

Coping with a potential infrastructure shortfall due to the pooling restriction

The problems posed by the application of the limitation in regulation 123(3) of the Community Infrastructure Levy Regulations 2010 (“2010 Regulations”) commonly known as the pooling restriction have been repeatedly highlighted particularly after it was applied from 6th April 2015 to all local planning authorities and not just to those which had introduced CIL.

It prohibits any planning obligation when

- (i) the obligation is a reason for the grant of planning permission;
- (ii) the obligation provides for the funding or provision of an infrastructure project or type of infrastructure;
- (iii) there have since 5th April 2010 already been five or more separate planning obligations relating to planning permissions granted for development in the authority’s area relating to the same infrastructure project or type of infrastructure.

Each of these elements to the pooling restriction gives rises to its own problems of statutory construction. This is not helped by the absence of a rationale for this limitation other than it is to be a stick by which authorities are encouraged to introduce CIL. It has been well appreciated that this limitation will restrict infrastructure funding for authorities particularly if, as is the case with many, the authority has not yet introduced CIL. However, for authorities the pooling restriction does not just pose a general funding problem but also separately presents a specific problem as to how each authority is to respond to individual planning applications requiring financial contributions by way of planning obligations.

In this context planning applications for small developments will be unsatisfactory even if the contributions needed are related to an infrastructure project rather than a type of infrastructure. The restriction on the number of contributions imposed by the pooling restriction will mean that at most there can be five contributions to be put towards the pool. The number may be less because the pooling restriction does not distinguish between obligations relating to planning permissions which are implemented and those that are not. An obligation to contribute will be taken into account by the pooling restriction even though the authority may never receive the contribution.

With an application relating to a small development the amount of the contribution will be correspondingly small which may in turn mean that the ultimate size of the pool to be achieved by the maximum number of permitted contributions is smaller than that which is actually needed to provide the item of infrastructure. If planning applications are not managed then the size of the developments for which planning permission are granted prior to the limit being reached will determine how near the authority gets to the size of pool actually needed to fund the particular item of infrastructure. This may be settled by the order in which a number of planning permissions are determined. Such a haphazard approach to producing a pool of contributions is undesirable.

Often applications for a number of residential developments are made in an area. In consequence a community facility such as a community centre or school will be required. Such a community facility may need to be funded by contributions pursuant to section 106 assuming that the infrastructure project or type of infrastructure does not appear on the authority's list of infrastructure. It is to be expected that such planning obligations will be formulated by reference to the specific infrastructure project so that there is a fresh limit of five planning obligations under the pooling restriction. If the planning applications for smaller residential developments are determined first this will result in a shortfall in the pool. It will waste the number of planning obligations allowed by the pooling restriction. The planning applications for the larger residential developments need to be determined first if there is to be no or only a small shortfall.

Clearly in such a situation there is a real prospect of a significant shortfall in funding for the required item of infrastructure. How should an authority respond to this prospect? Does it have to deal with applications individually as they come in without regard to the future impact of the pooling restriction? If so it will require the normal contribution appropriate to the circumstances of the particular proposed development but that will not address the concern of an infrastructure shortfall. Alternatively can it take into account the prospect of such a future infrastructure shortfall due to the application of the pooling restriction and if it can in what manner?

When the impact of a proposed development requires additional or improved community infrastructure then it is to be expected that such need will be a planning objection which needs to be mitigated. An obligation to make a financial contribution may be an appropriate means of mitigating the objection but such contribution cannot be based on a false premise. It must reflect the reality of what will happen. A contribution which will or may result in a pool which is too small will not achieve the required mitigation. It should follow from this that such a planning obligation will not satisfy the requirements of regulation 122(2)(a) of the 2010 Regulations. It will not properly mitigate the planning objection and so will not make the proposed development acceptable in planning terms. If it does not achieve this objective then it will not be "necessary to make the development acceptable in planning terms" (reg. 122(2)(a)).

This was the outcome in *Telford and Wrekin BC v SSCLG* [2013] EWHC 1638 (Admin). The case was concerned with a financial contribution towards off-site highway improvements which raised a similar but slightly different issue. In that case it was found by the Inspector on a planning appeal that the amount of the contribution had been calculated on a false premises that all the proposed developments taken into account would actually proceed (Turner J. at para. 95). In consequence the pooled costs "did not reflect the reality of what was going to happen in terms of future proposed development" (para. 94). Turner J. upheld the Inspector's decision that the requirements of necessity in reg. 122(2) of the 2010 Regulations were not satisfied in such circumstances.

The planning permission in that case stood notwithstanding the highway contribution falling to the ground because clause 15 of the particular planning agreement provided that an obligation found by the Inspector not to comply with regulation 122 of the

2010 Regulations would be cancelled but the remaining parts of the agreement would continue in force. However, without such a provision in the relevant planning agreement a failure to mitigate a planning objection due to the future application of the pooling restriction may result in the refusal of the planning application which in turn can lead to unwanted planning appeals. To avoid this some authorities are granting planning permission for residential developments but subject to a Grampian condition that the development cannot commence until the item of community infrastructure has been provided. This creates uncertainty for the developer and the planning authority. It will result in pressure on the authority responsible for the provision of that type of infrastructure. Such authority may not be the CIL charging authority and so an unneeded strain may be created between the two authorities.

Interestingly this issue of potential infrastructure shortfalls caused by the operation of the pooling restriction has been considered in a recent decision of a planning Inspector, Mr. John Chase, in a planning appeal concerning a proposed residential development of ten houses in Warfield Bracknell (Appeal ref: APP/R0335/W/15/3131136). The site is at the end of a cul de sac from an existing site and in an area designated for comprehensive mixed use development. The Council had not been able to demonstrate a five year supply of developable residential land and the developer focused on the current shortage of land for housing whilst this site is immediately available. The Council countered this by pressing the need for a comprehensive integrated approach to the development area and in particular the need for a managed approach to the provision of infrastructure to serve the area. Part of this infrastructure will be funded by CIL but the Inspector stated that “the main elements will be financed by specific planning obligations” (para. 16). The developer offered an unilateral undertaking containing a number of obligations to make financial contributions towards a range of infrastructure proportionate to the overall cost of the provision of the infrastructure.

In this context the Council raised the concern that there are multiple owners in the area and that there is a strong likelihood that the pooling restriction will apply “leading to a future shortfall in the funding of the overall scheme” (para. 17). The limit was not breached by the undertaking offered but the Inspector accepted that the Council’s concern about the future impact of the pooling restriction was a material consideration to be taken into account and as a result of doing so the appeal against refusal was dismissed. It was considered that a grant of planning permission would adversely affect the comprehensive development of the area (para. 28).

A Grampian condition suggested by the developer was rejected on the same ground as an alternative unilateral undertaking that the development would not commence until contributions had been made in association with the development of other land owned by the developer in the area. The latter undertaking would have increased the amount of the contributions ultimately made by the developer whilst possibly counting for the purposes of the pooling restriction as one obligation regarding each infrastructure project. Both suggestions were considered to run counter to the argument that the land was available for immediate development as progress would be dependent on other proposals in the area.

It is particularly noteworthy that this appeal was in an area in which CIL had been introduced. The answer to the Council's concerns was not that it should resolve them exclusively through the CIL regime. In an area in which CIL had not been introduced the authority's concern would be even greater.

The Council's preference was that developers should coordinate their activities so as to limit the number of separate proposals thereby seeking to maximise the size of the pool created. The Inspector felt it was a realistic objective (para. 18) and could be achieved by a consortium of landowners. This would be particularly important as the land for the infrastructure would need to be provided as the Council did not own it already. It certainly indicates the need for a degree of ingenuity and co-operation between developers and with the relevant authority to overcome the practical problems arising from the pooling restriction.

Now that the pooling restriction has been in force across the country for nearly a year the impact on infrastructure funding and the number of planning permissions granted is being felt. The impact needs to be taken into account by local planning authorities when determining planning applications and in the appropriate circumstances it will be a proper reason for refusing an application. Although the imposition of Grampian conditions may be a means of avoiding a contribution being wasted such conditions do lead to considerable uncertainty and no immediate development. A refusal of the planning application can be the correct course as illustrated by the Warfield appeal. If suitable for the circumstances of the relevant area the real answer may rest with collaboration between developers and the authority. Unless the pooling restriction is modified or removed dealing with its implications is going to continue to require significant time and effort for the foreseeable future on the part of both developers and authorities.