

Developer contributions – significant changes to regulations

Developers may be asked to provide contributions for infrastructure in different ways. Planning obligations, known as section 106 (s106) agreements are legal obligations entered into to mitigate the impacts of a development proposal. Developers may also contribute towards infrastructure by way of the Community Infrastructure Levy (CIL) which is a fixed charge levied on new development to fund infrastructure and intended to address the cumulative impact of development in an area.

The Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019 came into force on 1 September 2019. The amended regulations make changes to how CIL is charged, collected and reported and seeks to clarify the relationship between CIL and s106 contributions. The Government have updated the national Planning Practice Guidance on [Community Infrastructure Levy](#) and [Planning Obligations](#) to reflect the amended regulations.

The amended regulations follow an independent review of CIL which concluded that the present system of developer contributions was too complex and uncertain and recommended to Government that CIL be replaced with a low-level Local Infrastructure Tariff combined with s106 agreements for larger developments. The Government has not pursued this and instead has amended the current system. Nevertheless, these amendments will result in significant change to the way developer contributions can be used to fund infrastructure.

The key changes

1. Planning authorities were previously not allowed to pool more than five s106 obligations to fund a single infrastructure project. This pooling restriction has been removed.
2. The CIL 'Regulation 123' List has been removed. Planning authorities can now use CIL and section 106 obligations to contribute towards the same piece of infrastructure, subject to three planning tests (Regulation 122) to ensure that s106 contributions are necessary, reasonable and directly related to the development.
3. Guidance clearly distinguishes between the purpose of s106 obligations to mitigate site-specific impacts and CIL which can be used to address the cumulative impact of infrastructure in an area. Typically, s106 health contributions have not been sought from individual developments where 'health' was identified on an authority's Regulation 123 List. The removal of the Regulation 123 List will remove this obstacle.

4. CIL Regulation 123 Lists will be replaced by an infrastructure funding statement (under Regulation 121A) which identifies the infrastructure required to support development in an area and how it will be funded, using CIL, or s106 obligations, or a combination of both. The first statement should be published by 31 December 2020.
5. The infrastructure funding statement should also include details of how much money has been raised through CIL and s106 obligations and how it has been spent.
6. The scale of s106 obligations is influenced by development viability. Previously viability was assessed as part of the planning application. Now, viability is assessed at the local plan stage and viability assessments submitted with a planning application should be based on the plan evidence.

The impact of the changes

Combining s106 obligations and CIL to fund infrastructure

The removal of the s106 pooling restriction and the CIL Regulation 123 list allows authorities to pool and combine CIL and s106 obligations to fund the same piece of infrastructure, where identified in the infrastructure funding statement. The removal of the Regulation 123 list could also encourage authorities to pass CIL funds to bodies outside of their area to deliver infrastructure that supports development in their own area. This could address cross-boundary infrastructure requirements and needs which cover a wider area, such as hospital and community healthcare.

The Government have taken a pragmatic approach to the concern that developers could be paying twice for the same piece of infrastructure, known as 'double dipping' by effectively saying that a more flexible system is needed to ensure the faster delivery of infrastructure. Also, the infrastructure funding statement will provide a more consistent and transparent approach to reporting on the use of s106 and CIL funds and will provide an audit trail of expenditure.

Therefore, a combination of s106 and CIL could be used to deliver new or improved health infrastructure. This includes both s106 in kind and financial contributions. For example, a s106 in kind shell and core health facility could be delivered with the use of s106 financial contributions from other developments or CIL funds where there is a funding gap.

The amended regulations don't affect existing planning permissions, including outline permissions, although if a permission is varied it might trigger the need for different developer contributions. The Government is to produce guidance on how amended regulations affect historic s106 planning obligations.

Using s106 obligations to address the site-specific impact of development where a CIL is in place

S106 obligations assist in mitigating the impact of development to make it acceptable in planning terms, subject to the three tests in Regulation 122. These tests apply whether or not there is a CIL operating in the area. Guidance clearly distinguishes between the purpose of s106 obligations to mitigate site-specific impacts and CIL which can be used to address the cumulative impact of infrastructure in an area. Typically, s106 health contributions have not been sought from individual developments where 'health' is identified on an authority's Regulation 123 List. The removal of the Regulation 123 List will remove this obstacle.

Planning authorities have been unwilling to seek s106 health contributions, even when a site-specific impact has been identified due to concerns over potential developer 'double-dipping'. In some areas, with limited CIL receipts and other competing CIL funding priorities, the impact of development of healthcare has not been adequately addressed.

In practice, the use of s106 obligations to mitigate site-specific impacts will tend to apply to larger, strategic developments which generate a critical mass of demand for new or improved infrastructure, where there is insufficient existing capacity to accommodate the additional demand.

It therefore follows that the cumulative impact from smaller developments in an area could be addressed by CIL rather than s106 obligations. Government guidance recognises this and states that the levy is the most appropriate mechanism for capturing developer contributions from small developments.

Infrastructure Funding Statements

The purpose of an annual infrastructure funding statement is twofold: to introduce a more consistent and transparent approach to reporting on the receipt and use of developer contributions; and as a forward planning tool to identify how future infrastructure to support development in an area will be funded. There are various components to the statement which should include:

- Details of CIL receipts and expenditure, including the items of infrastructure on which CIL has been spent or allocated, and the amount of CIL spent or allocated on each item.
- Information on the amount of s106 obligations, both financial and non-monetary (in kind contributions) secured, received, allocated and spent, and details of the allocation or expenditure on individual items of infrastructure. It should include details of trigger points for payments and deadlines for spending as set out in individual s106 legal agreements.
- a statement of future spending priorities on infrastructure in line with up-to-date or emerging plan policies identifying infrastructure projects or types of infrastructure that the authority intends to fund, either wholly or partly, by CIL or by s106 obligations. It will not dictate how funds must be spent but will set out the planning authority's intentions.

- a report on the delivery and provision of infrastructure, where authorities are able to do so.
- an estimate of future income from developer contributions, where authorities are able to do so.

The first statement should be published online by 31 December 2020 and will cover the financial year 2019/2020. It is intended that the statement is published annually, but planning authorities can publish updated data and statements more frequently if they wish.

Developer contributions data for the infrastructure funding statement should be collected and published in an agreed format and the Government is producing guidance to help local planning authorities collect and produce data and are testing approaches, including an online '[developer contributions dashboard](#)'.

Importance of infrastructure planning

Local Plan policies requiring planning obligations should be informed by evidence of infrastructure needs and requirements. This evidence is usually compiled as an infrastructure delivery plan or infrastructure schedule. The evidence can be standardised with the use of formula or models. The guidance refers to the use of regional cost multipliers for providing school places. The [HUDU Planning Contributions Model](#) provides a standardised approach to assess healthcare infrastructure requirements and contributions.

Therefore, there is a close relationship between the local plan evidence and the infrastructure funding statement and the information in the statement should feed back into reviews of plans to ensure that policy requirements for developer contributions remain realistic and do not undermine the deliverability of the plan.

Infrastructure planning should be shared exercise and infrastructure funding statements can be a useful tool to improve engagement with infrastructure providers and commissioners.