RE: CIL Regulation 73A - Infrastructure Payments [Unclassified]

Tom Winter [Tom.Winter@communities.gsi.gov.uk]
Sent: 11 July 2014 11:25
To: Joseph Ward (GCSX)
Cc: Alison Fairhurst [Alison.Fairhurst@communities.gsi.gov.uk]

Joseph

Thank you for your email. You'll appreciate that the Government cannot give legal advice or interpret the law.

The levy was conceived as a way of providing infrastructure to support the development of the area – not for making individual applications acceptable in planning terms. The introduction of the levy was intended to drive the scaling back of section 106 agreements so that they are focussed on making individual developments acceptable – something the statutory tests and the restrictions on pooling seek to achieve – and to replace tariff based section 106 schemes. The industry has pressed us for greater clarity on what can be sought through section 106 and what should be funded through the Levy and the wording of the regulations is intended to reflect that.

While we want to help give developers certainty around the delivery of infrastructure we also want to avoid any attempt to reduce the total contribution to infrastructure through the levy and section 106 contributions. It would not be right for a developer to reduce their liability by offering to provide, for instance, a school which local policies clearly anticipated being delivered through section 106. The regulation 123 list (or any list provided by the Council indicating projects they would be willing to consider as payment in kind) should provide a clear indication of projects that are intended to mitigate the wider impacts of development, which are not therefore necessary to make individual developments acceptable, and which may be suitable for payments in kind. The test in the regulations is intended to ensure that this approach is clear and that local authorities cannot be pressured into adding items to any payment in kind list which are inappropriate.

Kind regards,

Tom

From: Joseph Ward (GCSX) [mailto:Joseph.Ward@towerhamlets.gcsx.gov.uk]
Sent: 10 July 2014 11:50
To: Alison Fairhurst; Tom Winter; CIL
Subject: CIL Regulation 73A - Infrastructure Payments [Unclassified]

Sent on behalf on Anne-Marie Berni

Dear Alison and Tom,

Further to our conversation yesterday, you asked me to set out our concerns in an email – see below. The concern we have relates to infrastructure in kind and the Regulations seem to be causing some debate amongst the CIL community. Not least, this was raised at our EiP and the Examiner has requested some further information on this.

My concern is that the development industry interpretation of the Regs, is not helpful to us or them and is certainly not in the spirit of the Regulations and why indeed they were written to include the provision of infrastructure in kind (I am so sure of this, because I was part of the evolution of the notion of its inclusion). What we really need from CLG (rather urgently, as we have to publish a report to include this information by the 18th July 2014) is some kind of assertion on what the rue intention of the Regulations is and how they should be interpreted, in this example. Otherwise, we could be on some very shaky legal ground – as the legal interpretation is also not reflective of the intention of the Regulations. Multiple media commentators have made reference to the fact that this regulation is of little or no use - we should be able to provide examples of this if you require.

Our query specifically relates to Reg 73A(7)(b)(ii) which has regard to accepting infrastructure payments. The Council is in the process of seeking legal advice regarding the proper interpretation of this regulation. It may be the case that this Regulation would prohibit a Charging Authority from accepting infrastructure as a payment if the infrastructure being provided is required to make the development acceptable in planning terms. We find the application of this Regulation difficult to understand in terms of its practical application for delivering infrastructure on development sites.

The purpose of this Regulation is, as we understand it, to prevent double charging through S106/278 and CIL and nothing more complicated?

The interpretation of integrating this Regulation with a mechanism for delivery (as emerging from others in the industry) is that, when securing infrastructure on site, the Council may have to:

1. Secure the land via a CIL payment in kind, entering into an agreement in accordance with Reg 73(7).
2. Secure the proportion of the infrastructure that directly mitigates the development via a S106 agreement – only this portion will likely comply with the 3 tests set out in Reg 122. For example, if a development produces a child yield of 100 Section 106 would only be an appropriate mechanism to secure the proportion of an education facility which would be required to accommodate 100 children – this may be only one tenth of a school, for instance.
3. Secure the remaining portion of the infrastructure via CIL as this portion may not technically be making the development acceptable in planning terms as it is serving a wider population than that which can be attributed to the development. An agreement in accordance with Reg 73A(8) must be entered into to secure this proportion. Going back to the school example this would be a in-kind CIL payment commensurate to nine tenths of the school's value.

Clearly, this is a very convoluted method for delivering infrastructure and would present a multitude of challenges for a Charging Authority and for a developer to the extent that the infrastructure is simply not delivered. And, I expect, not the intention of the Regulations at all.

Another interpretation of Reg 73A(7)(b)(ii) is that the whole of any infrastructure to be provided under a Local Plan site allocation is to make the development acceptable in planning terms. In this instance there is no circumstance under which we will be able to accept infrastructure payments. A local authority can't deliver infrastructure outside of the scope of the Local Plan. Securing on-site infrastructure under S106 may not be possible due to the three tests in Reg 122.

It would be of great help to the Council if CLG were to clarify the intention of the 2014 amended Regulations, in respect of a Charging Authority accepting infrastructure payments and set out a viable method of delivering this infrastructure. It would be the Council's preference to accept in kind CIL payments of infrastructure on allocated sites – and indeed the intention of how the notion came about. The Council considers that infrastructure allocations have been imposed because they are considered necessary in order to support the development of the planning authority area, rather than the specific development itself.

I would be grateful if you could send your thoughts on how to secure infrastructure in kind on development sites, in light of Reg 73A(7)(b)(ii).

I look forward to hearing from you as a matter of urgency. Please do call me (020 7364 5324) or my colleague Joseph Ward if you would like to discuss this further.

Regards

Anne-Marie Berni

Joseph Ward MRICS

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