

CIL v Section 106

What is the difference between CIL and a section 106 agreement?

Section 106 agreements are put in place to make it possible to approve a planning proposal that might not otherwise be acceptable in planning terms. For example, a section 106 agreement might require a developer to fund improving the access road to a site, to ensure that access will be safe once the development is completed. Or to ensure that the need for affordable housing is met, and that communities are mixed and diverse, section 106 agreements can require a developer to include a certain proportion of affordable housing on an otherwise market housing development. They are specific to the site that is proposed for development.

CIL is a general levy on all development, designed to raise funds for infrastructure needed generally as a result of an increase in development in an area.

Although local authorities are not required to adopt CIL there are new restrictions on how existing planning obligations can be used and Councils will only be able to raise money for most infrastructure through the new levy.

New development will nearly always have an impact on infrastructure with different types of development and scales of development having different effects. A single new dwelling may not appear to have an impact but the cumulative impact of twenty or so single dwellings will have. It is therefore fair that all development pays a share towards the cost of infrastructure, services and amenities that everyone uses and not just large-scale development. Through CIL all but the smallest building projects will make a contribution towards additional infrastructure but this will be based on viability testing.

Operation of CIL and Section 106 together

Reg. 86. Regulation 123 of the Community Infrastructure Levy Regulations provides for charging authorities to set out a list of those projects or types of infrastructure that it intends to fund through they [sic] levy. This list should be

based on the draft list that the charging authority prepared for the examination of their draft charging schedule.

87. When a charging authority introduces the Community Infrastructure Levy, section 106 requirements should be scaled back to those matters that are directly related to a specific site, and are not set out in a regulation 123 list. For transparency, charging authorities should have set out at examination how their section 106 policies will be varied, and the extent to which they have met their section 106 targets. Relevant local policy changes should be implemented at the same time that the charging schedule is introduced, and integrated as soon as practical into the relevant Plan.

88. Where the regulation 123 list includes a generic item (such as education or transport), section 106 contributions should not normally be sought on any specific projects in that category. Such site-specific contributions should only be sought where this can be justified with reference to the underpinning evidence on infrastructure planning made publicly available at examination.

Reg. 89. The charging authority's proposed approach to the future use of any pooled section 106 contributions should be set out at examination and should be based on evidence. Where a regulation 123 list includes project-specific infrastructure, the charging authority should seek to minimise its reliance on planning obligations in relation to that infrastructure. When the levy is introduced (and nationally from April 2014), regulation 123 limits the use of planning obligations where there have been five or more obligations in respect of a specific infrastructure project or a type of infrastructure entered into on or after 6 April 2010.

Advantages

1. It is generally fairer because it widens the contribution base, catches the 'free riders' and requires almost all to contribute.
2. More specifically, it is fairer on larger developments which, where they are first in or last out of an area tend to over-pay.
3. It is certain because the charging schedule combined with the planning permission will determine the amount payable reasonably precisely.
4. It is faster because it removes the element of individual negotiation around the quantum of the payment. Finally, it funds sub-regional infrastructure which was more difficult to fund through traditional s106 agreements.

Disadvantages

1. It is inextricably bound up with the development plan system so that there are likely to be delays in setting CIL.
2. Because of this it lacks flexibility and will be difficult to amend quickly as market conditions change.
3. It is intended to be mandatory with few exceptions. As a consequence those sites which are unable to bear the burden of CIL will not come forward for development.
4. The arrangement breaks the link between development and related infrastructure. There is no opportunity for any direct covenants between the charging authority and the developer, to encourage the timely provision of infrastructure. Instead it is said that CIL is simply a cash collection system which makes insufficient provision for delivering necessary infrastructure.

Note REG 122

Decision makers will need to scrutinise obligations much more carefully.

Authorities will need to be able to justify their claim for contributions in answer to the questions:

(i) Where are the contributions to be used?

(ii) When?

Non chargeable development continues to be judged by Circular 05/05