

CIL regulation 123 limitations and planning obligations

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When the deadline of 6th April 2015 passed the “pooling restriction” contained in the CIL regime applied to all charging authorities regardless of whether or not an authority has introduced CIL in its area. The original deadline had been 6th April 2014 but by then only around 40 authorities had succeeded in completing the demanding process of introducing CIL 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 100 authorities have introduced CIL with many more seeking to introduce it. These authorities will either now or shortly be receiving CIL payments from which to fund infrastructure.

Those that have recently introduced CIL will be grappling with the practical issues arising from the operation of the CIL regime. Those that have not will be facing funding shortfalls for infrastructure with one inevitable consequence being a reduction in the numbers of needed new houses. Authorities which have introduced CIL may also still be facing funding shortfalls. These difficulties will not have been helped by the debacle over the imposition of the restrictions as regards small developments on contributions for affordable housing and then their quashing by Mr. Justice Holgate in R (oao West Berkshire

DC) v DCLG [2015] EWHC 2222 (Admin). This has created uncertainty and the Court of Appeal hearing in March of this year may not remove that uncertainty.

Apart from the problems posed by the existence of these limitations there is the added problem that the provisions are not simple and straightforward. They throw up difficult issues of construction which by themselves are highly undesirable and it is surprising that some of these construction issues should even be possible. It poses problems not just for the authorities but also for developers and third parties such as highway authorities and other undertakings responsible for infrastructure. The promised for simplicity when CIL was introduced appears in this area to be as elusive as it is in other area of the CIL regime.

In this context it is interesting that Mrs Justice Paterson in R (oao Orbital Shopping Park Swindon limited) v Swindon BC [2016] EWHC 448 has recognised that the CIL regime is a taxing regime and that this imposes limitations with regard to the construction of the CIL provisions. In particular the learned judge applied the dicta of Lord Wilberforce in Vestey v IRS [1980] AC 1148:

"Taxes are imposed upon subjects by Parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined.

A proposition that whether a subject is to be taxed or not, or, if he is, the amount of his liability, is to be decided (even though within a limit) by an administrative body represents a radical departure from constitutional principle. It may be that the revenue could persuade Parliament to enact such a proposition in such terms that the courts would

have to give effect to it: but, unless it has done so, the courts, acting on constitutional principles not only should not, but cannot, validate it."

In addition it has to be remembered that the CIL regime is a standalone regime which as regards definitions and interpretation is not part of the planning regime. Part 11 of the Planning Act 2008 is expressly excluded from section 235 which is the definitions section in that Act

The CIL limitations will impact on planning applications and in some cases be a reason for refusing planning permission. When the pooling restriction catches a proposed planning obligation it may mean that a planning objection cannot be overcome. Separately the operation of the pooling restriction may result in infrastructure shortfalls because it is not possible to assemble a pool of sufficient financial contributions to provide the required infrastructure.

1. CIL Limitations - the CIL regime contained in the Community Infrastructure Levy Regulations 2010 has applied three restrictions to planning obligations and another with regard to planning conditions and highway agreements. Each of the three applies to planning obligations which constitute a reason for granting planning permission. The two limitations in regulation 123 each contain common phrases which throw up difficult issues of construction.

The restrictions are:-

(a) Reg. 122 – a planning obligation must comply with the three statutory tests in reg. 122 requiring the planning obligation 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. It gives statutory effect to what previously was official guidance most recently in Circular 05/05.

(b) Reg. 123(2) – a planning obligation must not provide for the funding or provision of “relevant infrastructure” which is any type of infrastructure or any project of infrastructure which appears in the authority’s reg. 123 list of infrastructure. Any infrastructure entry on the list may be funded in part or exclusively from CIL receipts but there is no obligation on the authority. This restriction now applies to highway agreements as well. It only operates when CIL has been introduced by the authority.

(c) Reg. 123(2A) – a planning condition may not require a highway agreement to be entered into for funding or providing relevant infrastructure nor may it prevent or restrict the carrying out of a development before such a highway agreement is entered into. With highway agreements there is no limitation akin to the pooling restriction.

(d) Reg. 123(3) – a planning obligation must 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 has 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.

2. Requirements of reg. 122 – This test replaces the similar requirements previously contained in Circular 05/05. A principal objective of these requirements is to prevent the

purchase of planning permissions¹. It is not proposed in this paper to consider the numerous cases on the application of reg. 122 as this is a separate topic in its own right which can give rise to a number of demanding determinations. There are five points that I would make within the context of this paper.

2.1 Reaction of Courts to regulation 122 – there is a split in the approach adopted by the judges to the inclusion of these requirements in reg. 122. On the one hand Bean J. in *R (oao Welcome Break Group) v Stroud DC*² considered that there was nothing novel in the reg. 122 and that the judgment of Lord Hoffman in *Tesco Stores v SSE*³ remains good law. 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”; and

(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.

A similar approach was adopted by Paterson J. in *Smyth v SSCLG*⁴ who stated that 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 judgement on conventional public law principles and no more. It is not to step into the Inspector's shoes and start exercising its

¹ Turner J. in *Telford v Wrekin BC v SSCLG* “the policy behind regulation 122 is to inhibit developers from “buying” planning permission with the promise of wide ranging largesse”. See also HHJ Purle QC in *Persimmon Homes North Midlands v SSCLG* [2011] EWHC 3931 (Admin) para. 8

² [2012] EWHC 140 (Admin)

³ [1995] UKHL 22

⁴ [2013] EWHC 3844 (Admin)

own planning judgement on the matters before the Inspector. That would be an impermissible exercise of its powers.”

On the other hand Lang J. DBE in *Oxfordshire County Council v SSCLG*⁵ 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.⁶ 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.”

Over time that second approach may have a stronger influence.

2.2 Reason for grant of planning permission – the operation of each of the three limitations in the CIL regime applying to planning obligations is triggered not by all planning obligations but only those which are a reason for the grant of planning permission. With reg. 122 such a planning permission must satisfy the three requirements. With the limitations in reg. 123 such an obligation must not infringe either of the two limitations in reg. 123.

Lewison LJ stated in *R (oao Savage) v Mansfield DC*⁷ 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.*”⁸

⁵ [2012] EWHC 186 (Admin)

⁶ Para. 29

⁷ [2015] EWCA Civ 4 at para. 68

⁸ [2011] EWCA Civ 832 at para. 15

The Savage case was concerned not with the funding of infrastructure but with a provision in the planning agreement seeking to exclude a right to compensation if the permission was revoked or modified which provision was then varied so as to come within the scope of section 106 by providing for the repayment of any compensation received in such circumstances. It operated if the planning permission was revoked or modified. This meant that the provision could not operate if the development was implemented and, therefore, Lewison LJ considered it could not have been used to overcome a planning objection and in consequence could not have been a reason for granting planning permission. He also considered that it showed that as the provision could not operate if the development had been carried out then the proposed development must have been acceptable in planning terms without that provision.

Reference was made to the Derwent case. This case concerned the sale of a site by the local authority to Tesco. There was a planning application to authorise the use of the site as a supermarket. The site was next to the Old Trafford cricket ground and there was also an application for the improvement of that stadium. The authority agreed to apply the proceeds of sale in improving the Old Trafford stadium for international cricket. The two planning applications were considered separately and both planning permissions granted. A challenge was raised by the owner of a site further away from the Stadium who was prepared to contribute to the improvement of the Stadium in return for planning permission to use that site as a supermarket

Benefits on one site may in appropriate circumstances be taken into account in offsetting “the planning disbenefits of another.”⁹ The argument that the cross-subsidy was

⁹ Carnwath LJ at para. 5 applying R (Sainsbury’s) v Wolverhampton CC [2010] UKSC 20

not necessary and so did not comply with the requirements of regulation 122 was rejected by Carnwath LJ (as he then was) who stated:¹⁰

“We are entitled to start from the presumption that those members who voted for the proposal were guided by the officer's advice. If so, they would have understood that they should consider the merits of the two parts of the proposal separately. They would have found in the officer's report sufficient reasons to conclude that, so viewed, they were acceptable in planning terms. At the same time they would have been aware that the proposal was being put forward as not merely acceptable, but as carrying with it significant regeneration benefits, including the improvement of the cricket ground. The offer of a legal agreement to secure those benefits would no doubt have added to the attractions of the proposal. But that does not mean that it was regarded as necessary to offset some perceived planning objections. Nor is there anything in the officer's report to suggest that it was. 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.”

The benefits were not necessary to make the development of the Old Trafford Stadium acceptable in planning terms but there was a sufficient connection between the two sites to justify the inclusion of the benefit. That connection justified the securing of the benefit even though it was not a reason for the grant.

In both the Savage and Derwent cases some reliance was placed on the stated reasons given for the grant but those stated reasons do not appear to have limited the scope of the enquiry by the judges to those stated reasons nor do they appear to have been viewed as conclusive.

¹⁰ At para. 15

A planning obligation which is not a reason for the grant of the planning permission will not be within the limitations relating to planning obligations. This has been suggested as a means of avoiding the application of those limitations and in particular the pooling restriction. However, caution should be exercised when relying on such an argument. If a section 106 planning obligation is required to offset a planning objection and there is no other mitigation then it is hard to see how the officer's report to the planning committee can overlook the need for the particular planning obligation or it be suggested that the planning obligation has been considered but is not a reason for the grant of planning permission.

In some cases it will be difficult to determine on which side of the line a planning obligation falls between planning obligations which secure a permissible planning benefit but do not offset a planning objection and those that do offset a planning objection. This should not be a matter of semantics but dependent on a fact sensitive enquiry. It will be interesting to see how this particular point develops.

2.3 Composite developments – it has been argued in R (oao Campaign to Protect Rural England) v Dover DC [2015] EWHC 3808 (Admin) that in reg. 122(2) “development” has a different meaning to “development” in reg. 122(1). It was argued on behalf of the claimant that in reg. 122(2) it is limited to that part of the development for which planning permission is sought which funds the contribution. The relevant planning application included an application for outline planning permission for a large residential development (521 dwellings and a 90 apartment “retirement” village) of land in the Farthingloe valley (within an area of outstanding beauty) with a hotel and conference centre development on the Western Heights at Dover plus 31 dwellings combined with an application for full planning permission for the conversion of the Drop Redoubt at the Western Heights into a

visitor centre and museum. Part of the section 106 agreement requires a heritage contribution of £5 million towards the Drop Redoubt on the Western Heights which is one of the largest Napoleonic fortifications in England. The funding is to refurbish the fortification and to convert it to a visitor centre and museum.

By limiting the meaning of development in reg. 122(2) to the Farthingloe site the claimant argued that the heritage contribution was not necessary and failed to satisfy the requirements of reg. 122(2). It was undoubtedly a reason for the grant of the planning permission as without it there would have been no planning permission. Mitting J. rejected this argument and held that the satisfaction of the reg. 122 requirements must be judged by reference to the whole development for which planning permission is granted. A composite development comprising a number of elements is permissible under planning law and is a matter for the judgment of the local planning authority. In such cases the advantages of one element can be balanced against the disadvantages of another.¹¹

When viewed as a composite development it was clear that the heritage contribution was necessary to make the development acceptable in planning terms and was directly related to the development. Further it was fair and reasonable in scale and kind. In consequence it satisfied reg. 122. Leave to appeal was refused by Mitting J.

2.4 Administering and monitoring fee – in Oxfordshire CC v SSCLG supra an obligation to pay an administration and monitoring fee in relation to a development of 26 residential units was held not to be compliant with reg. 122 as it was not necessary to make the development acceptable in planning terms. Lang J. DBE considered that it is part of the functions of a local planning authority to administer, monitor and enforce planning

¹¹ Lord Collins in Sainsbury's Supermarkets Limited v Wolverhampton City Council [2010] UKSC 20 at paragraphs 58 and 70. That decision was applied by Lindblom J. in R (oao Thakeham Village Action Limited) v Horsham DC [2014] EWHC 67 (Admin) after reg. 122 came into force (reg. 122 satisfied – para. 219). Lord Collins was cited by Mitting J. in the Dover case at para. 15

agreements and that the costs of doing so would be included in the authority's budget. The application was a routine one and the permitted obligations in the planning agreement were one off payments rather than continuing obligations. The fee claimed was from a standardised table and not an individualised assessment of special costs liable to be incurred for the particular development.

Since that decision the point was considered in a planning appeal concerning a planning application for up to 94 dwellings (APP/V3120/A/13/2210891). As part of the package of section 106 contributions required by Oxfordshire County Council there was one contribution for £5,000 towards its costs of monitoring and administering the section 106 agreement. This was challenged on the ground that it was not necessary to make the proposed development acceptable in planning terms. The Planning Inspector, Mr Anthony Lyman, was shown two advices by Mr Dove QC (now Mr. Justice Dove) advising that if an obligation is accepted as necessary for such planning purpose then the proper costs of administering that obligation cannot rationally be found to be unnecessary in planning terms simply because the administration is a function of the local authority (para. 163). This advice was accepted with the conclusion that the administration fee was compliant with the tests in reg.122. In turn this conclusion was accepted by the Secretary of State (para. 28 letter dated 19th February 2015).

The Oxfordshire CC decision did not mean that reg. 122 will prevent all such fees but it did make it much harder to seek standardised fees. The later planning decision related to a larger development but it would appear that the logic of the advice accepted is that no such contribution could be challenged unless the amount does not fairly and reasonably relate to the scale of the proposed development. Such fees when justified by the

appropriate evidence have been accepted by planning inspectors¹² although challenges based on this High Court decision can also succeed¹³.

2.5 Non-compliance not defence to enforcement of planning obligation – once the planning obligation is entered into performance of the obligation cannot be avoided on the ground that it does not comply with all the requirements of reg. 122. It is then too late to avoid enforcement of a due liability. In R (oao Millgate Development Limited) v Wokingham BC [2011] RWCA Civ 1062 (which concerned a pre CIL planning obligation) a developer having given prior to a planning appeal hearing an unilateral undertaking to make contributions could not later avoid performance when the inspector attached no weight to such undertakings.

This remains the position under reg. 122 as is illustrated by the facts of the recent Court of Appeal decision in R (oao Robert Hitchins Limited) v Worcestershire County Council and Worcester City Council [2015] EWCA Civ 1060. The original developer in order to obtain planning permission for a residential development had entered a planning agreement which included an obligation to pay a transport contribution in three equal tranches. The site was sold and the original developer made a second planning application which was decided by a Planning Inspector who held that the transport contribution sought did not comply with reg. 122. The second planning permission was granted in identical terms to the first save that there was no obligation to pay the transport contribution. The original developer then launched judicial review proceedings and one of the grounds was that the authority had

¹² In Taylor Wimpey Limited v South Oxfordshire [2016] PAD 2 the Planning Inspector such a fee was considered to be justified because the planning agreement was complex requiring various trigger points and monitoring (para. 46). This justification also applied in Barret (CEMEX UK Properties) Limited v South Oxfordshire DC [2016] PAD 3 at para. 50. In UKI (Shoreditch) Limited v Tower Hamlets LBC [2015] PAD 65 the nature of the planning obligations which were considered to be likely to involve additional expense for the council in monitoring compliance with them (para. 80).

¹³ Para. 35 appeal decision concerning land east of Cambridge Road Puckeridge (APP/J1915/5/W/3016566

wrongly refused to vary or set aside the obligation in the first planning agreement to pay the transport contribution. Permission to pursue this ground was set aside by Paterson J as unarguable. Notwithstanding the finding of the Planning Inspector that the contribution did not comply with reg. 122 the liability to pay the contribution remained and the authority could not be compelled to remove it. However, subsequently the Court of Appeal upheld the first instance decision that by switching to the second planning permission the unpaid instalments of the transport contribution would not be triggered.

3. General pre-conditions applicable to both regulation 123 limitations relating to planning obligations – there are four pre-conditions which need to be satisfied before either of the limitations contained in regulation 123 apply to a planning obligation. These are:-

- (i) reason for grant of a planning permission;
- (ii) infrastructure;
- (iii) community infrastructure
- (iv) funding or provision of infrastructure.

Taking these individually:-

3.1 reason for grant of a planning permission – to be within the scope of either limitation the relevant planning obligation must be a reason for the grant of planning permission. This has been discussed in section 2.2 above. It follows that some planning benefits may still be secured without the application of either limitation. The problem is that if relied on there must be uncertainty as to the validity of the obligation. It has also been put forward as the basis for an argument that there is a distinction between an obligation being a reason for the grant of planning permission and one which is a reason for not refusing a grant. The uncertainty with such an approach must be even greater.

3.2 Infrastructure - the subject matter of the planning obligation must be infrastructure. CIL has its own statutory definition of infrastructure which is an inclusive definition and not a comprehensive definition. Section 216(2) Planning Act 2008 (“2008 Act”) provides that

““infrastructure” includes—

(a) roads and other transport facilities,

(b) flood defences,

(c) schools and other educational facilities,

(d) medical facilities,

(e) sporting and recreational facilities, [and]

(f) open spaces. . .

(g) [this included affordable housing but it was deleted by the Localism Act 2011 and reg. 63 of the 2010 Regulations]”

There has been uncertainty as to what other types of community support are included within infrastructure. The provision or improvement of broadband networks has been one item that has been raised and discussed.

Separately there is the issue of the scope of the items within the definition of infrastructure. Is it limited to fixed assets, physical assets or does it extend wider? With a number of the items in the statutory definition it is drafted by reference to facilities. The

word “facilities” has been considered by the Court of Appeal in *R (on the application of Keating) and others v Cardiff Local Health Board* [2005] EWCA Civ 847. This was with regard to section 3 National Health Service Act 1977 which imposed a duty to provide facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as the Secretary of State considers are appropriate as part of the health service. The particular issue was whether this covered just accommodation and plant or services as well which chimes particularly well in the context of infrastructure.

Brooke LJ stated at para. 41 as regards facilities that “its meaning will be derived from the context in which the word is used. It means “that which facilitates”. Sometimes the word refers to tools, or accommodation, or plant, which facilitate the provision of a service. Sometimes it refers to an entire service provision, like a laundry service, or the provision of a day centre, which facilitates the prevention of illness, or the care of persons suffering from illness, or the after-care of persons who have suffered from illness.”

The term was used elsewhere in the 1977 Act in a restrictive manner but Brooke LJ stated at para. 42 that “that is only what one would expect when the draftsman uses a chameleon-like word like “facilities” which takes its colour from its context.” In consequence it was held to have in section 3 a wider and different meaning from that elsewhere in the same Act.

With a community medical centre is infrastructure limited to the building or does it include the fitting out? Will fitting out include medicine? Does it extend to the vehicles used to transport the aged and disabled to and from the centre? Does it include the staff? Is an

obligation to provide a bus service to a town centre an obligation relating to infrastructure?
In the recent draft Charging Schedule published by Torbay DC it indicated that it considered that packages for the improvement of city centres did not involve infrastructure. Is that correct?

This particular issue links in with the next two.

3.3 Community infrastructure – the infrastructure must be for the benefit of the local community or a section of it and not for private purposes. In principle this is a similar point to that which arises with regard to whether property qualifies as an asset of community value.

3.4 funding or provision – CIL can be used to fund all expenditure on infrastructure but does this unlimited scope apply also to planning obligations? With effect from 29th November 2012 reg. 59(1) of the 2010 Regulations was amended to ensure that there was no doubt as to the wide manner in which CIL can be applied with respect to infrastructure. After the amendment it provided that

“59(1) A charging authority must apply CIL to funding [the provision, improvement, replacement, operation or maintenance of]¹⁴ infrastructure to support the development of its area.”

Prior to the amendment in 2012 it read that a “(1) charging authority must apply CIL to funding infrastructure to support the development of its area”.

¹⁴ Words in square brackets added by reg. 7 2014 Regulations

The wording in reg. 123 has remained the same since its introduction in 2010 in that it continues to apply to planning obligations “to the extent that the obligation provides for the funding or provision of” relevant infrastructure (reg. 123(2)) or an infrastructure project or type of infrastructure (reg.123(3)). In reg. 123(4) funding in relation to the funding of infrastructure is stated to mean the provision of that infrastructure by way of funding. Are the words “funding” and “provision” limited by the original formulation of reg. 59 or to be construed without regard to that provision? If to be construed by reference to reg. 59 is it only by reference to the unamended provision or can account be taken of the amended reg. 59? If the former construction is correct is the scope of the original reg. 59 limited to the provision of infrastructure and not to its improvement or replacement or maintenance or operation?

In practical terms will this phrase, for example, catch obligations to improve existing infrastructure? For example, if the impact of a new residential development means that a nearby park needs to be expanded or extra facilities are required will either or both limitations in regulation 123 apply to a planning obligation sought to fund or provide this. It should be noted that even in May 2011 the DCLG CIL Overview stated that CIL receipts could be used to fund improvements to existing infrastructure deficiencies if these deficiencies would be made worse by the development.

An example of this point arising in practice is with contributions sought to improve existing Suitable Alternative Natural Greenspace (“SANG”) to ensure that they have suitable capacity to mitigate the impact of a proposed development. Guildford BC argues that this is not the funding of the provision of infrastructure because there is no new infrastructure. Some planning inspectors accept this argument whilst others do not. In those in which the

argument has not been accepted it means that the pooling restriction can apply to it and if it does then the impact of the proposed development on the Thames Basin Heaths Special Protection Area (“TBHSPA”) will not have been mitigated by such a contribution because it must not be taken into account.¹⁵

Guildford BC’s position is clearly set out in a report to its planning committee which emphatically states that “Regulation 123(4) makes clear that “funding” in relation to the funding of infrastructure means the provision of that infrastructure by way of funding.”¹⁶ It is stated that having taken legal advice on this point it has been raised with the Customer Quality Control department at the Planning Inspectorate. The response was that the Inspectors who did not accept the argument were entitled to do so and the only way to challenge the decision of an inspector is through the Courts. It is proposed to continue seeking such contributions on the basis that they are not caught by the pooling restriction on the basis of the legal advice given but there is concern that such planning decisions may adversely affect the delivery of housing in the area.

Similarly will obligations to fund the operation or maintenance of infrastructure be caught or outside the scope of reg. 123? An example of this point in practice is with regard to contributions to Strategic Access Management and Monitoring (“SAMM”). It is a contribution relating to access management and monitoring and has been accepted by planning inspectors as not funding an infrastructure project or type of infrastructure.¹⁷

¹⁵ For example, the appeal decision relating to 9 Old Court Road Guildford Surrey (APP/Y3615/W/15/3039165) and the appeal decision in footnote 17.

¹⁶ Para. 2.1 of the report dated 16th December 2015 which can be found on the authority’s website.

¹⁷ For example, Appeal decision relating to 102 Nightingale Road, Guildford (APP/Y3615/W/15/3035790).

If this view is correct then it would mean that contributions towards matters such as the increase of capacity at a school will not be caught by the CIL limitations in reg. 123.

Views differ but it seems extraordinary that it should not be clear beyond doubt from the statutory provisions and that there should be the possibility of such a divergence of views. A wider rather than a narrower construction would seem more consistent with the overall CIL regime.

4. Relevant infrastructure –

4.1 Avoidance of double dipping - the first limitation in reg. 123 seeks to address the government's concern that there should not be "double dipping". The fear was that a developer would pay the CIL charge arising as a result of the grant of planning permission for a new development to be applied in funding infrastructure and then also have to pay a section 106 contribution which would fund the same infrastructure. As there is no guarantee or even expectation that the CIL receipt will be applied to meet infrastructure needs arising from the developer's development such duplication of funding is more theoretical than actual. It is the two fold payment by the developer towards infrastructure funding which is the objection.

Logically to wholly avoid this concern all infrastructure funding should come from CIL receipts. Instead charging authorities list on a regulation 123 Infrastructure List all the types of infrastructure and infrastructure projects which may be funded (wholly or partly) by that authority from CIL receipts. If there is no such list and the authority has established a Charging Schedule then all infrastructure will be funded from CIL receipts. No planning obligation can be required to fund or provide infrastructure which appears on the

Infrastructure List. It is important to note that the absence of a charging schedule will prevent the application of this limitation as otherwise it would mean that no planning obligations could be entered.

If the real objective is to protect developers from double dipping then this does not seem a particularly effective method of doing so. There is no requirement that CIL receipts have to be applied in respect of such infrastructure. Reg. 59 does not limit the application of CIL receipts to “relevant infrastructure” which it could easily have done but such receipts may be applied to fund all infrastructure. By having such an Infrastructure List the authority is really stating the areas of infrastructure which cannot be funded by a section 106 planning obligation.

The requirement that account be taken of the draft Infrastructure List when the charging authority is going through the examination process in order to establish the CIL regime in its area will enhance the importance of the Infrastructure list. The proposed funding of the infrastructure items on that list from CIL receipts will affect the CIL rates fixed and will mean that changes to the Infrastructure List will involve more thought because any such change will affect the balance that has been struck between funding and development viability in the examination process.

4.2 Type of infrastructure or infrastructure project – the charging authority has the ability to choose between listing types of infrastructure or infrastructure projects or combining the two. There is no statutory definition of type or project. In *Feetum v Levy* [2005] EWCHC 349 “project” in insolvency legislation was given its ordinary meaning which

was considered to be a broad one which encompasses a proposed or planned piece of work or undertaking.

The operation of the distinction between the two is extremely important. This is illustrated by the recent decision by the Secretary of State in relation to a large residential development in Wharton Lancashire. The planning application was made before the introduction of CIL in the area. The original planning agreement provided for a general education contribution towards primary schools in the area. The local authority failed to make a decision in time and so a non-determination appeal was made to the Secretary of State and a Planning Inspector was appointed. Before his decision CIL was introduced and the Inspector raised the issue whether the application of the pooling restriction meant that the education contribution would be invalid. Correspondence then took place between the Secretary of State, the local planning authority and the developer. The general education contribution was substituted by an undertaking given by the developer “setting out the schools for which the funding towards primary school provision would be targeted” (para. 18 Secretary of State’s decision dated 24th September 2015) and it was stated that this undertaking “complies with the CIL Regulations” (para. 20).

The proposed development had an impact on education in the area and this needed to be mitigated if planning permission was to be properly granted. A pooled contribution towards educational infrastructure in general terms was blocked by the pooling restriction. By reformulating the planning obligation so that it focused not on a type of infrastructure but on an infrastructure project this saved the proposed development and enabled the planning permission to be granted. The size of the development was such that the amount of the contribution did not give rise to a concern about an infrastructure shortfall

The manner in which the issue was dealt with indicates that the obligation was regarded as being one which was a reason for the grant of planning permission and thus within the scope of the pooling restriction in reg. 123(3). It also illustrates what is regarded as a planning obligation relating to an infrastructure project by the Secretary of State as opposed to being a planning obligation relating to a type of infrastructure.

The general view at present is that from the charging authority's perspective it is preferable to include infrastructure projects rather than types of infrastructure. This is because:-

(i) Flexibility - the authority retains greater flexibility if it focuses on projects rather than types. The inclusion of an infrastructure type means an across the board prohibition on planning obligations relating to the funding or provision of any infrastructure covered by the type in the list. For example inclusion of education on the list prohibits any infrastructure relating to the provision of education from being the subject matter of a planning obligation.

(ii) Focus – it is easier to formulate and understand the boundaries of infrastructure projects than types of infrastructure. This will mean that the infrastructure consequences for the authority will be simpler to determine whilst the impact on section 106 planning obligations will be easier to anticipate for developers.

(iii) Construction issues – using types of infrastructure in the list carries with it a greater risk of construction issues (see section 4.5 below).

(iv) Pooling restriction – it is easier to retain section 106 planning obligations as a means of part funding infrastructure notwithstanding the application of the pooling restrictions in reg. 123(3) if the infrastructure list contains infrastructure projects rather than types of infrastructure.

4.3 Splitting projects – there is not just an incentive to focus on infrastructure projects as opposed to types of infrastructure when formulating a reg. 123 Infrastructure List or a section 106 planning obligation but there is then a further incentive to divide up projects into a number of smaller projects. This could increase the number of contributions permitted by the CIL Limitations.

The danger is that the division will be disregarded if challenged in the Courts. A finding that in reality there is a single project rather than a number of separate projects may result in contributions obtained as being caught by one or other of the reg. 123 limitations. For example, an infrastructure project to construct a new school or increase the capacity of an existing school cannot be divided into a number of projects to provide individual school rooms. The project being undertaken is provide a new school or increased capacity and such a division would be wholly artificial and solely for the purpose of avoiding the application of one or those of those CIL limitations.

Such an approach is already known in the context of the planning regime. The requirements regarding the need for an Environmental Impact Assessment cannot be avoided by splitting the project in order to avoid assessment of its cumulative effect (*Burridge v Breckland DC* [2012] EWHC 1102 (Admin))¹⁸. In that case although the project

¹⁸ Applying *Ecologistas en Accion v Ayuntamiento de Madrid* [2009] PTSR 458 (see para. 45) and *Umweltanwalt von Karnten v Karnten Landesregierung* [2010] Env. LR 15)

was split with two planning applications Pill LJ held that they could not be treated otherwise than as a single project or development¹⁹. This line of authorities was held not to apply to cause the two planning permissions considered in the recent Orbital Shopping Park case supra. That was because the focus of CIL is to charge developments authorised by planning permission and that is clearly defined by the CIL regime with no scope for the linking of planning permissions. In contrast in the context of sub-dividing the pooling restriction is focused on an infrastructure project and that is an issue to be determined on the facts.

Further such an approach fails in the context of tax avoidance by the application of the Ramsay doctrine to the construction of taxing legislation. This doctrine is not limited to tax and would result in the artificial division of projects being disregarded. The line of authorities explaining that doctrine²⁰ did not apply to the two planning permissions in the Orbital Shopping Centre case supra for the reason given but that would not bar the application of the doctrine to the attempted sub-dividing of a project.

This type of issue has been considered by planning inspectors. For example in a planning appeal relating to land at the rear of 131 Winchester Road Four Marks²¹ a contribution towards the expansion of a specific school was discussed at the hearing of the appeal but it was confirmed by the Council that it had received more than five contributions towards this project. However, the education contribution in the unilateral undertaking offered by the developer “specifically refers to the expansion plan for the school including a new classroom.” (para. 52). No fresh evidence was provided by the Council and the

¹⁹ Para. 41

²⁰ Including the two mentioned in the Orbital Shopping Centre case - *MacNiven v Westmoreland Investments Limited* [2003] 1 AC 311 and *Barclays Mercantile Business Finance Limited v Mawson* [2005] 1 AC 684 did not apply to make the works chargeable.

²¹ APP/M1710/W/15/3060919

developer indicated that the issue surrounding the educational contribution had been resolved. The Inspector stated as regards this point at para. 52

“However, it is not clear to me whether this is a new project entirely separate from the expansion plans discussed at the Hearing. I, therefore, cannot be certain that the contribution would not be pooled towards a project which has already received five contributions. Therefore, I am unable to take the education contribution into account.”

The decision serves to emphasise both that there is a need to prove that there is a real and separate infrastructure project and that there have not already been five or more contributions towards the project.

The line between artificial sub-divisions of a single project and a number of genuine projects will in some cases be a difficult one to draw. The impact of the availability of funding or rather than the lack of it may itself influence what constitutes a project.

4.4 Need to refer to project? - In order for the CIL limitations to apply by reference to an infrastructure project rather than a type of infrastructure must the planning obligation expressly refer to the project as a project? Alternatively, will it be sufficient for the planning obligation to refer to a type of infrastructure but for the authority to give evidence that the contribution is to be applied for a particular project? In an appeal decision relating to land east of Cambridge Road Puckeridge²² the latter course was adopted. The developer had included a generic contribution towards education in the unilateral undertaking offered during the course of the hearing of the appeal but the Council confirmed that it received

²² APP/J1915/W/15/3016566

generic contributions but since April 2010 no contributions towards the specific project of expanding a specific middle school. The Planning inspector stated at para. 28 that

“Whilst it would have been far preferable for the UU to have explicitly referred to this specific project, the County Council has indicated expressly that the monies would be targeted in that way. On that basis I am prepared to accept it, noting that the appellant has not taken issue on this particular point.”

Such an approach provides a lifeline when planning obligations are incorrectly formulated by reference to a type of infrastructure rather than an infrastructure project. It cannot be expected that it will extend to cases in which a generic contribution is made and then subsequent to the grant of planning permission it is decided that the fund will be applied to fund a specific infrastructure project. Such an approach would result in very significant uncertainty and undermine the important distinction between infrastructure projects and type of infrastructure.

4.5 Types of infrastructure – it is not clear from the legislation what is actually meant by “type of infrastructure”. Does it mean generic descriptions and if it does are these to be taken from the statutory definition of infrastructure. If it is then how will items of infrastructure that are not within that statutory list be described. Alternatively, can sub-classes be placed on the Infrastructure List and will they be effective in limiting the prohibition to the sub-class or will it cause the prohibition to cover the whole type of infrastructure which includes the sub-class. For example, will the inclusion of secondary education prohibit just planning obligations relating to the funding or provision of infrastructure for secondary education or education generally? My view is that the inclusion

of a sub-class will be effective in limiting the infrastructure covered by the list to the sub-class. To prevent an authority from being able to formulate such a limitation would be contrary to the policy of allowing decision-making as regards the operation of much of the CIL regime to be made at a local level. In particular the authority has an absolutely free discretion as to what items to include on the Infrastructure List and it would seem illogical to prohibit the authority from selecting sub-classes of a particular type thereby compelling it to choose between types particularly when there is no definition of type.

4.6 Exceptions – from the beginning of the introduction of CIL attempts have been made to qualify the items included on the Infrastructure List. Such qualifications may be of questionable validity in my view and likely to lead to problems in the future. One of the first was an attempt to maximise the section 106 funding by having at the bottom of the Infrastructure List containing generic descriptions of infrastructure the following words: “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 is ineffective if once a type of infrastructure is mentioned on the Infrastructure List the limitation in reg. 123(2) bites. It is not open to an authority to then exclude infrastructure from the specified type and in particular it is not possible to effectively qualify the type of infrastructure included by reference to factors which do not relate to the description of the infrastructure but to the means by which it is to be funded or the source for the funding or provision of the infrastructure.

More recently another form of exception has been used in Infrastructure lists. It is along the lines of the following exception: “where the need for specific infrastructure contributions is required to make the development acceptable in planning terms and in accordance with the statutory requirements”. Again this in my view is ineffective. It does not seek to qualify the description of the infrastructure covered but to provide for the source of funding for a type of infrastructure. In substance it is seeking to override the prohibition by permitting section 106 planning obligations to be imposed in relation to a type of infrastructure which is included on the authority’s Infrastructure List. There is nothing in reg. 123 that permits such a step to be taken. To adopt such an approach is in my view dangerous because it may result in an accumulation of invalid planning obligations. This may have consequences as regards the validity of the grants of planning permissions and create a large potential bill for the authority.

Another common feature of such infrastructure lists is to draw a distinction between infrastructure local to the development on the one hand and strategic or area wide infrastructure on the other. Such a distinction is not in my view objectionable and can be achieved as, for example, with the Oxford City Council Infrastructure List. It has to be borne in mind that any planning obligation permitted has to satisfy the requirements of reg. 122 regardless of what is stated in the Infrastructure list.

Some authorities refer to a type of infrastructure but exclude provision on certain specified sites. For example Bedford BC lists additional school capacity but excluding named sites. It is important that this should be valid as a developer may agree to construct a school on such a site.

4.7 Variation of Infrastructure List – it is important that having introduced CIL an authority should keep its Infrastructure List under review. Circumstances within the area will change. It will gain greater experience from the administration of the CIL regime. As a result changes to the Infrastructure List may be required. Some authorities have stated that regular reviews will be carried out. For example Oxfordshire City Council intends to have half-yearly reviews.

The particular concern of the government was that authorities might seek to maximise infrastructure funding by changing from time to time its infrastructure list. The specific concern was that if a large development was anticipated which will have a significant impact with regard to a particular type of infrastructure such as education the authority will remove the reference to education from the list. It will then seek section 106 contributions for educational infrastructure such as a new school from the developer of the large development and then later add education back on to its Infrastructure List. Such changes are simple in that they can be effected by publishing the new amended list. It is questionable whether an authority would act in such a manner. However, one of the points made by HBF to the recent CIL review is that Daventry DC removed certain transport projects from its draft reg. 123 Infrastructure List before CIL came into force and that this was in response to the examiner reducing the chargeable rate in respect of residential development in rural areas. It should be noted that the draft Infrastructure List was not included in that examination and that now the position would be different as the list will have been taken into account in the examination.

The government did consult in 2013 on whether it should introduce procedural restrictions with regard to such changes but no amendment was included in the 2014

Regulations. In the Official guidance it is stated that changes for such purposes should not be made and that any change should only be after appropriate consultation. With the changes in the 2014 Regulations there is now a linkage between the infrastructure list and the charging schedule. When establishing the CIL regime this will now involve the presentation of evidence taking into account the contents of the list for scrutiny during the examination process it seems to me less likely that an authority will feel that it has an unrestrained ability to change the list.

I would expect that a more likely reason for a change to the list will be as a result of experience gained by the authority from operating its CIL regime. Actually administering a CIL regime may have highlighted issues or changed views. The authority may have formulated the contents of its list by reference to types of infrastructure and now be regretting this. It may have included exceptions in the list which it now has doubts about and does not wish to rely on. The infrastructure needs within the area may have changed. It may have introduced CIL a few years ago and the rise in house prices may be tempting it to review its CIL rates which may in turn involve a reconsideration of the Infrastructure list.

Any change now will require the authority to assess the effect of the change in the context of the area's infrastructure needs and funding and the evidence which resulted in the fixing of the prevailing CIL rates for the area.

The risk of such a change may cause developers to seek to protect against the possibility in any development agreement entered into before the grant of planning permission.

5. Pooling restriction – the limitation in reg. 123(3) is not intended to end pooled contributions but to scale back their use and to encourage authorities to introduce CIL. There would appear to be no rationale for choosing five obligations as the limitation other than to ensure that the limitation bites. What it is achieving at present is considerable uncertainty and deterring the use of planning obligations when such obligations are necessary to make developments planning acceptable. It is also causing a shortfall in infrastructure funding by preventing contributions and adversely affecting the creation of infrastructure funding pools.

5.1 Judicial consideration - contributions to a pool by way of planning obligations have been long recognised judicially as an important and valid means of funding infrastructure.²³ This limitation seeks to significantly reduce the scope for having pooled infrastructure contributions. As yet there has been no specific consideration of the pooling restriction by the Courts although it has been taken into account in planning appeals heard by planning inspectors. It has, however, been judicially noticed in passing when considering the application of the requirements in reg. 122.

In *Smyth v SSCLG* supra it was argued that a planning obligation was invalid because no consideration was given to the impact of the coming into force of reg. 123(3). The obligation provided for a pooled conservation contribution. The argument was that with the introduction of the pooling restriction (then fixed for April 2014) it would no longer be possible to impose further such pooled contributions and no allowance had been made for

²³ R (oao Crest Homes plc) v South Northamptonshire DC (1994) 93 LGR 205

the disruption of the accumulation of the pool so that the funding would become unworkable. Paterson J. rejected this argument²⁴ on the following basis.

“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 do and to provide evidence for 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 was approved by the Court of Appeal²⁵ on the basis that the Inspector was correct not to take account of the pending pooling restriction. It was considered that the pooled contributions would be replaced by CIL receipts²⁶. Sales LJ stated at para. 21

“In summary, when reg 123 comes into effect, it will prevent the use of planning obligations under s 106 falling within the scope of operation of reg 123 to fund infrastructure projects on a collective basis. Instead, it will be necessary for a local planning authority to set a community infrastructure levy under the CIL Regulations to levy money to provide collective funding for such projects.”

²⁴ At para. 196

²⁵ [2015] EWCA Civ 174

²⁶ Para. 119

The judicial statements have picked up on the need to look to CIL receipts for infrastructure funding once the pooling restriction comes into force although Paterson J. has appreciated that pooled contributions will still be possible.

5.2 The pooling restriction – the limitation in reg.123(3) needs to be set out in full as to paraphrase it risks failing to correctly reflect its terms.

“(3) [Other than through requiring a highway agreement to be entered into, a planning obligation] (“obligation A”) may not constitute a reason for granting planning permission to the extent that—

(a) obligation A provides for the funding or provision of an infrastructure project or [provides for the funding or provision of a] type of infrastructure; and

(b) five or more separate planning obligations that—

(i) relate to planning permissions granted for development within the area of the charging authority; and

(ii) which provide for the funding or provision of that project [or provide for the funding or provision of that] type of infrastructure,

have been entered into [on or after 6th April 2010].”

Before a planning obligation can now be entered into to fund or provide an infrastructure project or a type of infrastructure it is necessary to carry out an investigation to ascertain whether this pooling restriction will be infringed by the new planning obligation. The investigation to be carried out by the charging authority and the developer is to ascertain how many planning obligations have been entered into since 5th April 2010 in relation to the same infrastructure project or type of infrastructure (as appropriate). In the

event that five have already been entered into since 5th April 2010 then that new planning obligation cannot be entered into.

It is more likely that the limit will have been reached if the planning obligation relates to a generic contribution rather than a contribution to an infrastructure project. The more specific the infrastructure project the more chance there is that a planning obligation providing for a pooled contribution will not infringe the pooling restriction.

5.3 Operation of pooling restriction -

5.3.1 General pre-conditions – for the pooling restriction to apply the general pre-conditions discussed in section 3 above must have been satisfied²⁷. There will be an incentive for arguments to be raised that these pre-conditions have not been satisfied so that the pooling restriction does not operate. It may not be the charging authority that raises the argument but a third party which benefits from the imposition of a planning obligation requiring the payment of a pooled contribution. This is happening with pooled contributions relating to transport systems when the person affected is the relevant transport authority.

5.3.2 Exceptions - apart from the general pre-conditions there is one express exception from the operation of the pooling restriction in favour of the Crossrail contribution. It may be that it can be overridden, for example, with planning obligations to mitigate the impact of development on sites such as sites of Special Scientific Interest or Special Protection Areas.

²⁷ An example is 39 Hopkins Developments Limited v South Somerset DC [2016] PAD 4 in which a swimming pool contribution after a review of previous contributions was discovered by the Council to be caught by the pooling restriction and so could not be sought by the Council (para. 84).

5.3.3 No CIL Charging Schedule - since 6th April 2015 it no longer matters whether CIL has been introduced into an area. It now applies across the country. Prior to that date it only applied when CIL had been established in the area. For authorities which have not yet introduced CIL the imposition of this limitation is going to lead to a funding deficiency. The authority will not be in receipt of CIL but the funding from pooled contributions will probably be significantly reduced. The inability to resolve infrastructure objections to a development by this means may also result in fewer planning permissions as pooled contributions will not be available to make the proposed development acceptable in planning terms. Until the issue of the introduction of CIL has been addressed and resolved the outcome may be fewer houses built in the area. It is noteworthy that in the planning appeal involving the Frosts Family LLP and Milton Keynes the Secretary of State stated as regards two undertakings which were disregarded because they infringed the pooling restriction that it remained open to the Council to bring forward a Charging Schedule

5.3.4 Limit – the limitation is not formulated by reference to planning agreements but by reference to planning obligations. This means that if there is more than one planning obligation contained in a planning agreement relating to the same infrastructure project or more likely same type of infrastructure then it will be the number of obligations which are taken into account rather than the single planning agreement. There is no requirement that the previous planning obligations are only taken into account if they were a reason for granting a planning permission. This could give rise to problems if a number of obligations are given by way of unilateral undertaking before the final version is settled on prior to the grant of planning permission.

5.3.5 Duplication - when counting the number of material planning obligations in a planning agreement it is immaterial that there may be more than one obligation concerned with the same subject matter. For example if there is a positive obligation and in addition a negative one to strengthen the enforcement of the positive obligation that will count as two planning obligations for this purpose and not one.

5.3.6 Unimplemented planning obligations – account is not only taken of planning obligations contained in planning agreements relating to a planning permission which has been implemented. With a number of planning permissions the proposed development will not commence and so the CIL liability will never fall due for payment but any planning obligations arising as a result of that planning permission will still be taken into account when ascertaining whether a pooled contribution can be sought by the charging authority in respect of a subsequent development in its area. This is even the case if the unimplemented planning permissions relate to the same site so that it is inevitable that not all of them will be implemented.

I have heard it said that planning obligations tied to a time expired planning permission will not be taken into account but the drafting of the pooling restriction does not indicate that this is the case.

This aspect of the pooling restriction significantly increases the harshness of the operation of the restriction as regards local authorities. It avoids the need to monitor planning permissions so as to know whether it has been implemented and also avoids the uncertainty that would be created by the timing of the implementation of planning permissions. However, it greatly increase the chances of the limit in the pooling restriction

having been exceeded even with planning obligations relating to infrastructure projects. This is particularly so when some sites may have a number of planning permissions granted but not implemented and when new planning obligations are entered identical to earlier ones upon the variation of conditions attached to a planning permission under section 73.

5.3.7 CIL zero-rated zones – I have also seen the query raised whether planning obligations concerning developments in zones which are zero-rated for CIL purposes in the Charging Schedule will be disregarded. Again there is nothing in the wording of reg. 123(3) to justify this. Such planning obligations will be taken into account.

5.3.8 Unilateral undertakings – the pooling restriction applies not only to bilateral planning agreements but also to unilateral undertakings. It does not matter how the obligation comes into existence as either route will result in a planning obligation. Unilateral undertakings offered by a developer during the course of a planning appeal will be subject to the pooling restriction.

5.3.9 Infrastructure projects – the application of the pooling restriction will encourage authorities to formulate pooled contributions by reference to infrastructure projects rather than types of infrastructure. There are two reasons for this.

The first is that it will increase the number of pooled contributions that can be validly sought by the authority. The careful definition of infrastructure projects will increase the number of projects and the greater the number of projects the greater the number of pooled contributions which will be permissible before the limit in the pooling restriction is reached.

This is illustrated by the recent decision by the Communities Secretary in respect of a residential development proposed by Hallam Land Management at Wharton in Lancashire which is discussed in section 4.1 above. The adverse operation of the pooling restriction was avoided by relating the education contribution to an infrastructure project and not a type of infrastructure.

The second reason is that an infrastructure project is unlikely to give rise to uncertainty as to its scope and what constitutes a project whereas determining what constitutes a type of infrastructure faces considerable uncertainty.

As regards an infrastructure project it is undesirable to attempt to break up what constitutes a natural project into a number of smaller artificial projects (see section 4.4 above). This could lead to problems. For instance, it has been suggested that instead of the construction of a new school as an infrastructure project it could be divided into number of smaller projects comprising individual classes. In the future if it was to be found that there was actually a single infrastructure project comprising the whole school then applying the pooled restriction to that single project could result in many of the pooled contributions based on the smaller projects being invalid. Such a possibility is a high risk. The division of the real project artificially into a number of projects is likely to be disregarded in much the same way as the introduction of artificial steps in a series of transactions with a view to reducing the tax bill can be disregarded for tax purposes following the House of Lords decision in *W T Ramsay Limited v IRC* [1982] AC 300.

Many infrastructure projects will continue to be a “work in progress” over a substantial period. The final objective with the infrastructure may be significantly different

to the starting point. Expansion of the project may be hoped for but will involve a number of stages spread over a lengthy period. With each project it will be necessary to look at the facts in order to determine exactly what the scope of the actual ongoing project is at the time. Infrastructure which is genuinely being provided in stages should be treated as a number of projects rather than one overall project. This may, for example, be the case with a school which is to be constructed in stages. This is the approach that has been adopted with the ascertainment of the project for the purpose of EIA requirements. Future proposals are not taken into account if there is an existing standalone project (*Bowen-West v SS* [2012] Env. LR 22) rather than being “an integral part of an inevitably more substantial development” (Simon Brown J. in *R v Swale BC ex parte Royal Society for the Protection of Birds* [1991] 1 PLR 6 at page 16).

When the planning obligations are formulated by reference to a type of infrastructure then the limit in the pooling restriction will be met much sooner. In addition there is the issue as to what will be a type of infrastructure for these purposes. Will it be a generic description or will it be capable of division and yet remain a type of infrastructure? It is to be expected that many authorities will decide that it is preferable to avoid such problems and focus on infrastructure projects when formulating the subject matter of pooled contributions.

5.3.10 Evidence – it will be important that on planning appeals the Planning Inspector is provided with confirmation that the contributions sought by way of planning obligation do not infringe the pooling restriction²⁸. If there is a lack of evidence then the planning inspector will have to exercise caution. With some contributions, such as highway

²⁸ See Appeal decision in *Persimmon Homes West Yorkshire v City of Bradford MDC* [2016] PAD 5 at para. 58 for example of scope of confirmation required.

contributions, the nature of the contributions are such that there will be a presumption of infringement of the pooling restriction.²⁹ In a planning appeal relating to land at Mead Park Bickington³⁰ the Planning Inspector stated that he was mindful that since 6th April 2015 the pooling restriction applies and that he had very little evidence on the number of previous contributions notwithstanding a request for clarification to the Council which clarification was not received. This led the Inspector to conclude that as “such I cannot be certain that the five obligation threshold has not been breached. Therefore, I am unable to give any weight to the financial contributions as they relate to off-site sports provision.” (para. 54). In an appeal relating to land north of Campden Road, Shipston-on-Stour³¹ the Planning Inspector stated that in view of the uncertainty regarding the application of the pooling restriction “I take the precaution of excluding those item from my consideration of the benefits of the proposal.” (para.36). In that case both the developer and the Council had put evidence which conflicted on the point but interestingly the developer had made the further point that this issue was academic because the terms of the planning agreement bound the developer even if the obligation did not comply with reg. 123. The Planning Inspector considered that although the obligations would mitigate any adverse effects of the proposed development in terms of the burden placed on the local infrastructure the adverse effects of failing to compensate for those effects would not be so great as to overturn the general balance in favour of the scheme. The planning permission was granted but in those circumstances could the developer then refuse to perform the planning obligations disregarded by the Planning Inspector and could the issue as to the application of the pooling restriction be refought between the developer and the Council?

²⁹ Appeal decision in Helical (Liphook) Limited v East Hampshire DC [2015] PAD 51 at para. 56

³⁰ APP/X1118/A/14/2224465

³¹ APP/J3720/A/14/2221748

5.3.11 If the pooling restriction applies – when the pooling restriction applies it will not be possible to take into account the requested contribution. This will leave the decision maker to consider whether the contribution was required to mitigate an adverse impact of the proposed development on local infrastructure. It may be decided that in fact there is no need for the contribution.³² Even if it is considered that mitigation is needed but the contribution is not available to provide it planning permission can still be granted either if there is an alternative means of mitigating the objection or in the absence of such mitigation if the benefits of the proposed development are considered to exceed the adverse impact that cannot be mitigated.³³

5.3.12 How does local planning authority cope with the pooling restriction? - An unexpected consequence of the pooling restriction is that it may favour larger developments and will pose real problems for local authorities that will not wish to waste contributions by seeking them from small developments. The pooled contributions from larger developments will be accordingly larger in amount and so there is a greater likelihood that the necessary pool will be created without breaching the limit in the pooling restriction. With smaller developments the number of pooled contributions will need to be greater and so the chance of the limit in the pooling restriction being breached is greater. If the taking of contributions is not managed it will mean that the pooled contributions will be insufficient and the required infrastructure will not be supplied.

The authority cannot accept pooled contributions which due to their size realistically will not result in the provision of the infrastructure needed as a result of the development.

³² For example, in *Castlemead Group limited v Wrexham* [2015] PAD 56 the planning inspector found that there was no evidence of capacity issues at the local school and so an educational contribution was not needed.

³³ Appeal decision relating to land north of Campden Road, Shipston-on-Stour (APP/13720/A/14/2221748).

The contribution must reflect the reality of what is going to happen (see Turner J. in Telford and Wrekin BC v SS [2013] EWHC 1638 (Admin) and R (oao Lincoln Co-operative Society Limited) v South Holland DC [2000] All ER (D) 1812 para. 34). The planning objection arising from the development will not be mitigated by such contributions. How should the authority respond to such a planning application? How can it ensure that the contributions that it receives will produce a pool of a realistic size which will allow the required infrastructure to be provided?

This point has been considered in a planning appeal before Mr. John Chase (Appeal ref: APP/Ro335/W/15/3131136). This concerned a planning application for the development of ten dwellings which was refused by Bracknell Forest BC. A number of contributions by way of section 106 planning obligations were offered by the developer but the Council was concerned that due to the size of the development there would be an infrastructure shortfall because the contribution would be too small. It was recognised that although CIL would part fund the infrastructure “the main elements will be financed by specific planning obligations” (para. 16). It was also acknowledged that the planning obligations to pay a proportionate share of the cost of infrastructure would satisfy reg. 122.

The Council’s concern about the impact of the pooling restriction was accepted by Mr. Chase to constitute a material consideration and to be a reason for refusing permission. It was not considered appropriate to impose a Grampian condition preventing the commencement of development until the required infrastructure had been provided. This was because it would negate the principal argument in favour of the planning application that the land was available now to provide housing. It was uncertain when the development could be implemented particularly as the Council did not have land available for the

necessary infrastructure projects.³⁴ Similarly, a condition suggested by the developer that the development should not be commenced until the required contributions had been made was rejected for the same reason.

The Council's preferred solution was that the developers should co-ordinate and combine their applications in such a way that the required contributions could be achieved. In the circumstances of the wider area concerned in that appeal case the prospect of such co-ordination was considered by the Planning Inspector to be realistic and in fact there are grounds for believing that it may occur. If so then this would be a welcome development. However, in some areas even if such a level of co-operation is possible it will not always be sufficient to overcome the problem and other solutions will have to be looked for.

Some authorities have been using Grampian conditions to deal with the problem. It allows the planning permission to be granted but on a condition that the development will not commence until the provision of the relevant infrastructure such as a school. It is a means of managing the pooling restriction. It allows the authority to avoid taking financial contributions from small developments so that it can focus on obtaining contributions from larger developments with a view to achieving a pool of contributions which is a realistic size for the purpose.

With some developments instead of making an educational contribution the developer has taken on the obligation to provide a school. This does not avoid the

³⁴ In an appeal decision relating to land at the rear of 131 Winchester Road, Four Marks (APP/M1710/W/15/3060919) the Planning Inspector decided that there was not sufficient evidence to establish that an educational contribution would comply with the pooling restriction. A suggested Grampian condition that the development would not be occupied until the capacity of the local school had been increased was not accepted by the Inspector because the PPF required that such a condition should not be attached if there was no prospects at all of the action in question being performed within the time-limit imposed by the planning permission (para. 53). This was an aspect on which there was no evidence. .

application of the limitations but so long as education is not on the planning authority's reg. 123 Infrastructure List those limitations will not be infringed as the school will be a new infrastructure project and the limit in the pooling restriction will not be breached. In such cases it is to be expected that the developer may seek to have the provision of such infrastructure treated as an infrastructure payment for the purposes of Community Infrastructure Levy under reg. 73A of the 2010 CIL Regulations but bearing in mind that this will be difficult in particular due to the two conditions in sub-regulation (7)(b). Infrastructure provided pursuant to a section 106 planning obligation which is a reason for the grant of planning permission will not qualify for this CIL treatment. There may also be procurement issues to be considered.

5.3.13 Variation of planning agreement - there would seem to be little scope for authorities to reduce the number of previous planning obligations by varying the terms of earlier planning agreements. Regulation 123(3) focuses on the number of planning obligations that have been entered into on or after 6th April 2010. What happens to them after they have been entered into is not relevant when determining whether the limit in the pooling restriction has been reached. A variation by agreement will not be retrospective. A modification in accordance with section 106A TCPA 1996 cannot be made for the first five years of the existence of a planning obligation and thereafter only from the giving of notice of determination.

5.3.14 Verification – it will be an onerous task for the charging authority to verify compliance by any planning obligation with the pooling restriction. It will be necessary to consider all planning agreements after 5th April 2010. It would be surprising if the authority has classified the planning obligations entered into since that date. Apart from this creating

a potentially heavy work load there will a considerable degree of uncertainty as to whether or not any particular planning obligation is valid. Having granted planning permission and obtained the pooled contribution the authority may subsequently be challenged by the developer claiming the payment back whilst retaining the benefit of the planning permission. Such claims have been successful when the requirements of reg. 122 have not been fully satisfied and the planning agreement has included a blue pencil clause as in *Telford v Wrekin BC v Secretary of State*³⁵ and *Oxfordshire CC v Secretary of State*.³⁶

From the developer's perspective if the planning obligation relates to an infrastructure project it will probably be impossible to determine whether or not a planning obligation will breach the limit in the pooling restriction. It may be that the developer's priority is not to avoid paying invalid pooled contributions but to obtain the planning permission and if such a pooled contribution is the price for it the developer is prepared to pay it. However, it seems unfortunate that there is an inevitable lack of transparency regarding the operation of the pooling restriction. One consequence may be an increasing trend of developer's solicitors seeking to qualify the obligation to pay a pooled contribution in a planning agreement by the words "if due". This may secure the planning permission and defer a battle over the validity of the pooled contribution until later.

It is not just the applicant developer who may be concerned by the validity. It may be used by a developer or owner of a competing site. A challenge to the grant of planning permission may be launched on the ground that the pooled contribution to be paid by the planning applicant is invalid. The manner of formulating the pooling restriction has

³⁵ [2013] EWHC 1638 (Admin)

³⁶ [2015] EWHC 186

heightened the scope for confusion and litigation when planning obligations are being sought.

6. Hybrid approach - interestingly Torbay Council believes that pooled contributions remain viable notwithstanding the application of the pooling restriction. Following completion of the consultation process on its preliminary CIL charging schedule it has produced a new charging schedule. A radical element in this charging schedule is that there will be no CIL charge on larger residential schemes. Other authorities such as Peterborough City Council have adopted a similar approach but a major difference from Torbay's approach is what constitutes a large residential development. In the case of Peterborough it is 500 or more dwellings whereas with Torbay it is much lower as set out below. The infrastructure funding needed as a result of such schemes will be dealt with exclusively by way of section 106 planning obligations and planning conditions.

The CIL rate for residential development is set at £70 per square metre if on a brownfield site if fewer than 15 dwellings or a greenfield site if fewer than 11 dwellings save that where located in the AONB or certain rural exceptions in which case it applies if fewer than 6 dwellings. There will be no section 106 planning obligations in relation to such residential developments "except for direct site acceptability" which include "access, direct highway works, flooding and biodiversity". With development sites where the number of dwellings exceeds those limits the CIL rate is zero but section 106 contributions will be required "to cover infrastructure needed to make development sustainable". It is expressly stated that this is likely "to include direct site acceptability matters; affordable housing; sustainable development contributions necessary to make the development acceptable in planning terms."

What is not stated as yet is how the imposition of section 106 planning obligations will be managed so as to avoid breaching the limits imposed by the pooling restriction whilst ensuring sufficient funds for the area's infrastructure needs. It is a brave course of action bearing in mind the lower limits which result in CIL not applying. It is noted by the Council that the pooling restriction does not apply to matters which cannot be funded by CIL receipts such as affordable housing and other matters. One of these other matters is town centre management which it strikes me could include items which qualify as infrastructure. This highlights the importance of one of the pre-conditions discussed in section 3 above which is that the planning obligation will only be caught by the limitations in regulation 123 if the subject matter concerns infrastructure.

It is also stated that where possible with smaller residential developments matters will be addressed through planning conditions rather than section 106 planning obligations. The limitations contained in regulation 123(2) and (3) will not apply to planning conditions although the limitation relating to highway agreements will (reg. 123(2A) and see section 8 below). However, planning conditions will have a more limited scope than has been the case with planning obligations until the introduction of these limitations.

The decision in *R (oao West Berkshire DC) v SSDCLG* supra may have much less of an impact in Torbay because pooled contributions will not be sought from small developments.

7. Alternative powers – planning obligations have played a greater role than planning conditions in providing infrastructure funding because it was held that the use of planning conditions to meet what Lord Hoffman called “external costs” in *Tesco Stores v*

Secretary of State for the Environment³⁷ was Wednesbury unreasonable³⁸. With the application of the pooling restriction attempts may now be made to avoid this restriction by using other statutory powers. The pooling restriction only applies to planning obligations entered into under section 106. The difficulty is finding a statutory power which is not subject to restrictions which will seriously inhibit its use for this purpose. There is as yet no obvious candidate.

As mentioned in section 6 above Torbay DC is proposing to increase the use of planning conditions. In some circumstances Grampian conditions may be appropriate as a means of securing needed infrastructure. However, some are being imposed when there may not be a realistic prospect of the infrastructure being provided. For instance, one planning authority is granting planning permission for residential developments subject to a Grampian condition requiring the construction of a new school. Such a condition may be a means by which the authority seeks not to waste one of its five pooled contributions in relation to the new school project whilst at the same time avoiding an appeal if it had refused planning permission. One unintended consequence may be that the body responsible for education comes under pressure from developers who want to be able to implement their planning permissions.

When considering other alternatives it will be necessary to consider whether the alternative statutory power has the same consequences as planning obligations and in particular whether the obligation binds successors as it does under section 106. This is a particular advantage with planning obligations because it applies to positive obligations as

³⁷ [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."

³⁸ Hall & Co. v Shoreham UDC [1964] 1 WLR 240

well as negative ones and it applies even if the local planning authority does not own land nearby. It will be a difficult task to find an appropriate alternative to section 106.

Possible powers which might be considered are:-

(i) Section 111 Local Government Act 1972 – this is sometimes referred to in planning agreements in addition to section 106 and is included as a belt and brace exercise.

It reads:

“(1) Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.”

This statutory power has been the subject of considerable judicial consideration and in consequence is subject to a number of judicial restrictions. In particular the section cannot be used as a route by which statutory controls or restrictions are avoided (Carnwath LJ in *Kennedy v Charity Commission* [2014] UKSC 20 at para. 227 and Hobhouse J. in *Credit Suisse v Allerdale BC* [1997] QB 306). Further the activity authorised by section 111 must be incidental to a function of the local authority and not be incidental to an activity which is itself in turn incidental to a function (*McCarthy & Stone (Developments) v Richmond upon Thames* [2009] EWCA Civ 490).

An additional drawback is that unlike a planning obligation there is no provision for an obligation created under this power to bind the land and successors. With one-off

payments and a covenant from a party which is financially substantial this may not be a problem. With continuing obligations this could be significant. There are conveyancing methods which seek to confer the ability to enforce positive obligations against successors. These are often employed when overage arrangements are entered into on a sale. These will, however, be more cumbersome to administer than section 106 obligations and will not overcome any applicable judicial restriction on the exercise of the power.

(ii) Section 16 Greater London Council (General Powers) Act 1974 – this section provides that undertakings under seal with the legal owner of land will be enforceable against successors but it does not specify the circumstances in which such an undertaking may be given or the subject matter of the undertaking. A further disadvantage is the territorial scope of the provision. It reads:-

“(1) Every undertaking given to a local authority by the owner of any legal estate in land and every agreement made between a local authority and any such owner being an undertaking or agreement—

- (a) given or made under seal in connection with the land; and
- (b) expressed to be given or made in pursuance of this section;

shall be enforceable not only against the owner joining in the undertaking or agreement but also against the successors in title of any owner so joining and any person claiming through or under them.”

(iii) Section 33 Local Government (Miscellaneous Provisions) Act 1982 – this would be an excellent provision as it expressly binds successors but the qualification of the

circumstances in which it can be employed mean that it will be of little practical use. It reads:

“(1)The provisions of this section shall apply if a principal council (in the exercise of their powers under section 111 of the Local Government Act 1972 or otherwise) and any other person are parties to an instrument under seal which—

[(a) is executed for the purpose of securing the carrying out of works on land in the council's area in which the other person has an interest, or

(b) is executed for the purpose of regulating the use of or is otherwise connected with land in or outside the council's area in which the other person has an interest, and which is neither executed for the purpose of facilitating nor connected with the development of the land in question.”

The qualification at the end means that it will rarely if at all apply to the type of circumstances being considered.

(iv) Section 1 Localism Act 2011 - this confers a wide general power on local authorities but it will not automatically bind the land and successors. It is often raised as a possible alternative but the problem is the qualification of the power contained in section 2.

“1(1) A local authority has power to do anything that individuals generally may do.

(2) Subsection (1) applies to things that an individual may do even though they are in nature, extent or otherwise—

(a) unlike anything the authority may do apart from subsection (1), or

(b) unlike anything that other public bodies may do.

(3) In this section “individual” means an individual with full capacity.

(4) Where subsection (1) confers power on the authority to do something, it confers power (subject to sections 2 to 4) to do it in any way whatever, including—

(a) power to do it anywhere in the United Kingdom or elsewhere,

(b) power to do it for a commercial purpose or otherwise for a charge, or without charge, and

(c) power to do it for, or otherwise than for, the benefit of the authority, its area or persons resident or present in its area.

(5) The generality of the power conferred by subsection (1) (“the general power”) is not limited by the existence of any other power of the authority which (to any extent) overlaps the general power.”

Further there is a limitation on the scope of the general power in section 1 imposed by section 2.

“2(1) If exercise of a pre-commencement power of a local authority is subject to restrictions, those restrictions apply also to exercise of the general power so far as it is overlapped by the pre-commencement power.

(2) The general power does not enable a local authority to do—

(a) anything which the authority is unable to do by virtue of a pre-commencement limitation, or

(b) anything which the authority is unable to do by virtue of a post-commencement limitation which is expressed to apply—

(i) to the general power,

(ii) to all of the authority's powers, or

(iii) to all of the authority's powers but with exceptions that do not include the general power.”

Section 106 may constitute a pre-commencement power which is subject to restrictions including the pooling restriction and if it is then this general power in section 1 will be subject to the pooling restriction.

(v) Specific areas – in addition to general powers there may be statutory provisions which operate within specific areas such as education. For example section 460 Education Act 1996 authorises requests for voluntary contributions for the benefit of schools. Can the scope of this extend beyond parents of school children to developers? If it can would a contribution from a developer in such circumstances be regarded as voluntary?

8. Highway agreements – the 2014 Regulations amended reg. 123 so as to apply some limitations to highway agreements but not as extensively as with planning obligations. The pooling restriction does not apply to highway agreements nor do the requirements of reg. 122.

As a result of the amendments in the 2014 Regulations a planning condition can neither

(a) require a highway agreement for the funding or provision of relevant infrastructure to be entered into; or

(b) prevent or restrict the carrying out of development until a highway agreement for the funding or provision of relevant infrastructure has been entered into.

As with the limitation in reg. 123(2) (section 3 above) relevant infrastructure is any type of infrastructure or infrastructure project that appears on the relevant authority's reg. 123 Infrastructure List. The only difference is that if there is no such list (which in practice will never occur) then this limitation does not apply unlike the limitation in reg. 123(2).

It means that as with the limitation in reg. 123(2) there is a need for liaison between the charging authority and the highway authority. The inadvertent inclusion of road or other transport infrastructure in the reg. 123 Infrastructure List could have significantly adverse consequences for the highway authority. In consequence if such an inclusion is to be made in the list then there should be consultation first between the two authorities otherwise the unexpected result could be an infrastructure funding deficiency.

There is excluded from this limitation highway agreements within reg. 123(2B) which are "highway agreements to be entered into with—

(a) the Minister, for the purposes of section 1(1) of the 1980 Act;

(b) Transport for London; or

(c) a strategic highways company for the time being appointed under Part 1 of the Infrastructure Act 2015.”

The advantage to a developer of a highway agreement is that it secures for the developer the necessary highway works albeit at the cost of the developer. The limited protection from the inclusion of certain provisions in the highway agreement may reduce the bill payable by the developer but there will be no guarantee that the particular highway infrastructure will be provided.

9. Reforms – the current CIL review may recommend changes to the relationship between the CIL limitations and section 106 planning obligations. The HBF has, for example, suggested that strategic sites should be taken out of CIL and be dealt with solely by planning obligations. It is also in favour of the removal of the pooling restriction whilst noting that it has been suggested that authorities which have not introduced CIL should not be able to refuse a planning application if the pooling restriction applies on the ground of the development’s impact on infrastructure.

In addition there is the proposed dispute resolution procedure which has been introduced to the Housing and Planning Bill which will allow the Secretary of State to appoint a person with a view to resolving outstanding issues in section 106 negotiations by preparing a report on section 106 planning obligations required to make a planning permission acceptable in planning terms.

10. Updates – I will seek to update this paper on my website and the topic is further discussed in my CIL Guide. Both the paper and the Guide can be found on my website at <http://www.christophercant.co.uk/>

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