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PLANNING OBLIGATIONS AND POLICE CONTRIBUTIONS

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PLANNING OBLIGATIONS AND POLICE CONTRIBUTIONS

ADVICE

In this matter I am instructed on behalf of the Association of Chief Police Officers ("ACPO") in relation to issues arising in respect of securing contributions towards Police services as part of the development control and Community Infrastructure Levy regime. I previously provided advice on the 20th October 2009. In many respects that advice has now been overtaken by events and a principal purpose of the present advice is to bring matters up to date.

Since my previous Advice there have been some important developments. In terms of the law the Community Infrastructure Levy Regulations 2010 have now come into force. Of particular importance in relation to the issues to be addressed are Regulations 122 and 123. These Regulations provide as follows:

> "*122(2): A planning obligation may only constitute a reason for granting planning permission for the development is 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.

…

123(2) 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 of provision of relevant infrastructure.

(3) 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 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 type of infrastructure,

have been entered into before the date that Obligation was entered into.

(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 the 6th April 2014 or the date when the charging authority's first charging schedule takes effect, whichever is the 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 of types of infrastructure, or

(b) When no such list has been published, any infrastructure."

In relation to policy since my previous Advice circular 05/2005 which contained in particular provisions in relation to pooled contributions for infrastructure has been superseded by the National Planning Policy Framework. The Framework provides the following simplified advice in relation to planning obligations:

"*203. Local planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations. Planning obligations should only be used*

where it is not possible to address unacceptable impacts through a planning condition.

204. Planning obligations should only be sought where they meet all of the following tests:

- *Necessary to make the development acceptable in planning terms;*
- *Directly related to the development; and*
- *Fairly and reasonably related in scale and kind to the development.*

205. Where obligations are being sought or revised, local planning authorities should take account of changes in market conditions over time and, wherever appropriate, be sufficiently flexible to prevent planned development being stalled."

It will be clear from these provisions that the prior notion of pooled contributions has now been superseded. The approach from the 6th April 2014 (or in authorities where a CIL schedule has been adopted) is that planning contributions will either be levied through CIL in respect of infrastructure which is on what is commonly referred to as the "Regulation 123 List" or on an individual site contribution basis in respect of on or off-site infrastructure directly related to the development which is being granted consent through entering in to a s106 obligation. It is important to be clear therefore that there are as a result two sources of potential contribution. The first is from the adopted CIL schedule for which each relevant

development will be liable. The second is through an individual site contribution which has to pass the Regulation 122 test to which I shall return below.

Against the background of that change to the regime in which contributions can be sought it is necessary to engage with a number of issues which arise in the context of each of the alternative sources of contribution.

Dealing firstly with CIL. The first point to note is that "*infrastructure*" is not a narrowly defined term. Section 216 of the Planning Act 2008 provides a list of "*infrastructure*" but is clear that that list is non-exhaustive. That fact is demonstrated by the use of the word "*includes*" prior to the list being set out. In my view there is no difficulty in the proposition that contributions towards Police infrastructure is infrastructure for the purposes of the 2008 Act. In policy terms this is reinforced by the reference to security infrastructure in paragraph 156 of the National Planning Policy Framework. Furthermore it should be infrastructure is of course not limited to buildings.

In settling the level of the CIL schedule, Regulation 14 of the 2010 Regulations requires the planning authority to strike a balance between viability of development and the desirability of funding the "*total cost of infrastructure required to support the development of its area*" taking account of other sources of funding. Cross-boundary issues will be included through the discharge of the duty to co-operate. It follows from this and what has been set out above that the test which is posed in relation to the inclusion of items

within the CIL schedule posed by Regulation 14 is very different to the test under Regulation 122. Regulation 122 relates to planning obligations and requires the three tests to be passed in relation to site specific planning obligations. In setting the CIL schedule the test is different. What is required in setting the level of the levy is an understanding of the costs of infrastructure "*required to support the development of its area*". Thus there will be a relationship between the infrastructure on the schedule and the development which is anticipated across the local authority's area but because it is an overarching calculation questions of necessity and direct relationships do not arise. Provided that the infrastructure is required for the development in the area, it qualifies for inclusion on the Schedule. The two factors which will then potentially reduce the level of the levy are other sources of funding for the same infrastructure and issues related to development viability.

The other important feature of the 2010 Regulations is that in setting the Schedule the local planning authority need to produce "*relevant evidence*" as the basis on which they have prepared the Schedule. Beyond being relevant to demonstrating that the infrastructure is required to support the development of its area no further strictures are required by the Regulations. Clearly given the long timescales of Development Plan Documents (usually looking at 15-20 years ahead) it is necessary for the relevant evidence to address the infrastructure that will be required to support development during that period. To this extent therefore the evidence will need to reflect the timescales of the forward planning process. Relevant evidence will

undoubtedly include forward plans and strategies and the planned provision of infrastructure over that lengthy time period. It will be necessary to show firstly the relationship between the development anticipated and the infrastructure requirements to which it gives rise. Secondly it will be necessary to demonstrate that there are real plans for investment which have been settled into which the requirement fits. This requires therefore a fully formed future infrastructure plan with a commitment to delivery in relation to infrastructure generally and (perhaps coincidentally) the delivery of infrastructure associated with growth occurring. The plans must be realistic and costed. This is the current evidence which will be necessary in order to establish that they should be included within the CIL schedule.

Once collected Regulation 59 of the 2010 Regulations requires that the authority must spend the funds on infrastructure within its own area and further provides for a discretion for it to be spent on infrastructure outside its area. Once more the duty to co-operate will have a role to play in this. I see no reason for concluding that any different approach should be taken to the charging authority holding funds which have been levied against the costs of infrastructure to be provided by others that applies in relation presently to planning obligations. It will be therefore necessary for the charging authority to pass on to a relevant infrastructure provider the cost of infrastructure which has been levied by the CIL in order to enable that infrastructure provider to deliver the infrastructure required to support the development which has been granted permission. Regulation 61 enlarges the powers of the charging authority to include for the reimbursement of expenditure

which has already been incurred. Obviously the detailed administration of funds raised through CIL may vary from authority to authority but plainly it would be perverse for a charging authority having levied monies against a CIL schedule in which Police contributions featured to then fail to pass that element of the levy on which was intended to support the provision of further Police infrastructure.

I turn now to consider the situation in relation to individual site contributions. It is important to appreciate that many of the adopted CIL schedules proceed on the basis of a Regulation 123 List of projects which are to be funded from CIL leaving other elements of infrastructure to be delivered in a site by site basis. This can happen in particular in respect of development plans which contain large allocations of development which can be expected to provide a comprehensive package of infrastructure solutions based on their own individual development. It is however important to appreciate as set out above that in respect of the site by site contributions are no longer supported by national policy.

The extent to which individual site contributions can be sought depends upon the scope of the definition of "*necessary*". This question was considered recently by the Court of Appeal in the case of Derwent Holdings v. Trafford Borough Council & others [2011] EWCA Civ 832. The case concerned the validity of a planning permission granted in respect of a proposed development in two parts, firstly a large superstore and secondly the redevelopment of the Old Trafford Cricket Ground. If permission was granted then the proceeds of sale of the Council's land on which the

superstore was to be sited were to be passed on to Lancashire County Cricket Club to subsidise the redevelopment of their cricket ground. The challenge was brought on the basis of a failure to take account of relevant guidance in relation to the planning agreement. In concluding in relation to the submissions made by the Claimant Carnwath LJ (as he then was) stated as follows:

> "*15. Like the Judge, I am unable to accept this argument. 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 that was being put forward is not merely acceptable, but is carrying with it significant regeneration benefits, including the improvement to the cricket ground. The offer of a legal agreement to secure those benefits would no doubt have added to the attractions of the proposal. 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."*

Thus in that case it can be seen that the Court of Appeal did not take a strict approach to the requirement of the Regulations in respect of the necessity of the obligation to make the development acceptable in planning terms. It may be that further clarification is required by the Courts of the test of necessity. There is no reason, however, in principle to suggest that contributions towards Police infrastructure cannot be sought from a Section 106 obligation from an individual site. It will however be necessary to demonstrate that either on-site or off-site infrastructure is necessary and directly related to the impact of the development which is being granted consent. Furthermore it will obviously be necessary to demonstrate that any contribution will in fact be used in order to pay for infrastructure which will actually be delivered.

I trust I have dealt with all of the matters concerning those instructing me in relation to these issues, but needless to say I shall be pleased to assist upon the telephone if necessary if anything further arises.

IAN DOVE QC

8th October 2012

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ADVICE

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