



think harder

Welcome to Planning Matters from the experts at Cobbetts. We hope you enjoy this edition and would welcome your feedback on any issues you would like to see covered in this regular publication.

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## Community Infrastructure Levy - It is coming!

The current timetable is to issue the draft regulations for consultation in autumn this year and finalise them around spring 2009 to bring the whole system to life (provided the bill has survived which it won't if there is a change of Government before the autumn)! The vociferous opposition to the previous proposals, the Planning Gain Supplement, seem to have melted away. Or is it that the development industry has bowed to the inevitable and is now just going to make the best of it?

It will be some time before any actual levies are demanded. Local authorities have to decide whether to take up the charge and if they do, have to set about identifying development in the local plan period and the associated infrastructure. Once identified, delivery and funding strategies for each item will have to be produced. CIL is not expected to fund infrastructure in its entirety but because it will apply with few exceptions (such as householder development) it is expected to raise contributions that at the moment are not caught by the system.

Current funding sources including the new Regional Infrastructure Funds will still be on stream. It is intended that CIL will be paid on implementation, but there is a power for phased payments. Actual calculation of the amount due can only be done once most details of the development have emerged. The aim is to make the system more transparent and certain than the current negotiation of planning agreements on a site-by-site basis. But CIL will put the actual quantification of contribution well beyond the issue of outline consent.

The legislation makes it clear that the aim is to ensure that costs incurred in providing infrastructure for development can be funded (wholly or partly) from the uplift in value of land due to the grant of planning permission (Section 174). Regulations will ensure it is not set at a level which inhibits development. The examples given, Horley and Milton Keynes, where roof tax tariffs have successfully enabled forward funding of infrastructure and are clearly largely greenfield, uncontaminated sites. Substantial uplifts are expected from unlocking the development potential. The usefulness of CIL in more difficult areas may be more problematic. It may be that in these areas, the work necessary to set up CIL and the prospect of catching some value from small sites, may help to galvanise public sector bodies in drawing up funding strategies even if CIL pays only a small part.

It is at the sub regional level that CIL may really shine. Provision of hospitals, secondary education, new bypasses and motorway junctions may well benefit from the pooling of CIL contributions over a wider area. Problem areas will still benefit from such infrastructure even if they have made few contributions.

There seem to be two key questions: how can local authorities be sure at the time they grant planning consent that the necessary infrastructure will be provided in a timely fashion? What if there is a slowdown in housing starts which will delay CIL contributions? As a matter of public law, councils need to know that mitigation will be in place in line with the application proposals or Environmental Impact Assessment. Attaching a Grampian condition preventing development until the item is provided, will not be acceptable if the developer does not control the delivery.

Similarly, the developer will not invest large sums unless it is certain that schools and other major infrastructure, whether on or off site, will be coming forward. One solution may be to enlist the aid of one of the existing bodies such as RDAs or English

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Partnerships to forward fund the infrastructure, recouping the cost from CIL in due course.

Alternatively, the developer may fund certain items in exchange for a reduction in other contributions. In other words, a Section 106 agreement may give the developer the opportunity to fund and control the delivery of certain infrastructure on the basis that affordable housing or some other element becomes a CIL item in its place. There will clearly be a great opportunity for development bodies, both public and private, to work together with CIL providing an additional element of flexibility.

While details of the project are still being ironed out it is difficult to know what drafting changes are needed to basic planning and development documents. How can a developer avoid being double charged? Should contracts require a developer to be reimbursed if he agrees to provide infrastructure which will clearly be on the CIL list? How long should Councils be able to sit on money before it is returned to the paying party or should they be allowed a rolling programme where no specific contribution is earmarked for a specific purpose?

We are advising our clients on how to protect themselves in long-term contracts in view of the current uncertainties. If you would like to know more please contact [john.moritz@cobbetts.com](mailto:john.moritz@cobbetts.com)

## Can local authorities always change their minds?

The answer, strictly speaking, is no. As a matter of public law, local authorities must always act reasonably in the light of their powers and duties. From where we sit, this seems in many cases a counsel of perfection. Two recent cases shed some light on these issues.

In the Island Farm case – *R (on application of Island Farm Developments Ltd.) v Bridgend CBC* - the local authority had resolved to sell a site for sports use to the company. Before the transaction could be documented, elections brought about a change of political control. The deal was reviewed and a member of the new Cabinet was also a member of the protest group and so therefore decided not to sell. The disappointed buyer judicially reviewed that decision.

Helpfully, the court confirmed that public support for a policy or a political group or issues arising from the sale were not **in themselves** proof of bias. Of course, the same facts could lead to such allegations if evidence was available.

The second case concerns the approval of the contentious new Kings Cross development promoted by Argent. The application went to committee in March 2006, accompanied by a committee report 500 pages long, excluding annexes. The consent included over 60 conditions. At the committee meeting a resolution to grant was passed subject to the negotiation of a Section 106 agreement.

The agreement took some time to complete and it was not until October that the matter was returned to the committee. By that time, May elections had brought a change of political control and the new committee sought legal advice on whether they were bound by the previous decision or had an unfettered power now to reconsider the whole matter as the planning permission had not yet been issued.

The advice they got from lawyers was that they could change their minds, but they had to act reasonably. In the context of this application, that meant finding some change relevant to planning arising between the two dates or some error in the balancing of material considerations carried out earlier.

The committee decided, with some reluctance, that they had no grounds to refuse the application and the consent was issued. An objector judicially reviewed the issue of the consent on the basis that the legal advice was wrong and that members were entitled to approach the decision making process anew at the second meeting. The court upheld the legal advice given.

## Time limits for judicial review proceedings

It is critical for developers to know when they are safe from such proceedings. Commercial contracts usually limit judicial review clauses to three months from the issue of consent. This is fair enough, because the rules state that any action must be made promptly and in any event within three months of the decision in question.

That this time limit is not fixed in stone is illustrated by some recent cases. In the case of *Jonathan and Teresa Sumption v LB Greenwich* a certificate was granted by the council to confirm that building a wall did not require planning permission.

There is no requirement to notify neighbours or to publicise such an application. The certificate was granted on 17 January 2007 but it was only when work started in June that the neighbours became aware of the situation and they applied for an interim injunction on 8 June 2007.

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Judge Collins had no difficulty in deciding that the application had been brought promptly even though not within three months of the issue of the certificate.

In *Residents against Waste Site Ltd. V Lancashire CC and Global Renewables* the court accepted an application just two days short of three months. The delay had been due to the formation of a company limited by guarantee to represent the objectors in order to limit their exposure to costs!

## That legal answer you've always wanted to know...

Is there a legal difference between a best endeavours obligation and a reasonable endeavour obligation? And what about wording such as "all reasonable endeavours"?

The recent case of *Rhodia International Holdings Ltd and another v Huntsman International LLC* sheds some new light. Older cases had been inconsistent, some indeed holding that in practice and depending on the surrounding contractual requirements there was no difference!

The case concerned a business sale agreement which required the purchaser to use reasonable endeavours to obtain the transfer of certain contracts, including an electricity generation contract, to itself, thus relieving the seller of its liabilities under the contracts. In the event, the purchase proceeded by way of a special purpose vehicle and the generating company refused to transfer the contract without a parent company guarantee or letter of credit. This was not provided and the case came to court on the basis that the buyer had failed to use reasonable endeavours by not offering the required parent company guarantee or letter of credit. The court held that the purchaser was in breach of the contract and although damages are not yet known they could amount to over £14 million.

The judge in the case, expressed the difference in this way:

"As a matter of language and business common sense, untrammelled by authority, one would surely conclude that they [best endeavours and reasonable endeavours] did not [mean the same thing]. This is because there may be a number of reasonable courses which could be taken in a given situation to achieve a particular aim. An obligation to use reasonable endeavours to achieve the aim probably only requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavours probably requires a party to take all the reasonable courses he can. In that context, it may

well be that an obligation to use *all* reasonable endeavours equates with using best endeavours..."

So now you know! And I suspect this one will run and run.

## Cobbetts appoints two new Planning Directors

The planning team at Cobbetts has been strengthened by the appointment of two nationally recognised experts. Sandra Banks joins the Birmingham team along with Lorna McShane who will be based in Manchester.

Lorna brings over 25 years local government experience in planning law and joins the team from Muckle LLP in Newcastle upon Tyne. Her most recent local government experience was as Head of Legal and Committee Services at Wellingborough Borough Council in Northamptonshire. Lorna has acted for local authorities and other public sector clients, as well as developers, on planning, highways and environmental matters. In addition, she has worked on a number of occasions on compulsory purchase orders, planning appeals, judicial reviews, planning enforcement and the negotiation of complex S106 agreements.

Sandra was a senior planning partner at Denton Wilde Sapte before retiring in December 2006 to run her own practice. With over 20 years' experience in planning and public law, Sandra has advised extensively on private and public sector development projects. She has worked on some of the largest schemes nationally including the Milton Keynes Growth Area Infrastructure tariff, delivering the Thames Gateway at Barking Riverside and major new housing at Eastern Quarry, Dartford.

The experience of these two new additions will prove to be an invaluable asset to the overall experience of the planning team.