connecting the two. A tennis court in a field 100 metres from a house and separated by an area of undergrowth and grassland was not within the curtilage of the house.\(^99\) There was no appearance of close association nor were they in the same enclosure. A paddock at a lower level than the house’s garden and separated from the garden by a post and wire fence was not within the curtilage of the house for the purposes of an application for enfranchisement.\(^100\) An old barn was held not to be within the curtilage of an old farmhouse because it “turned away” from the farmhouse and was separated by a wall. There was an outhouse between the two.\(^101\) It was considered by Sullivan J not to be enough that the barn would have been a constituent part of the farming enterprise as the question was whether it was within the curtilage of the farmhouse and not the farm. A distinction had to be made between the part of the farm which was principally concerned with residential use and the part concerned with agricultural use. A similar result was reached in Morris v Wessex CBC\(^102\) where there was no ready access between the two buildings and a brick wall separated them.

7 **Facilitation** - It is not enough that it is convenient to have a building or land for use of the main building or that it is a valuable amenity to come within the curtilage of the main building. It must facilitate occupation of the main building.\(^103\)

8 **Which building** - It is important to determine accurately by reference to what building the curtilage is to be determined. In Dyer v Dorset the question was whether the cottage was within the curtilage of the main college building or any other building and not the whole college. Similarly, in Barwick v Kent CC the question was whether the house was within the curtilage of the fire station building and not the whole fire station. The fire station building included the garages and the yard but not the houses. A similar distinction has to be drawn with farmhouses as opposed to the whole farm.

9 **Size** - It has been argued based on the judgments in Dyer v Dorset CC that a curtilage can only be a small area. This was rejected in the Skerritts of Nottingham case and it was stated that smallness was not material.

10 **Automatically pass with conveyance** - One test as to whether land or a building is within the curtilage of another building is whether a conveyance of the principal building would automatically carry the land or other building without there being a specific mention in the conveyance.\(^104\)

11 **Boundary** - As is apparent from the above the extent of the curtilage is not identical to the boundary of a property. Confusingly although the legislation refers to curtilage when this topic is discussed boundary is often substituted for curtilage as in the debates in the House of Lords on 17th May 2011. This is not the case as the

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\(^99\) James v Secretary of State for Environment and Chichester DC (1990) 61 PCR 234

\(^100\) Methuen-Campbell v Walters supra

\(^101\) R v Taunton Deane BC [2008] EWHC 2752

\(^102\) 2001] EWHC 697

\(^103\) Barwick v Kent CC supra; and Buckley LJ in Methuen-Campbell v Walters supra at page 543 stated that test is not whether enjoyment of one is advantageous or convenient or necessary for full enjoyment of other.

\(^104\) Buckley LJ in Methuen-Campbell v Walters supra at page 543
curtilage may be significantly smaller in area than the area owned and in a few cases might be larger.

The point at which a drain running to a sewer in public highway leaves the curtilage of an ordinary house was raised in the House of Lords debates on 17th May 2011 and Lord De Manley stated that the point would be the back end of the pavement running along the street. It must obviously depend on the precise physical layout. In some case there may be a significant distance between the boundary wall of the house and the pavement. What will be disregarded is any soil up to the mid-point of the public highway within the ownership of the house abutting on the road.

Lord De Manley also indicated that the approach will be the same if the road is not a public highway but remains unadopted.