



City of Westminster Cabinet Member Report

Decision Maker:	Cabinet Member for the Built Environment
Date:	1 May 2015
Classification:	For General Release
Title:	Interim Guidance Note: Arrangements for use of planning obligations and other planning mechanisms in the period between 6th April 2015 and the introduction of Westminster's Community Infrastructure Levy.
Wards Affected:	All
City for All Summary	Use of planning powers such as planning obligations underpins delivery of a number of City for All objectives and priorities. The Interim Guidance Note sets out how these mechanisms will be used to ensure continued effective delivery of these after legislative restrictions on their use come into force.
Key Decision:	No
Financial Summary:	The Interim Guidance Note sets out an approach intended to mitigate any future loss to the Council as a result of the coming into force of restrictions on the use of section 106 planning obligations imposed by the Community Infrastructure Levy Regulations 2010 on 6th April 2015. It is estimated based upon past activity that, if left unaddressed, such losses could potentially amount to £2.3 million annually. There the costs of publishing the draft Interim Guidance Note and responding to any comments made are not significant and will be met from within existing budgets.
Report of:	Director of Policy, Performance and Communications

1. Executive Summary

- 1.1 The Community Infrastructure Levy Regulations 2010 (as amended) introduce restrictions on the use of planning obligations (commonly known as section 106 agreements and, in unilateral undertakings offered by developers) including one that prevents them from being used to secure contributions to help pay for particular types of infrastructure, or infrastructure projects, from more than five developments. This restriction comes into force on 6th April 2015.
- 1.2 The City Council currently has policies for “pooled” contributions of this kind for a range of infrastructure, which will in time be superseded by its Community Infrastructure Levy (CIL). This report seeks approval for publication of an Interim Guidance Note (Appendix A) which explains the approach that will be taken between 6th April 2015 and the coming into force of the Westminster CIL, with the objective of ensuring continued delivery of the Council’s planning policies while not unduly delaying the taking of planning decisions.

2. Recommendation

- 2.1 That the Cabinet Member for Built Environment approves the publication of the Interim Guidance Note attached as Appendix A.

3. Reasons for Decision

- 3.1 The Community Infrastructure Levy Regulations 2010 (as amended) introduce restrictions on the use of section 106 planning obligations to “pool” contributions to fund infrastructure, with the intention that this type of arrangement will over time be replaced by the Community Infrastructure Levy. These restrictions come into force on 6th April 2015.
- 3.2 There is considerable uncertainty among the development community, amenity groups and other stakeholders of the planning system about the approach the City Council will take to ensuring continued delivery of its policies and about the potential for delay in the taking of planning decisions this may cause. The Interim Guidance Note (Appendix A) is intended to explain the approach that will be taken, to meet these concerns as far as possible. It is being brought forward as a stand-alone note as preparation of a comprehensive supplementary planning document dealing with use of planning obligations and other planning mechanisms has been delayed as a result of recent changes to national planning policy and guidance concerning the Vacant Building Credit (VBC) and a recent High Court decision on use of section 106 agreements to seek contributions for administrative and monitoring purposes. The need for an interim note/statement is now pressing.

4. Background, including Policy Context

4.1 Planning obligations (widely known as “section 106 agreements” or, in some circumstances, “unilateral undertakings”) are used by the City Council to deliver a number of its strategic policy objectives, as set out in City for All, Westminster’s City Plan: Strategic Policies and other strategies and policies. The Council’s planning policies provide for their use to seek financial contributions for certain types of infrastructure. Examples include: closed circuit television, public realm contributions, education provision, parking improvements, etc. These contributions are sought from all developments that meet thresholds set in adopted policy by reference to the additional demand that each type of development generates for each type of infrastructure; the contributions are then “pooled” and spent on provision across the City.

4.2 In 2010, national government introduced a new charge that would be paid in respect of new development to help fund the infrastructure required by an area’s growth – the Community Infrastructure Levy (CIL). Ministers’ intention is that the CIL will replace the use of planning obligations to raise contributions to fund infrastructure other than that narrowly required to make a particular development acceptable in planning terms (such as access from a new development to the highway). To help ensure this, the Community Infrastructure Levy Regulations 2010 (as amended) – called “the Regulations” in this report – introduce a number of restrictions on the future use of planning obligations.

4.3 Regulation 123 (3) of the 2010 Regulations provides that:

Other than 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 granted 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.

“Highway agreement” in this context means an agreement made under section 278 of the Highways Act 1980.

4.4 The practical effect of this provision will be to prevent use of planning obligations in conjunction with planning applications to “pool” contributions from more than

five obligations, with those entered into since 6th April 2010 counting against the limit. This means that from 6th April 2015 no further planning obligations will be entered into which seek contributions to funding pools for the types of infrastructure referred to in paragraph 4.1. It should be noted that these restrictions do not apply to affordable housing or to the use of planning obligations for non-infrastructure items. They also do not have retrospective effect, so do not affect the use of contributions already secured.

- 4.5 The City Council is currently going through the process set out in the Regulations to set its own Community Infrastructure Levy. It carried out the first stage – consultation on a preliminary draft charging schedule (a ‘charging schedule’ is the legal document setting the CIL rates that will be charged) in September 2014. Having considered the comments received on this, it is intending to take the next step – consultation on a draft charging schedule – later in April 2015. The remaining stages in the process include appointing an independent examiner, who will conduct a public examination of the proposed Westminster CIL. Assuming a positive outcome, it should be possible to start charging by the end of this calendar year.
- 4.6 There will, therefore, be a gap between the coming into force of the regulation 123(3) restrictions and the start of CIL charging. Concern has been expressed by the development industry, some amenity societies and other groups and individuals concerned with planning in Westminster about the approach that the City Council will take during this interim period, in particular:
- Will the taking of planning decisions be delayed because of the restriction on the City Council’s ability to secure its policy objectives until it can start charging its CIL?
 - To what extent will the City Council’s ability to secure its policy objectives be prejudiced as a result of the restrictions coming into force?
- 4.7 To help address these concerns and to mitigate the impact on delivery of the Council’s infrastructure priorities, an Interim Guidance Note (Appendix A) has been prepared explaining the approach that will be taken during this period. Its underlying approach is to ensure that, as far as possible, the City Council will continue to apply existing adopted policy and practice during this interim period so that development is not unduly delayed and policy requirements can continue to be applied.
- 4.8 It seeks to do this first by explaining the precise scope of the restriction and what it will – and will not – affect. It then sets out the council’s intended approach, including:
- Taking careful account of the extent to which the restrictions in regulation 123(3) of the CIL Regulations apply in each case, including the scope that remains for pooling of contributions following the restrictions.

- Working with applicants to explore the extent to which it is appropriate to seek things that may be regarded as infrastructure as part of the design of their scheme, secured where necessary by use of planning conditions or obligations.
- Coordinating joint approaches by developers to secure collective provision of infrastructure addressing the needs of a number of schemes where this is appropriate and practicable.
- Exploring the scope for use of highway agreements under section 278 of the Highways Act 1980 to deal with highways-based public realm works.
- Taking particular care in the drafting of planning obligations to minimise the effect of the restriction by continuing to be clear and specific about the infrastructure projects or types of infrastructure they may be used to support.
- In each case that planning obligations are proposed to be used, continuing to take care to ensure the relevant legal tests for their use are met
- Taking particular care about how applications are reported to committee, and ensuring that the factors that can and cannot be taken into account in deciding applications are clear in every case to ensure the restrictions do not unnecessarily inhibit decision-making.

4.9 The note then deals with the future of the public realm credit system which, since May 2011, allows developers who have funded public realm improvements to credit these financial contributions against sums that would otherwise be sought for public realm improvement through planning obligations when they apply for planning permission for development in the same vicinity. The regulation 123(3) restriction explained in paragraph 4.3 prevents the use of planning obligations in this way, meaning that from 6th April 2015 the basis of the current public realm credit system will no longer be operative.

4.10 Developers have already been informed of the situation and were advised to ensure that use of their existing credits should have been included in planning obligations signed before 6th April 2015. The Interim Guidance Note explains that in the interim period up to adoption of the Westminster CIL the City Council will continue to consider the use of public realm credits where a scheme gives rise to the requirement to fund public realm improvements in the vicinity of a development site. It goes on to say that consideration is being given to ways of continuing the principle of encouraging the forward-funding of public realm improvements within the framework of the CIL legislation.

4.11 It was originally intended that the content of this note would have formed a chapter in a more comprehensive draft supplementary planning document (SPD) on 'Use of Planning Obligations and Other Planning Mechanisms' which will provide clarity about the extent of requirements that will be made of developers to ensure sustainable development and provide transparency about what the City Council will seek through section 106 and other planning powers after introduction of the Westminster CIL. Preparation of this document has been held

up by the need to address the implications of recent changes to national planning policy and guidance concerning the Vacant Building Credit (VBC)/affordable housing and a recent High Court decision on the use of section 106 contributions for administrative and monitoring purposes.¹ In the circumstances this separate note has been prepared for immediate publication.

- 4.12 The Interim Guidance Note is essentially a procedural note not a statement of policy or new policy. As stated above the intention is to include it in a more comprehensive draft SPD on 'Use of Planning Obligations and Other Planning Mechanisms' that will be subject to formal public consultation in due course. Therefore, this Interim Guidance Note is not subject to public consultation but the Council would be happy to receive any comments on the Note which can be used to inform preparation of the more detailed SPD.
- 4.13 There have already been discussions with the Westminster Property Association (WPA) about this proposed approach. On approval, officers would take steps to publicise it both internally and widely among developers and others concerned with planning in Westminster. Officers will monitor the practical operation of the arrangements and approaches set out in the Note in consultation with the WPA and others and will report to Members further, if necessary. In the meantime steps are being taken to ensure that progress is made with the process for setting the Westminster CIL with a view to keeping the interim period covered by this Note to a minimum.

5. Financial Implications

- 5.1 The Interim Guidance Note sets out an approach intended to mitigate any loss to the Council as a result on restrictions on the use of section 106 agreements imposed by the Community Infrastructure Levy Regulations 2010 that come into force on 6th April 2015.
- 5.2 Based on a review of section 106 agreements between 2008 and 2013, officers have estimated that the restrictions could involve the City Council foregoing up to £2.355 million per annum for the delivery of infrastructure.
- 5.3 The Interim Guidance Note is intended to set out a procedural framework that will mitigate the extent of this shortfall in the period before adoption of the Westminster CIL.
- 5.4 The costs of publishing the Note and responding to any comments made will be met from within existing budgets.

¹ Oxfordshire County Council v Secretary of State for Communities and Local Government [2015] EWHC 186 (Admin)

6. Legal Implications

- 6.1 Under section 111 of the Local Government Act 1972 (as amended), the City Council has the power to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions. This Interim Guidance Note is a procedural document explaining how it intends to discharge its functions as a local planning authority and, therefore, falls within the scope of this power.
- 6.2 The City Council also has the power to prepare and adopt supplementary planning documents. Regulation 12 of the Town and Country Planning (Local Planning) (England) Regulations 2012 sets out the requirements that it must follow with regard to public participation in preparation of the document, including giving details of those consulted during the preparation process, the issues they raise, and of how the council has addressed those issues in the document. The course set out in this report will help the City Council meet these requirements when it brings forward its draft supplementary planning document on 'Use of Planning Obligations and Other Planning Mechanisms'.

7. Consultation

- 7.1 Informal discussions have been held with the Westminster Property Association (WPA) about the general approach to the interim period as set out in this report. Given that this Interim Guidance Note is a procedural note that is not a statement of policy or new policy and the Council intends to include its content in a more comprehensive draft SPD that will be subject to formal public consultation in due course, it is not proposed to publically consult on this Note. However, the Council would be happy to receive any comments which can be used to inform preparation of the more detailed SPD.

If you have any queries about this Report or wish to inspect any of the Background Papers please contact: Andrew Barry-Purssell, (abarrypurssell@westminster.gov.uk Ext. 5662 /Rachael Ferry-Jones (rferry-jones@westminster.gov.uk Ext 2418)

BACKGROUND PAPERS:

None

NB: For individual Cabinet Member reports only

For completion by the **Cabinet Member for the Built Environment**

Declaration of Interest

I have <no interest to declare / to declare an interest> in respect of this report

Signed: _____ Date: _____

NAME: **Councillor Robert Davis**

State nature of interest if any
.....

(N.B: If you have an interest you should seek advice as to whether it is appropriate to make a decision in relation to this matter)

For the reasons set out above, I agree the recommendation(s) in the report entitled **Draft Interim Guidance Note: Arrangements for Use of Planning Obligations and Other Planning Mechanisms in the Period Between April 2015 and Introduction of Westminster’s Community Infrastructure Levy** and reject any alternative options which are referred to but not recommended.

Signed

Cabinet Member for the Built Environment

Date

If you have any additional comment which you would want actioned in connection with your decision you should discuss this with the report author and then set out your comment below before the report and this pro-forma is returned to the Secretariat for processing.

Additional comment:
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If you do not wish to approve the recommendations, or wish to make an alternative decision, it is important that you consult the report author, the Head of Legal and Democratic Services, Chief Operating Officer and, if there are resources implications, the Director of Human Resources (or their representatives) so that (1) you can be made aware of any further relevant considerations that you should take into account before making the decision and (2) your reasons for the decision can be properly identified and recorded, as required by law.

Note to Cabinet Member: Your decision will now be published and copied to the Members of the relevant Policy & Scrutiny Committee. If the decision falls within the criteria for call-in, it will not be implemented until five working days have elapsed from publication to allow the Policy and Scrutiny Committee to decide whether it wishes to call the matter in.