Planning obligations – what contribution can they still make to funding infrastructure?

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The extended deadline of 6th April 2015 has just passed for the coming into force of the much mentioned "pooling restriction". This is one of the sticks being used by the government to encourage local authorities to introduce the Community Infrastructure Levy. The original deadline had been 6th April 2014 but by then only around 40 authorities had succeeded in completing the demanding introduction process which can take up to thirty months. In consequence the deadline was extended by a year to allow more authorities to bring in the new source of funding for infrastructure. To be fair to the government it made it clear that having extended the deadline once it was not going to again. Now just over 80 authorities have introduced CIL and will be receiving CIL payments from which to fund infrastructure.

What is to happen to the over one hundred authorities which have started the CIL introduction process and are at varying stages along it? It may be rash to believe that apart from those authorities part way through the process the remainder which have not started the process have made a conscious decision that there is no need to do so. In some cases that is undoubtedly so but probably not with all such authorities. How will those authorities fare?

Until the advent of CIL a major source of funding for local infrastructure was through section 106 planning obligations. These were not limited to remedying specific infrastructure matters arising in relation to the site. Unlike planning conditions the scope of planning obligations permitted financial contributions to be made by developers to meet the impact of the proposed development on infrastructure in the local area. It has become common place for financial contributions to be made towards a wide range of infrastructure needs such as schools, libraries, community centres, open spaces and highways.

With the intention of encouraging local authorities to introduce CIL a number of restrictions have been introduced seeking to limit the use of planning obligations. Some apply across the country even if CIL has not been introduced in the particular area where the proposed development is located. The intention is that these restrictions should bite but if they do how will authorities which have not yet introduced CIL fund local infrastructure? As part of the problem will such authorities have to refuse planning applications because it is no longer possible to make the proposed development acceptable in planning terms by the developer offering financial contributions?

The CIL regime contained in the Community Infrastructure Levy Regulations 2010 has applied three restrictions to planning obligations. Each applies to planning obligations which

constitute a reason for granting planning permission. The three restrictions are that such planning obligations must:

(a) comply with the three statutory tests in reg. 122 requiring it to (i) be necessary to make the development acceptable in planning terms; (ii) directly relate to the development; and (iii) be fairly and reasonably related in scale and kind to the development. This has applied since 6th April 2010 regardless of whether the authority has introduced CIL.

(b) not provide for the funding or provision of "relevant infrastructure" which is any type of infrastructure or any project of infrastructure which appears ion the authority's reg. 123 list of infrastructure. Any infrastructure entry on the list is intended to be funded exclusively from CIL receipts. This restriction now applies to highway agreements as well. It only operates when CIL has been introduced by the authority.

(c) not infringe the pooling restriction in reg. 123(3). This restriction now applies in all areas regardless as to whether CIL has been introduced. As a result such a planning obligation cannot be imposed if there have since 6th April 2010 been five or more planning obligations entered into with the authority providing for the provision or funding of the same infrastructure project or type of infrastructure. It does not apply to highway agreements. Just reading the terms of the restriction creates an immediate impression of clumsy uncertainty. It has received a great deal of publicity as effectively bringing to an end the provision of financial contributions to infrastructure through section 106 planning obligations. A simple prohibition would have at least had the advantage of certainty. This restriction unfortunately lacks that advantage which because of the pressure on authorities to obtain infrastructure funding and on developers to carry out developments means that considerable time, effort and money is going to be wasted on trying to understand and avoid the restriction. Bearing in mind the intense demand for new housing to create such uncertainty by such an approach strikes me as strange and unhelpful both to authorities and to developers.

The effect of this combination of restrictions will be a major concern to authorities that have not yet introduced CIL but even those that have will be affected by the uncertainty that attaches to their operation. For developers there will be the concern whether the restrictions will block a proposed development because the usual method of making it acceptable in planning terms is no longer available. However, the restrictions may also be used by some to seek to block a proposed development which is a competitor either for planning permission or as a business if the proposed development is completed. A number of the cases which consider the application of the statutory tests in reg. 122 have been litigated because an interested party is a competitor.

It has been said that the "pooling restriction" means that from now on planning obligations will be restricted to coping with the site specific impact of the proposed development and bar financial contributions to meet the wider local infrastructure needs. In contrast it has also been suggested that the operation of the "pooling restriction" can be simply overcome by avoiding the relevant planning obligation being given as a reason for the grant of planning permission and using them to overcome a refusal to grant planning

permission. There should not be the possibility for such divergent views over the operation of such a restriction which affects the important issues of funding infrastructure and obtaining planning permissions.

For authorities and developers it means that unless and until the position is clarified there will be a need to muddle through. There have been no cases on the operation of the restrictions in reg. 123 (referred to in (b) and (c) above). There have been a round fifteen cases in which the issues for consideration by the judge included whether or not the statutory tests in reg. 122 had been complied with and in particular the need for a planning obligation that has triggered the operation of the regulation to be necessary to make the proposed development acceptable in planning terms. A more detailed consideration of those authorities is contained in chapter twenty of my Guide to CIL (a link to which can be found on my chambers webpage http://www.9stonebuildings.com/cc_cv.shtml or my personal website http://www.christophercant.co.uk/community-infrastructure-levy/).

The following general points can be made arising from those authorities and a consideration of the regulations.

(i) statutory tests in reg. 122 – the stance taken by the Courts in the authorities to date suggests that enacting the requirements of Circular 05/2005 has not effected a change. In R oao Welcome Break Group and Others) v Stroud DC[1] Bean J expressly stated that there is nothing novel in reg. 122 and that Lord Hoffman's judgment in the Tesco Stores case[2] remained good law. This reflects the judicial approach adopted in the majority of these cases. A slightly different approach was adopted by Lang J. DBE in Oxfordshire CC v Secretary of State[3] when she stated that reg. 122 must be adhered to as it is a statutory requirement rather than being guidance which should be considered but not necessarily followed.

(ii) "such planning obligations" – each of the restrictions in regulations 122 and 123 is expressly stated to apply not to any planning obligation but to a planning obligations which is a reason for the grant of planning permission. It follows from this wording that there may be a valid planning obligation which does not trigger the operation of any of the restrictions if it is not a reason for the grant of planning permission. A planning obligation which does not relate to the proposed development will not be a valid planning obligation but will be regarded as an attempt to purchase a planning permission. However, if it relates to the proposed development it will be valid unless it infringes any of the three restrictions and for it to do so it is a pre-condition that it must be a planning obligation which is a reason for the grant of planning permission. If is not a reason for the grant then the restrictions will not apply and the planning obligation will continue to be valid as in R (oao Savage) v Mansfield[4] following Derwent Holdings v Trafford BC.[5]

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[1] [2012] EWHC 140 (Admin)
[2] [1995] UKHL 22
[3] [2012] EWHC 186 (Admin)
[4] [2015] EWCA Civ 4
[5] [2011] EWCA Civ 832

This provides scope for planning obligations to continue to play a role despite the "pooling restriction" but only if not a reason for granting planning permission. When a planning permission is granted the summary of reasons that has to be supplied may answer the question whether a planning obligation has been a reason for the grant. At present it does not appear from the judgments that such a summary is conclusive on the point. In any event the planning obligation may be a unilateral undertaking offered after a refusal to grant planning permission during the course of an appeal to an Inspector. If the planning permission is taken into account by the Inspector when allowing such an appeal then it seems to me that it is a reason for the grant of planning permission. If the Inspector did not take it into account but it relates to the proposed development then it will not have triggered the operation of any of the restrictions.

(iii) the restrictions are expressed to apply only to planning obligations pursuant to section 106. It is to be expected that consideration will be given to exploring the possibility of using alternative statutory provisions to impose similar obligation. This in turn will raise the issue whether the restrictions applicable to planning obligations will indirectly limit the alternative statutory provisions or whether they can be exercised free from the application of these restrictions.

(iv) the "pooling restriction" and its limitation to five planning obligations will operate separately as regards types of infrastructure and projects of infrastructure although there seems to have been a reluctance to give official guidance confirming this. This will encourage planning obligations relating to specific projects of infrastructure and provides further scope for authorities to continue to use planning obligations.

(v) in calculating the number of material planning obligations that have been entered into for the purposes of the pooling restriction planning obligations relating to unimplemented planning permissions will be included and if a planning agreement contains more than one then each obligation will be included and not just the planning agreement.

(vi) there is a risk for authorities when including blue pencil clauses in planning agreements. A planning obligation may infringe one of the restrictions particularly the statutory tests in reg. 122 but with such a clause the grant of planning permission may still stand without the benefit of the invalid planning obligation. In such cases the authority may have lost the benefit of a financial contribution as in Telford v Wrekin BC v Secretary of State[6] and Oxfordshire CC v Secretary of State.[7]

The application of restrictions and in particular the pooling restriction will not be straightforward but it is not the end of planning obligations requiring financial contributions towards the costs of local infrastructure. Interestingly Torbay DC has adopted a "hybrid approach" with the draft CIL charging schedule that it is seeking to introduce. It clears believes that the issues with section 106 planning obligations can be managed. It is proposed that larger residential developments will not give rise to a CIL charge but will be

[6] [2013] EWHC 1638 (Admin)
[7] [2015] EWHC 186

dealt with by section 106 planning obligations whilst smaller residential developments will be charged to CIL and planning obligations will be limited to site specific matters.

This is encouraging for authorities still seeking to introduce CIL. What is important is that the cumulative implications of the three restrictions are understood and there is in place a strategy for managing the issues that will arise.