

## APPENDIX A

### **Interim Guidance Note: Arrangements for use of planning obligations and other planning mechanisms in the period between 6<sup>th</sup> April 2015 and introduction of the Westminster CIL**

#### **1. Introduction**

1.1 This note deals with the arrangements that will be put in place during the period that will elapse between the coming into force of the restrictions on pooling planning obligations (commonly known as section 106 agreements or, in some cases, unilateral undertakings made by developers) under regulation 123(3) of the Community Infrastructure Levy Regulations 2010 (as amended) on 6<sup>th</sup> April 2015 and the introduction of Westminster's Community Infrastructure Levy (CIL) later in the year. The City Council is working actively to set its CIL with a view to ensuring that this interim period is kept as short as possible. A draft charging schedule is intended to be published for consultation in early April.

1.2 **As far as possible, the City Council intends to continue to apply existing policy and practice during this interim period so that development is not unduly delayed and policy requirements can continue to be applied.**

1.3 It is intended that in time, this note will be incorporated in a comprehensive supplementary planning document (SPD) dealing with the use of planning obligations and other planning mechanisms. It is our intention to issue this SPD for consultation shortly with a view to formal adoption at the same time as our CIL is adopted or before. This note is being brought forward now to help provide clarity for developers and others involved in the planning process about the approach that the City Council intends to take, particularly in light of concerns that have been raised by the sector about the likely uncertainty during this period.

#### **2. The restrictions**

2.1 Regulation 123(3) of the Community Infrastructure Levy Regulations 2010 (as amended) 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 6<sup>th</sup> April 2010.*

“Highway agreement” in this context means an agreement made under section 278 of the Highways Act 1980 (see paragraph 2.4).

**2.2** The practical effect of this provision will be to prevent use of planning obligations in conjunction with planning applications to “pool” from more than five obligations, with those entered into since 6<sup>th</sup> April 2010 counting against the limit. **This means that from 6<sup>th</sup> April 2015 no further section 106 agreements will be entered into which seek contributions to funding pools for:**

- **CCTV contributions**
- **Generic public realm contributions (including contributions for the delivery of the North West Westminster Special Policy Area)**
- **Education contributions**
- **Pooled contributions towards improvements to public space in priority areas**
- **Contributions towards the cost of parking improvements**
- **Pooled contributions to a Waste Management Fund.**

It is important to note, however, that there may, in some circumstances be situations in which it is appropriate to seek up to five pooled contributions from developments for infrastructure projects or types of infrastructure where this meets the statutory tests for the use of planning obligations (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).

**2.3** The restrictions apply only to agreements relating to the funding or provision of either specific infrastructure projects or types of infrastructure. They do **not** apply to contributions towards the cost of things that are not “infrastructure”. The Planning Act 2008 gives examples of things that *may* constitute “infrastructure” – e.g. roads and other transport facilities; flood defences; schools and other educational facilities; and open spaces. There is, however, no *comprehensive* definition, and each case will, therefore, have to be considered on its merits. As a rule of thumb, the definition will tend to cover larger, fixed items likely to be accounted for as capital assets. Smaller-scale, and more moveable items accounted for by revenue spending may fall outside the definition (i.e. works relating to hard infrastructure such as paving, surface treatments and street furniture will generally be infrastructure for this purpose; tree planting and soft landscaping may not be). **Affordable housing is explicitly excluded.**

**2.4** The restrictions also explicitly do not apply to use of planning obligations requiring developers to enter into agreements under section 278 of the Highways Act 1980 dealing with works on and to the highway. Where section 278 agreements are used,

there is no restriction on the number of contributions that can be pooled<sup>1</sup>. The further restrictions in the 2010 Regulations to prevent use of both CIL and section 106/278 agreements to fund the same infrastructure projects - what is sometimes known as “double dipping” - **do** apply to highway agreements, however.

**2.5 For the avoidance of doubt, these restrictions cannot be applied retrospectively. They do not affect planning obligations entered into before 6<sup>th</sup> April 2015 or contributions the City Council has already received.** These will continue to be dealt with in accordance with existing policy and practice. Existing funds using past section 106 contributions – such as those supporting delivery of the Paddington Area Transport Strategy (“PATS” - public transport improvements) and the Paddington Area Traffic and Environmental Management Study (“PATEMS” - highway improvements, including long-term vehicular access) and the Paddington Social and Community Fund Account (“PSCFA”) will continue to be managed in accordance with the terms of the original agreements. Longer-term, these arrangements will be reviewed to ensure consistent governance of resources secured through the planning system.

**2.6** The restrictions apply at the point at which the decision is made to grant planning permission, and affect the factors that may lawfully be taken into account at that point. **They do not, therefore, apply retrospectively to cases in which that decision was made before 6<sup>th</sup> April 2015**, even if this took the form of a resolution to grant permissions and the administrative act of issuing the planning permission is delegated to officers on satisfactory conclusion of a planning obligation. They also do not apply to cases in which planning obligations are entered into that do not relate to the granting of a planning permission.

### **3. The Council’s intended approach**

**3.1** From 6<sup>th</sup> April 2015, the City Council will seek to apply the approach to planning obligations set out in this document to secure delivery of its planning policies by:

- Taking careful account of the extent to which the restrictions in regulation 123(3) of the CIL Regulations affect this and other planning considerations in each case.
- 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 section 278 highway agreements – and planning obligations requiring developers to enter into them - to deal with highways-based public realm works.
- Taking particular care in the drafting of planning obligations to reduce the extent to which the restriction will be triggered by continuing to clear and specific about

---

<sup>1</sup> National Planning Policy Guidance, paragraph 25-107

the infrastructure projects or types of infrastructure that may be involved in each case and linking them to the demands and impact of the relevant development.

- In each case that a planning obligation is proposed to be used, ensuring the three statutory tests for use of planning obligations are met
- Taking particular care about how applications are reported to the Planning Applications Committee, and of the need for clarity about the factors that can and cannot be taken into account in deciding applications to ensure the restrictions do not unnecessarily inhibit decision-making.

#### **4. Public Realm Credits**

4.1 In May 2011 the Council adopted a Supplementary Planning Document (SPD) on operating a public realm credit system in Westminster  
[http://transact.westminster.gov.uk/docstores/publications\\_store/Public\\_Realm\\_Credits\\_SPD\\_Adopted\\_May\\_2011.pdf](http://transact.westminster.gov.uk/docstores/publications_store/Public_Realm_Credits_SPD_Adopted_May_2011.pdf) .

4.2 This SPD set a framework to incentivise early private capital investment to assist the council in enhancing the city's public realm as an important economic asset. The system was designed to encourage developers and landowners to invest in the council's priority public realm schemes on the proviso that they would be eligible to apply for their investment to be registered as a public realm credit. By December 2014 this framework enabled the council to agree to grant £8.8 million worth of public realm credits. Credits have been awarded to a number of developers in recognition of the investment that they have made towards the delivery of priority public realm improvements in areas including Covent Garden, Kingly Street, King Street, Portman Square, Leicester Square, Oxford Street, Piccadilly, New Quebec Street and Chapel Place.

4.3 To a developer the advantage of obtaining a public realm credit is that they may then, subject to a number of conditions, use it to offset a future planning obligation requirement to pay a financial contribution towards public realm improvement works. The policy basis for this is that the necessary public realm improvement works to which the contribution would be allocated have already been delivered through the upfront investment. This was especially important in the lead up to the 2012 Olympics and Paralympics when London and Westminster, in particular, was in the global spotlight. To ensure that the improvement works relate to the impact of the future development, and thereby meet the regulatory tests for using planning obligations, the credit must:

- Be derived from improvement works within the same public realm contribution area as the future development to ensure that the improvement works are within the vicinity of the development;
- Be used against a planning obligation within 7 years of the grant of the credit to ensure that the future development benefits in time from the improvement works.

#### ***The effect of the CIL Regulation restrictions***

- 4.4 Because of the limitations that the CIL Regulations impose on the council's ability to pool planning obligations for infrastructure from 6<sup>th</sup> April 2015 explained in section 2 of this note, the council will no longer be able to pool contributions for public realm improvement works from this date. The consequence of this is that there will not be a general public realm planning obligation tariff against which a public realm credit can be directly offset. Developers have been advised of this fact throughout the process and urged to ensure that the use of their existing credits be included in planning obligations signed before the 6<sup>th</sup> April 2015.
- 4.5 At the time of writing there are a number of public realm credits which remain unused. In view of this, during the interim period between 6<sup>th</sup> April 2015 and the date on which a Westminster CIL is adopted, the council will seek to continue to consider the use of public realm credits where a scheme gives rise to the requirement to fund public realm improvements in the wider vicinity of the site.
- 4.6 During this period the council will consider contributions from developments (that would have otherwise contributed to the former public realm tariff obligation), secured through a maximum of five obligations, to specifically identified public realm improvement projects within the vicinity of individual sites. In these circumstances, and using the same criteria and framework set out in the Public Realm Credits SPD, the council will still consider whether the developer should be able to use a public realm credit to offset any obligation to make a contribution. As has always been clear<sup>2</sup>, this judgement cannot fetter the Planning Applications Committee's discretion on whether a public realm credit should be accepted. It will, however, be a material consideration.

***The future of the Public Realm Credit System on adoption of a CIL***

- 4.7 The Council recognises that there is a continual need to revitalise places and streets, connect areas of the city together and enhance their distinctiveness and character in ways that ensure there is a safe, well managed, attractive and clutter free environment that puts the pedestrian first. Major investment in enhancing the public spaces, streets and routes throughout the city is necessary to attract further investment and underpin investor confidence in the city. This investment cannot be secured without the support of key stakeholders in the city. This is particularly true of the West End/Core CAZ which is subject to the most development pressure, the most demands on its public infrastructure and as such is likely to generate the most CIL and is likely to be the largest recipient of its spend.
- 4.8 Given this background and in acknowledgement of the major public realm improvement works that have been brought forward through the Public Realm Credit system, the council is giving detailed consideration to ways in which it can continue to work with key stakeholders to ensure the effective delivery of priority public realm improvement works following adoption of a Westminster CIL. Having taken account of the very prescriptive nature of the CIL Regulations, and the mandatory requirement to pay CIL in cash on commencement of a development, the

---

<sup>2</sup>Westminster City Council Supplementary Planning Document, Public Realm Credits – Operating a System in Westminster, paragraph 3.8

council considers that this would be better dealt with through the application of CIL funding and appropriate use of the regulation 123 list.

- 4.9 The CIL Regulations specifically allow for reimbursement from CIL of expenditure already incurred on infrastructure (regulation 60(1)) and for passing CIL receipts to another person for that person to apply to funding infrastructure (regulation 59(4)). Subject to other legal considerations, including state aid and the provisions governing the public procurement of works, the council will give further consideration on whether these regulations can facilitate an alternative arrangement which would allow developers to fund or deliver the council's agreed priority public realm projects in advance of a development coming forward. In each scenario CIL could be used to either reimburse the developer for expenditure already incurred by them or to fund directly the delivery of the works. Such arrangements will be considered alongside the future governance arrangements for the application of CIL funding.

## **5. Comments**

- 5.1 Although this is not formally a consultation document, the City Council would welcome any comments on the approaches outlined in this Interim Guidance Note to help inform preparation of the draft SPD. Any comments should be sent by email to [cil@westminster.gov.uk](mailto:cil@westminster.gov.uk) or in writing to:

FAO: Andrew Barry-Purssell/Rachael Ferry-Jones  
CIL Interim Guidance Note  
Policy & Strategy, Policy, Performance and Communications  
Westminster City Hall  
64 Victoria Street  
London SW1 6QP