LONDON BOROUGH OF TOWER HAMLETS

COMMUNITY INFRASTRUCTURE LEVY – PAYMENTS IN KIND

OPINION

INTRODUCTION AND SUMMARY OF ADVICE

1. I have been instructed by the Mayor of London and Transport for London to comment on a written Opinion, dated 17 July 2014, from Mr William Upton, which is relied upon by London Borough of Tower Hamlets ("LBTH") as part of its evidence to the current Examination into LBTH's proposed charging schedule for the purposes of the Community Infrastructure Levy Regulations 2010, as amended ("the Regulations").

2. Mr Upton's Opinion deals with the use of "in-kind" payments, and the extent to which it is possible for a charging authority to accept infrastructure payments in lieu of community infrastructure levy ("CIL") under regulation 73A. Specifically, Mr Upton addresses the well-known difficulties arising from regulation 73A(7)(b)(ii), which precludes a charging authority from accepting an infrastructure payment in respect of infrastructure which is "necessary to make the development granted permission by the relevant permission acceptable in planning terms". Mr Upton proposes three solutions to this problem, namely that:

    a. The regulation 73A(7) restriction does not apply where there are two separate permissions. Consequently, the normal difficulties can be overcome by making separate applications for (i) the chargeable development and (ii) the infrastructure in question;[1] and/or

    b. Where only part of the infrastructure is needed in order to make a development acceptable, it should be possible for the developer to offer the remainder of the infrastructure (i.e. the part which is not strictly necessary) to offset the CIL liability;[2] and/or

[1] Upton paras 5 and 20-27
[2] Upton para 28

c. Since there is an expectation that any infrastructure which is included on the list prepared by the charging authority pursuant to regulation 123 will be funded by CIL, it is "not necessary to make the development granted permission by the relevant permission acceptable in planning terms".[3]

3. For the reasons set out below, I do not agree with Mr Upton's analysis. Even leaving aside the absence of any justification for assuming that regulation 73 was intended to be a broad facilitative measure (as opposed to a narrowly defined exception),[4] a purposive approach cannot be taken to the extent that it overrides the actual words of the Regulations. In the present case, I do not consider that the actual words of the Regulations support Mr Upton's suggestions.

RELEVANT LEGISLATIVE PROVISIONS

4. Regulations 73 and 73A provide for "payments in kind", which may be set off against liability to CIL. For the purposes of this Opinion, Regulation 73 (which deals with "land payments") is not in issue, and is the effect of Regulation 73A (which deals with "infrastructure payments") which falls to be considered. Regulation 73A provides that:

> "(1) If a charging authority has made infrastructure payments available in its area it may accept one or more infrastructure payments in satisfaction of the whole or part of the CIL due in respect of a chargeable development.
>
> (2) An infrastructure payment is the provision of one or more items of infrastructure by a person (P) who would be liable to pay CIL in respect of a chargeable development on commencement of that development.
>
> (3) Where CIL is paid by way of an infrastructure payment the amount of CIL paid is an amount equal to the value of the infrastructure provided.
>
> (4) Paragraph (1) is subject to the following provisions of this regulation.
>
> (5) …
>
> (7) A charging authority may not accept an infrastructure payment unless –
> (a) …
> (b) it is satisfied that the infrastructure to be provided –
> (i) is relevant infrastructure, and

[3] Upton paras 4 and 30-33
[4] See paras 13-14 below

(ii) is not necessary to make the development granted permission by the relevant permission acceptable in planning terms;

(c) …

(8) …

(12) In this regulation –

(a) …

(d) 'relevant infrastructure' has the same meaning as in regulation 123 …; and

(e) 'relevant permission' means the planning permission which grants permission for the chargeable development mentioned in paragraph (2)."

5. Regulation 73A needs to be read together with regulations 122 and 123. So far as relevant to this advice, regulations 122 and 123 (as most recently amended) provide as follows:

"**122. Limitation on use of planning obligations**

(1) …

(2) A planning obligation may only constitute a reason for granting permission for the development if the obligation is –

(a) Necessary to make the development acceptable in planning terms;

(b) Directly related to the development, and

(c) Fairly and reasonably related in scale and kind to the development.

(3) …

123. Further limitations on use of planning obligations

(1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.

(2) A planning obligation may not constitute a reason for granting permission for the development to the extent that the obligation provides for the funding or provision of relevant infrastructure …

(2A) …

(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 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.

(4) In this regulation –

…

'relevant determination' means –

(a) In relation to paragraph (2), a determination made on or after the date when the charging authority's first charging schedule takes effect, and

(b) In relation to paragraph (3), a determination made on or after 6th April 2015 or the date when the charging authority's first charging schedule takes effect, whichever is earlier; and

'relevant infrastructure' means –

(a) Where a charging authority has published on its website a list of infrastructure projects or types of infrastructure that it intends will be, or may be, wholly or partly funded by CIL … those infrastructure projects or those types on infrastructure;

(b) Except where paragraph (c) applies, where no such list has been published, any infrastructure;

(c) In relation to any planning obligation requiring a highway agreement to be entered into or condition falling within paragraph (2A), where no such list has been published, no infrastructure."

ANALYSIS

(a) CAN THE DIFFICULTIES BE OVERCOME BY MAKING SEPARATE APPLICATIONS FOR (I) THE "MAIN" DEVELOPMENT AND (II) THE INFRASTRUCTURE?

6. Mr Upton's reasoning on this issue is set out in paragraphs 5 and 20-27 of his Opinion as follows:

> "5. …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"

and

> "20. … If [a developer] 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'*. This would, on [the commentators'] 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. This may well be the proper conclusion on 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…
>
> 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.
>
> 27. [The 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 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. It is possible to turn the size of the strategic sites to their advantage."

7. I do not agree that the difficulties to which regulation 73A gives rise can be overcome by the simple expedient of separating the "main development" and the "infrastructure" into two separate applications. My reasons for this are as follows:

    a. The "relevant permission" for the purposes of reg 73A is the permission which authorises the chargeable development under consideration: see regulation 73(12(e). Potentially, if a scheme is divided into two separate applications, both may[5] qualify as "chargeable development". However, for present purposes, I shall ignore this potentially complicating factor and assume that the principal concern is the liability of what Mr Upton refers to as the "main" (i.e. non-infrastructure) component of the development;

    b. While, as Mr Upton observes,[6] "the prohibition in reg.73(A)(7) is on the use of an Infrastructure Payment to offset the CIL payable on the development granted permission by the relevant permission", there is nothing in the wording of regulation 73 (or anything else in the Regulations) which limits this principle to cases where the infrastructure is itself permitted by "the relevant permission" or is part of the same planning application as the "main" development. The prohibition is on the use of infrastructure payments in cases where the infrastructure is necessary in order to make the relevant development acceptable in planning terms, and applies whether or not the infrastructure is the subject of a separate planning permission or is even permitted development.

    c. The question whether infrastructure is "necessary to make the development granted permission by the relevant permission acceptable in planning terms" is not

[55] depending on the types of development identified in the charging schedule as being liable to CIL
[6] Upton para 27

something which can be determined simply by reference to the scope of the application for the development. There are two sides to this:

i. Contrary to the suggestion in para 20 of Mr Upton's opinion,[7] the mere fact that a developer seeks permission for something (and therefore includes it within an overall application) does not of itself demonstrate that it is "necessary", still less that it is "necessary to make the development granted permission … acceptable in planning terms";

ii. Conversely (and perhaps more importantly) the fact that infrastructure is not included in the same application as the "main development" does not demonstrate that it is not "necessary". For example, a particularly dense residential scheme may require physical improvements to the off-site highway and/or public transport connections such as a bus terminus or train station. While these may sometimes be included in the same application, there is no reason why they have to be: indeed, where the necessary improvements are to infrastructure owned by a third party, there may be good practical reasons why they should not. In such cases, the permission for the "main development" is likely to be the subject of some sort of Grampian condition. The condition is clear evidence that the off-site infrastructure is "necessary", even though it does not form part of the application.

d. In seeking to distinguish small schemes where the infrastructure provided will be that required by the "main development" from strategic sites where the infrastructure will serve a wider planning purpose for the surrounding area, Mr Upton's analysis oversimplifies the matter. In reality, the infrastructure which a development plan expects to be provided on many strategic sites will fall into both categories: once constructed, it will undoubtedly serve a wider area than the application site itself, but this does not alter the fact that it is needed to mitigate the impacts of the "main" development and so allow the full potential of the strategic site to be unlocked;[8]

e. Cases of this sort can be distinguished from the ***Tesco Stores*** decision discussed at para 23 of Mr Upton's Opinion. As Mr Upton notes, that was a case where the bypass was not "necessary" because "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". On the particular facts, the Secretary of State's decision not to attach any significant weight to the provision of the bypass was entirely understandable, but that was a decision on the particular facts of that case. It establishes no wider precedent.

[7] "if [the developer] 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…"

[8] Mr Upton addresses this possibility in para 28 of his Opinion, which I consider in section (b) below

(b) CAN INFRASTRUCTURE, ONLY PART OF WHICH IS "NECESSARY TO MAKE THE DEVELOPMENT GRANTED PERMISSION BY THE RELEVANT PERMISSION ACCEPTABLE IN PLANNING TERMS", BE USED TO OFFSET CIL IN SO FAR AS IT IS NOT "NECESSARY"?

8. At paragraph 28 of his Opinion, Mr Upton recognises that there may be cases where only part of the infrastructure which is being provided is required in order to make the main development necessary, with the remainder benefitting the wider area. In such cases, he suggests that the whole of the infrastructure could be offered by way of an infrastructure Payment, "although the part that is 'necessary' to [the] development could not be counted towards paying for [the] CIL liability".

9. While I agree that this would be an eminently sensible way of resolving the difficulties inherent in the Regulations, I regret that I cannot see any way in which the words of the Regulations can be construed so as to arrive at this result. In particular:

    a. The thing which charging authorities are prohibited from accepting is an "infrastructure payment": regulation 73A(7);

    b. An "infrastructure payment" is "the provision of one or more items of infrastructure", where the infrastructure will be "provided to the charging authority or a person nominated by the charging authority". The infrastructure which is the subject of an infrastructure payment is therefore an identifiable, physical "thing";

    c. While there may be situations in which there is a physically distinct part of infrastructure which could be identified as that which is necessary in order to make the main development acceptable, in most cases this will be impossible. For example, if a development requires a new roundabout to be provided in the highway, it is the whole of the roundabout which is "necessary", even though the development may only give rise to 50% of the additional traffic using it. It would make no sense whatsoever to give the charging authority (or the highway authority) half the roundabout as an infrastructure payment, on the basis that it was only the other half which was necessary in order to make the development acceptable.

    d. Even in cases where it might be possible to identify a physically distinct component of infrastructure which is all that is necessary to make the main development acceptable, it will rarely be possible or logical to separate that component out for provision to the charging authority. For example, Mr Upton refers to a school where the "child yield" from the development gives rise to a need for only one new form. In such a case, it makes no sense to posit an infrastructure payment which consists of a single classroom (or even series of classrooms, one for each year) within a larger building or complex of buildings;

    e. The analysis in (b) to (d) above is reflected in Mr Upton's own suggestion that the developer might "[offer] a new school" as the subject of an Infrastructure Payment,

albeit that "the part that is 'necessary' to [the] development could not be counted towards paying for [the] CIL liability". Implicit in this is the fact that the infrastructure itself cannot be subdivided. However, while the problems outlined in (c) and (d) above might be overcome if the Regulations provided a means for determining the overall proportion of an item of infrastructure which could reasonably be required of a main development, and for deducting that proportion from the overall cost of providing the infrastructure, so as to arrive at an infrastructure payment which represented the balance (as Mr Upton proposes) there is nothing in the Regulations which allows this, either by reference to the physical extent of the infrastructure or the cost of constructing it. Rather, regulation 73(11) requires the value of "the infrastructure provided" to be determined on the basis that it is "the cost … of providing that infrastructure". The infrastructure referred to is clearly the whole of the infrastructure which is provided to the charging authority.

(c) IS INFRASTRUCTURE "NECESSARY TO MAKE THE DEVELOPMENT GRANTED PERMISSION BY THE RELEVANT PERMISSION ACCEPTABLE IN PLANNING TERMS" IF IT IS IDENTIFIED IN A REG 123 LIST?

10. Mr Upton's reasoning on this issue is set out in paragraphs 4 and 31-33 of his Opinion. In particular, he argues as follows:

> "4. … If regulation 73A is read alongside both regulations 122 and 123, then any infrastructure on the reg 123 list will be funded by 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."

And

> "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."

11. The principal difficulty with these arguments is that they conflate two separate issues, namely:

    a. Whether an item of infrastructure is necessary in order to make a "main" development acceptable;

b. Whether it is lawful for a planning authority to seek (or rely on) a planning obligation which secures the provision of that infrastructure when deciding whether to grant planning permission.

12. Clearly, there is a link between these two things, in so far as a planning authority should not seek to secure the provision of infrastructure through a planning obligation unless the infrastructure is necessary in order to make the development acceptable. A planning obligation should only be used to secure infrastructure which is "necessary": that much is made clear by regulation 122. However, it does not follow from this that the provision of infrastructure is not "necessary in order to make the development … acceptable in planning terms" merely because the regulations now prevent authorities from securing that infrastructure by means of a planning obligation:

    a. It is important to distinguish the regulation 122 test (whether the *planning obligation* is necessary to make the development acceptable) from the regulation 73A(7) test (whether the *infrastructure* is necessary to make the development acceptable). A planning obligation requiring a developer to provide infrastructure may not be necessary if it is clear that the infrastructure will provided through CIL, but this does not mean that the infrastructure itself is not necessary. For the purposes of regulation 73A(7), it is the latter which is relevant;

    b. Although the purpose of the CIL Regulations was in part to enable planning authorities to use CIL contributions to fund the provision of infrastructure which was not directly linked to the chargeable development from which the CIL was collected, there is not (and has never been) a "bright line" between infrastructure which has in the past been funded by planning obligations and infrastructure which, in the future, government wishes to see funded by CIL. As noted above, there will be many cases where infrastructure is both needed in order to make a particular development acceptable, and of wider community benefit. In such cases, the purpose of regulation 123 is to encourage planning authorities to move away from reliance on planning obligations and towards reliance on CIL. Given the longstanding limitations on the ability of planning authorities to require developers to enter into planning obligations, it follows that CIL will, in many cases, be used to provide infrastructure which is necessary in order to make a particular development acceptable, and that "relevant infrastructure" will frequently include items which are both necessary before a particular development can come forward, and of wider benefit to the community. The fact that infrastructure is being paid for by CIL does not alter the need for it;

    c. This is confirmed by the wording of regulation 73A(7)(b), which precludes a charging authority from accepting an infrastructure payment unless it is satisfied *both* that the infrastructure to be provided is "relevant" *and* that it is "not necessary to make the development ... acceptable in planning terms". On Mr Upton's analysis, "relevant infrastructure" could never be "necessary to make the development …

acceptable", since its inclusion in the list of "relevant infrastructure" would mean that its provision would be secured through CIL. If this were right, then regulation 73A(7)(b)(ii) would be redundant. I do not consider Mr Upton's analysis is a logical approach to the construction of the Regulations. Regulation 73A(7)(b)(ii) was plainly intended to add something to regulation 73A(7)(b)(i). It could only do so if an item of infrastructure could be "necessary to make the development ... acceptable in planning terms" notwithstanding the fact that it was constituted "relevant infrastructure".

d. The same point emerges from LBTH's own draft charging schedule, which states that:

> "The Council will not seek planning obligations … for infrastructure include in the list … unless the need for specific infrastructure contributions is required to make the development acceptable in planning terms…"

On Mr Upton's analysis "infrastructure included in the list" could never be "required to make the development acceptable in planning terms". The exception which LBTH itself proposes would therefore never be engaged. His conclusions therefore contradict LBTH's own proposals.

e. Finally, I note that Mr Upton's reasoning is premised on the belief that, if an item of infrastructure is identified in the regulation 123 list, it is safe to assume that it will provided through the application of CIL contributions. However, the inclusion of an item of infrastructure on a charging authority's regulation 123 list is no guarantee that it will be provided, and there is nothing in the Regulations which requires a charging authority to use the CIL collected in respect of a particular development towards the provision of infrastructure which is considered necessary in order to make that development acceptable. In short, it is simply not possible to conclude that infrastructure is "not necessary" simply because "the Council have determined that the funding of this relevant infrastructure will be raised more generally, by way of CIL and other sources."[9]

CONCLUSIONS

13. The difficulties which flow from regulation 73A(7) are well known and, as Mr Upton observes, have been the subject of discussion by numerous commentators. It is inherent in that debate that the wording of the Regulations is viewed by many as problematic, in so far as it drastically reduces the scope for reliance on infrastructure payments, and is therefore difficult to reconcile with the overall desire to encourage development and promote the

[9] Upton para 31

release of strategic sites. To that extent, I have considerable sympathy for Mr Upton's desire to find a more workable solution.

14. However, these concerns have to be seen against the backdrop of the position taken by the original CIL Regulations, namely that there would be no provision for infrastructure payments at all. It is a matter of record that this was not an omission, but a deliberate and considered stance. While the 2014 amendments reflect a shift in that position, it is very clear (as Mr Upton himself points out[10]) that the ability to use infrastructure payments is still closely circumscribed, in ways which the ability to use land payments is not. The position has been relaxed, but – deliberately - only to a limited extent. In the circumstances, it would be dangerous to assume that a particular construction of the regulations is necessarily contrary to government's intentions simply because it would preclude the use of infrastructure payments in cases where many developers and planning authorities would find it convenient to be able to use regulation 73. If one seeks to understand the government's intention, that process has to be rooted in the words of the Regulations themselves.

15. For the reasons set out above, I consider that Mr Upton's approach focuses too much on what many would like the Regulations to provide, and not enough on what the Regulations actually say. I do not consider that his interpretation is supported by the words which the government has chosen.

16. If there are any questions arising from the above, those instructing should not hesitate to contact me.

PAUL BROWN Q.C.
15 September 2014

Landmark Chambers
180 Fleet Street
London EC4A 2HG

[10] Upton paras 10-13