In the matter of the
Planning Act 2008, Part 11, and the
Community Infrastructure Levy Regulations (as amended)

The use of payments 'in kind' to satisfy the CIL liabilities

OPINION

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1. I have been asked to advise the London Borough Council of Tower Hamlets regarding the use of 'in-kind' payments in the payment of the Community Infrastructure Levy ("CIL"). The CIL Regulations (as amended) allow for the person liable for the levy to agree with the Council for land and/or infrastructure to be provided, instead of money, to satisfy a charge arising from the levy. The extent to which this can be done has arisen as an issue during the examination into the draft Charging Schedule.

2. The terms of the CIL Regulations are fairly restrictive. The regulations do prevent a developer from seeking to offset his CIL charges by providing infrastructure that is seen as being required to make the development for which he is seeking permission acceptable in planning terms. In that instance, the only offset that he can seek is from the value of the land that he is prepared to transfer.

3. I consider that there is still considerable scope for in-kind payments to be made. This is not an easy part of the regulations, as it goes to the heart of the overlap between the CIL regime and the section 106 regime once the CIL is in place in an area. We know that legal commentators have stated that there will be little scope for in-kind payments to be made under regulation 73A, given the wording of regulation 73A(7). A similar point has been made orally at the examination (by DP9 and by the GLA). This could be said to adversely effect the delivery of the strategic sites, which depend in part on providing strategic infrastructure on their own sites.

4. This does not however appear to reflect the intention of the relevant provisions of the CIL Regulations. There is indeed an alternative interpretation, that would allow for extensive in-kind provision to be agreed on strategic sites. If regulation 73A is read alongside both regulations 122 and 123, then any infrastructure on the reg.123 list will be funded by the CIL and so it is "*not necessary to make the development granted permission by the relevant permission acceptable in planning terms*" - it is already going to be provided by other means.

5. Ultimately, the proper interpretation of regulation 73A is a matter for the courts. I am confident that there is a simple solution for this conundrum on larger sites (where this issue has arisen): separate planning applications should be made for the main development and for the development of the in-kind infrastructure. The prohibition in reg.73A(7) is on the use of an Infrastructure Payment to offset the CIL payable on the development granted permission by the relevant permission. If there are two separate permissions, the restriction does not apply. The developer can apply for permission for the infrastructure and to offer it as an in-kind payment as part of the CIL owed with regard to the other planning permission for the main development.

The legal framework

6. Part 11 of the Planning Act 2008 provides for the implementation of the Community Infrastructure Levy. Most of the detail is set out in the Community Infrastructure Levy Regulations (as amended, now for the 4th time) which are made pursuant to the 2008 Act. The Secretary of State has also produced Guidance on CIL to the charging authorities in general, and about how a power "relating to planning or development is to be exercised"[1]. The current version of the CIL Guidance was published online in June 2014, and it replaces the earlier versions[2].

7. The statutory purpose of the levy is stated in the Act, that:
    a. "*the overall purpose of CIL is to ensure that costs incurred in providing infrastructure to support the development of an area can be funded (wholly or partly) by owners or developers of land*" (s.205(2) of the Planning Act 2008);

[1] See s.223(3) Planning Act 2008.

[2] As the June 2014 version is said not to have changed the Feb 2014 with regard to this issue, I have retained the references to the Feb.2014 Guidance in this Advice.

b. the authority that charges CIL are required "*to apply it, or cause it to be applied, to funding infrastructure*" (s.216(1)).

8. It is notable that the Levy is charged on new development as it is approved – and it is to be calculated by reference to the time when planning permission first permits the development as a result of which the levy becomes payable (s.208, Planning Act 2008). This has been amended recently to allow for the situation where a planning permission is phased, so that each phase of the development is treated as if it were a separate chargeable development for levy purposes (see Regulation 8(3A) as amended by 2014 Regulations). This may apply to schemes which have full planning permission as well as to outline permissions.

9. As for in-kind payments, section 217(1) of the 2008 Act allows the regulations to make provision about payment "*in forms other than money (such as making land available, carrying out works or providing services)"*. The CIL Regulations now provide for two types of 'in-kind' payment pursuant to this.

10. The first type of in-kind payment is for the provision of land. This was the only one contained in the original CIL Regulations 2010, and it has remained unamended since then. The charging authority may accept one or more 'land payments' in satisfaction of the whole or part of the CIL due (reg.73(1)). The amount of CIL that is therefore treated as having been paid by this method is assessed as the amount equal to the value of the land. "Land" is defined as including existing buildings and structures, and any legal estate or interest in land (s.73(14)).

11. There is no restriction on this type of 'in-kind' payment in relation to the reg.123 list. It is therefore of broad application. The Council must aim to ensure that the land is used for a 'relevant purpose' – that is, so that it is used "*to provide or facilitate (in any way) the provision of infrastructure to support the development of the charging authority's area*" (reg.73(5) and (13)).

12. The second type of in-kind payment is for an "infrastructure payment" (reg.73A). This was inserted into the CIL Regulations by the amendments made in 2014 (SI 2014

No.385). What is an "infrastructure payment" is given a precise definition – it is defined as the provision of "*one or more items of infrastructure*" by a person who would be liable to pay CIL. The authority "*must aim to ensure that the infrastructure will be used to support the development in its area*", which can include accepting infrastructure provided outside its area (s.73A(5) and (6)). It will be secured by a written agreement, in accordance with the requirements of the regulations. The regulations also restrict the use of an infrastructure payment if it is a means of securing additional funding. The charging authority must decide to make this type of payment available in its area.

13. The regulations do however place more limits on the ability to use these types of 'in-kind' payments than they do on land payments – which is the main point of the current controversy. Regulation 73A(7)(b) states that the council may not accept the "infrastructure payment" unless "it is satisfied that the infrastructure to be provided" -

    (i) is "*relevant infrastructure*", which is defined as having "the same meaning as in regulation 123" – i.e. the list of infrastructure or types of infrastructure listed on the reg.123 list; and

    (ii) It is "*not necessary to make the development granted permission by the relevant permission acceptable in planning terms*".

14. The wording used in (ii) mirrors the language used in regulation 122 that a planning obligation can only be a reason for granting planning permission if it is "necessary to make the development acceptable in planning terms". On the other hand, the wording does not includes the other tests set out in Reg.122 that the obligation must be directly related to the development, and fairly and reasonably related in scale and kind to the development if it is to be a reason for granting permission.

15. However, the effect of this restriction in Regulation 73A(7)(b) is far from clear, as discussed further below. We get little assistance from the CIL Guidance 2014. Section 2.3.11 of the February 2014 CIL Guidance document only deals briefly with this situation when the levy can be paid 'in kind' rather than in cash. The important point that it does make is that any charging authority that chooses to adopt a policy of accepting infrastructure payments:

> "must publish a policy document which sets out conditions in detail. This document should confirm that the authority will accept infrastructure payments and set out the infrastructure projects, or types of infrastructure, they will consider accepting as payment (this list may be the same list provided for the purposes of Regulation 123)."

16. There is otherwise no clear guidance on the issue of 'in-kind' payments, particularly when it comes to the consideration of the larger sites, where the developer is likely to provide infrastructure as part of the one development.

17. It is also important to acknowledge that the ability for a Council to use CIL payments to provide the necessary infrastructure is relevant in determining any planning applications – the main 1990 Act has been amended so that a "any local finance considerations, so far as material to the application" is now a material planning consideration (s.70(2) of the TCPA 1990 as amended by s.143 Localism Act 2011). A "local finance consideration' is defined as government grants or "sums that a relevant authority has received, or will or could receive, in payment of Community Infrastructure Levy" (s.70(4) as amended). The Council will also have made clear what infrastructure will be funded by CIL, in full or in part, on its reg.123 list, so that it is a material consideration that there will be further infrastructure provided. The only uncertainty is that, as the Council is unrestricted in the way in which it can use the CIL monies it receives, it is not possible to say that any particular piece of infrastructure will be provided or when.

18. The CIL Regulations also deal with the way in which the Council should determine planning applications. In the normal pre-CIL world, the developer would be expected to provide – say – an education contribution by way of a planning obligation. The only restrictions will be those set out in regulation 122(2), that a planning obligation may only constitute a reason for granting planning permission for the development if the obligation is "necessary to make the development acceptable in planning terms" and also directly related to the development, and fairly and reasonably related in scale and kind to the development.

19. Once the CIL is in place in its area, there is a further limitation. If education infrastructure has been included on the reg.123 list in the CIL world, a planning obligation cannot then be required for this. The CIL Regulations provide that a planning obligation may not constitute a reason for granting planning permission for the development to the extent that the obligation provides for the funding or provision of 'relevant infrastructure' (reg.123(2)) – i.e. the infrastructure set out on the reg.123 list. It will also be reasonable for a developer to argue that any infrastructure listed on the reg.123 list is going to be provided by other means than by a section 106.

The alleged restrictions on the use of in-kind "infrastructure payments"

20. Several commentators have concluded that a developer can make little use of the new Infrastructure Payment under regulation 73A. If he or she is providing infrastructure as part of their development then it is almost inevitably going to be seen as a requirement of the scheme, and therefore necessary "*to make the development granted permission by the relevant permission acceptable in planning terms*" (to use the language of reg.73A(7)). This would, on their interpretation, prevent that piece of infrastructure being accepted by the Council as an in-kind Infrastructure Payment. The developer would simply pay the CIL monies, and the Council would have to make its own decision about how that infrastructure is to be provided.

21. That may well be the proper conclusion on the smaller sites, where the developer is only interested in his own piece of land, and the infrastructure is clearly required to support his planning application.

22. But even then, there will be some opportunities. For instance, the planning committee may conclude that the provision of a new access onto the highway is required for the new development, but that the improvement of the nearby roundabout to assist the development of the area is too indirectly connected – its improvement is desirable but not "necessary". The funding and construction of the new access would then be secured by a s.106 obligation or s.278 agreement, but the roundabout's improvement would not be and would be part of the transport infrastructure to be funded through CIL and other means. The developer could simply pay the CIL rates, or he could offer

to construct the roundabout improvement, and this could be the subject of an Infrastructure Payment as part of his CIL liability.

23. We can take a real life example as well, where the court has agreed that a planning obligation is not 'necessary', even though it is a material planning consideration. In the leading case of *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, there were rival plans for the development of superstores on different sites in Witney, Oxfordshire, by Tesco and Sainsbury's (in conjunction with Tarmac). Tesco offered to provide full funding for the town bypass road, even though there was only a tenuous relationship with the road because of a slight worsening of traffic conditions (a 10% increase) if the foodstore was built. The Secretary of State was inclined not to take account of the funding offer, but also stated if it were to be taken into account, then because of the tenuous nature of the connection, the partial contribution was too limited to affect the ultimate decision. The House of Lords confirmed that the Secretary of State had fulfilled his duty by taking the offer into account but according it very little weight. It was still a material planning consideration as it was sufficiently related to the proposed development – even though it was not necessary. That offer from Tesco could now be the subject of an Infrastructure Payment.

24. A different consideration arises on larger sites, where the development plan expects that there will be on-site provision of strategic infrastructure to serve the wider area. Whilst that infrastructure does in part make the development granted permission acceptable in planning terms, that is not its primary purpose. This requires further consideration.

The provision of infrastructure on strategic sites

25. Taking an example from Tower Hamlets, the planning application for the redevelopment of the site at Wood Wharf is described as including the provision of a new school. Whilst that school will be used by other residents' children, it seems as a matter of the Local Plan that the whole school is "necessary to make the development granted permission by the relevant permission acceptable in planning terms". At the moment, the application for outline planning permission includes the offer to provide the land and build the school as part of the permission. This would be treated as an in-kind payment, as part of a section 106 agreement. The developer and the Council have

also identified, in the absence of physical delivery of the in-kind contributions, a financial contribution for education can be made - on the Indicative Scheme this would be £6.72m.

26. In the CIL world, it would seem that reg. 123(2) would apply, as school facilities are on the reg.123 list. The developer could offer the land as a Land Payment (under reg.73) but he could not (on the strict legal commentator's interpretation) offer to build and fit out the school as an Infrastructure Payment (under reg.73A). The remaining CIL liability would need to be paid. Using the Indicative Scheme as the benchmark, I am informed that the current estimate is that the residual s.106 contributions would be in the order of £17.6 million and not the £43m currently assessed.

27. This last point about the restriction on the use of an Infrastructure Payment only holds good if there is one planning application for the whole development on the site. Separate planning applications should be made for the main development and for the development of the school. The prohibition in reg.73A(7) is on the use of an Infrastructure Payment to offset the CIL payable on the development granted permission by the relevant permission. If there are two separate permissions, the restriction does not apply. The developer can apply for permission for the education infrastructure and to offer it as an in-kind payment as part of the CIL owed with regard to the other planning permission for the main development. It is possible to turn the size of the strategic sites to their advantage.

28. There may also the argument that only part of the school is required to make the strategic site's development acceptable in planning terms. The rest of the school's capacity would be used to support other development in the area. So, you could have a developer offer to build a new school where the 'child yield' from his own housing development only requires the provision of one new form. If the developer would only ever be asked to fund part of the relevant infrastructure, under the s.106 world, then it can be said that the remainder of the infrastructure is not 'necessary' for his development. Whilst his housing development might require a new entry class in a school to be provided, it cannot require a whole new school. If the developer offered a new school, then this could be the subject of an Infrastructure Payment, although the

part that is ‘necessary’ to his development could not be counted towards paying for his CIL liability as well.

29. Each instance of an in-kind payment will require a separate analysis from the planning considerations. The Council will have to be clear, when dealing for instance with the strategic sites, as to which parts of the supporting infrastructure are ‘necessary’ and which are not. There is also one further point to be made, about the proper interpretation of the CIL regulations.

The alternative interpretation on the use of “infrastructure payments”

30. The interpretation that the legal commentators appear to have overlooked is that the regulations 122, 123 and 73A use the same phrase in different contexts. It may be the same question, but the answer to the question of what is or is not “necessary to make the development acceptable in planning terms” has changed with the introduction of CIL and of the regulation 123 list.

31. In a CIL world, the developer cannot be required to provide an education contribution to make the development acceptable in planning terms (due to reg.123(2)), as education facilities are on the reg.123 list. Nor can an education contribution be said to be “necessary to make the development acceptable in planning terms” as the Council have already determined that the funding of this relevant infrastructure will be raised more generally, by way of CIL and other sources. In this sense, the restriction in reg.73A(7) is actually superfluous – the critical regulation is reg.123. All that regulation 73A(7) does is to cover the situation where a residual planning obligation is still required, as well as a CIL payment, and it confirms that you cannot use the planning obligation as a form of in-kind Infrastructure Payment as part of your CIL payment.

32. We can again illustrate how this applies by using the example of the current Wood Wharf application. The scheme needs to make provision for education facilities, in order to be acceptable in planning terms. Under the current pre-CIL regime, the developer is able to provide this under the section 106 arrangements. That is the approach that has been taken in the current planning application. As the July 2014 report to committee states, land has been set aside for a new school, and the developer

is likely to provide the land and the school itself as an in-kind payment. The report goes on to state that, in the absence of the physical delivery of the in-kind contribution, a financial contribution would be made in accordance with the formulae in the Planning Obligations SPD [para 3.4] for education. This will be the sum that is necessary for education provision, directly related to the development, and fairly and reasonably related in scale and kind to the development. This can all be done as part of the overarching single outline planning permission, for which a total of some £43million worth of planning obligations is required.

33. Under the CIL regime, the developer of Wood Wharf would not make any specific education payment as part of the residual section 106 arrangements, as education is included on the Council's reg.123 list. He would make a CIL payment of a general sum, some of which the Council may choose to use for education. The Council may agree with the developer that his offer to provide the land for the school can be accepted as part of the CIL payment (under reg.73 as an in-kind land payment). The Council may also accept the developer's offer to build the school as well, as a desirable way of providing the infrastructure that the Council will be providing. Even if this offer is not made, the residual s.106 contributions would still be in the order of £17 million (or the slightly higher £19.6m assessed in the viability assessment).

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