
CIL: WHAT PRICE PLANNING (or, How to Work & Work With the Tax System)?[1]

INTRODUCTION

1. In 1947, the Labour Government nationalized land *development* value. The outgoing Labour Government nationalized development *hope* value through its CIL Regulations which came into force in April 2010 just before its May defeat.

2. Before its cancellation by the NPPF in March 2012, as recently as 18th July 2005, the Office of the Deputy Prime Minister published Circular 05/2005 in which Annex B stated:

> ***B6.*** *The use of planning obligations must be governed by the fundamental principle that planning permission may not be bought or sold. It is therefore not legitimate for unacceptable development to be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms.*
>
> ***B7.*** *Similarly, planning obligations should never be used purely as a means of securing for the local community a share in the profits of development, i.e. as a means of securing a "betterment levy".*

3. But, between that Circular and the CIL Regulations 2010, Lehman Brothers collapsed in September 2008, the financial world changed, and an incoming Coalition was left devoid of funds.

4. Times had changed and thus have historic fundamentals. On 15th January 2012, Parliament brought into force section 70(2)(b) of the Town and Country Planning Act 1990 as amended by section 143 of the Localism Act 2011. This now requires planning decision makers to take account of local financial considerations "so far as" material to the planning application.

5. The very wide scope of the consideration is shown by the Minister's view at the Report Stage of the Bill in the House of Commons: (My emphasis)

> *The new clause [section 70(2)(b)] reflects the fact that the introduction of the community infrastructure levy, and, potentially, other rebates to the local community, as I like to call them, can be used for planning purposes. It is important to be clear, lest there is any doubt on the part of local authorities, that such rebates, just like under section 106, can be made when they are relevant to planning considerations…New clause 15 clarifies that it is reasonable for a planning authority to take such funds into account if they are to be used in connection with the planning application.*

6. A Brave New World of fiscal planning? With potential for local community rebates? Has New Labour's financial profligacy resulted in planning by auction? The planning obligations landscape

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[1] *This seminar paper is made available for educational purposes only. The views expressed in it are those of the author. The contents of this paper do not constitute legal advice and should not be relied on as such advice. The author and 39 Essex Street Chambers LLP accepts no responsibility for the continuing accuracy of the contents.*

has also changed. Local financial considerations are already changing the approach of decision makers to the use of section 106 planning obligations to justify grants of planning permission by firm application of the new statutorily expressed criteria to manoeuvre *revenue* receipts from section 106 delivery to delivery via CIL mechanisms. Whilst Parliament has sought to simplify the planning system, Eric Pickles told Parliament on 17th September 2012 that "planning is a quasi-judicial process". It remains as complex a system as it ever was.

7. The move towards privately funded infrastructure was heralded even before January 2012:

   a) in a call-in decision from October 2011, relating to a development of 23 houses close to the Thames Basin Heaths Special Protection Area, the Secretary of State declined to give *any* weight to a *planning obligation* for a payment of over £200,000 towards additional greenspace designed to protect the SPA, taking the view that the level of payment was not reasonably related in scale or kind to the development, and the application was refused. (But see below as to how greenspace may be "infrastructure" underpinned by CIL);

   b) Similarly, in another October 2011 decision, on a larger residential development, whilst giving weight to contributions to affordable housing, community facilities and transportation provision, the Secretary of State considered that a contribution towards the upgrading of health facilities was *not* compliant with the CIL Regulations and therefore would be *disregarded*. And see below how CIL has primacy for finance;

   c) In another recent case the developer had entered into a Unilateral Undertaking in connection with an appeal (on a development of 14 houses). The Council had refused the application on the basis of inadequate provision for *infrastructure* so the developer submitted an Undertaking as part of the appeal that they would make a payment of £170,000 towards various infrastructure costs. At *no* point did the Council *justify* what they were seeking. The Inspector granted permission but said that he was giving very little weight (but not *no* weight) to the content of the Undertaking as he considered it was unnecessary. The developer completed the development without making the payment and the Council sought to enforce it. Finally, as part of the proceedings the Council did justify that an amount was required but it was less than the £170,000 provided for in the Section 106 Undertaking. The Court of Appeal, however, had *no* sympathy with the developer's argument (that the full amount should not be *payable*) and supported the Council's enforcement of the Section 106 commitment. The Court's position is noteworthy.

d) More recently, Nick Boles told Parliament on 17th September 2012 that:

Regulations were drawn up to stop councils using section 106 and the community infrastructure levy to take two bites at the cherry, but we are aware of concern about the position. I know that the hon. Gentleman is better at harrying Ministers than almost anyone else in the House, and I have no doubt that he will continue to harry me, and my officials, to ensure that the CIL supports growth and the infrastructure that underpins it.

e) On 16th October 2012, the Government published draft Regulations to amend by refinement the current CIL Regulations. This levy is very much here to stay.

8. It therefore pays to be aware of the CIL tests when negotiating with local authorities and for such authorities to be alive to CIL in tandem with negotiated obligations under Regulations 122 and 123 (and the NPPF paragraphs 203-205).

CONTENT

9. This paper is divided into the following parts:

a) Why we are where we are: a radical shift;
b) Wider Context: Section 70(2) and its scope; Equality Act 2010; a new approach to policy.
c) CIL: Your local "flexible friend";
d) Where are we now?
e) The emerging fiscal planning map;
f) Statutory backbone: CIL regime;
g) The Charging Authority;
h) To what does CIL apply?
i) Who pays?
j) Who can be exempt?
k) When is it due?
l) Setting the CIL charge;
m) CIL rate setting procedure;
n) Enforcement;
o) Appeals.

WHY WE ARE WHERE WE ARE: A Radical Shift

10. The Localism *Bill* was an essential part of the Coalition government's Big Society policy and in December 2010 was accompanied by "Decentralisation and the Localism Bill: an essential guide" in which the government set out its ideas and proposals in a more easily digestible form. Most importantly it's stated that "it made the case for a *radical shift* of power *from* the centralised state *to* local communities, and describes six essential actions required to deliver decentralisation down through every level of government to every citizen." However, as the BBC's Nick Robinson pithily observed in his blog on the day that the Bill was published: "Governments with money centralise and claim the credit. Governments without cash decentralise and spread the blame. Those are not the views of a hardened media cynic. They are what I was told by one of the Tories' top policy wonks before the election."[2]

11. The Localism Act provides the legislative foundation for this "radical shift" by six essential actions:

    - *Lift the burden of bureaucracy*
    - *Empower communities to do things their way*
    - *Increase local control of public finances*
    - *Diversify the supply of public services*
    - *Open up government to public scrutiny*
    - *Strengthen accountability to local people*

12. With regard to increasing local control of public finances, the Localism Bill proposed Council tax referendums to "give local residents the power to veto excessive increases, by requiring local authorities to hold a referendum on any proposed rise above a certain threshold." The Bill gave local authorities the power to grant a discount in business rates, enabling then to respond locally to the concerns of local businesses. The biggest surprise was the retention of the Community Infrastructure Levy (something that the Tories had proposed *abolishing* in February 2010) and the introduction of a requirement on local authorities to allocate a proportion of CIL revenues *back* to the neighbourhood from which it was raised thus allowing "those most directly affected by the development to benefit from it."

13. Since then, Parliament has enacted that local financial considerations can qualify as a planning consideration required to be taken into account. Most recently, the National Planning Policy Framework of 27th March 2012 underscores three roles of planning, of which one, the "economic role", assumes identification and coordination of development requirements, "including the provision of infrastructure". So begins recovery of development value inherently reduced by CIL.

WIDER CONTEXT: THE NEW SECTION 70(2)

14. Section 70(1) of the Town and Country Planning Act 1990 (as amended) entitles the local planning authority (and on appeal the Secretary of State) to grant planning permission on application to it. By section 38(6) of the 2004 Planning Act, the decision maker is required to determine the application for planning permission in accordance with the terms of the development unless material considerations indicate otherwise. But, from 15th January 2012, Parliament has enacted an amended section 70(2) of the 1990 Act as follows:

> *In dealing with such an application the authority shall have regard to:*
> *a) The provisions of the development plan, so far as material to the application;*
> *b) Any local finance considerations, so far as material to the application; and*
> *c) Any other material consideration.*

15. Today, section 70(4) defines: [My emphasis]

> *"local finance consideration" means:*
> *a) A grant or other financial assistance that has been, or will or could be, provided to a relevant authority by a Minister of the Crown; or*
> *b) Sums that a relevant authority has received, or will or could receive, in payment of Community Infrastructure Levy.*

16. Grants might include:
    a) Great Britain Building Fund: the £400m "Get Britain Building" Fund and government-backed mortgage indemnity guarantee scheme to allow housebuyers to secure 95% mortgages;
    b) Regional Growth Funds;
    c) New Homes Bonus;
    d) Affordable Homes Programme Funding.
17. As to CIL itself, CIL receipts and proposed receipts are themselves capable of qualifying as material local finance considerations. Of particular interest, however, is potential receipts. That is, those neither received or anticipated "will" be received. This seems to foreshadow accelerated revenue receipt. It seems that it is here a planning auction begins. The scope of the auction is premised on the scope of the term "material" consideration. It can be recalled that this is wide.
18. As introduced above, at the Report Stage of the Bill in the House of Commons, the Minister said: (My emphasis)

> *The new clause [section 70(2)(b)] reflects the fact that the introduction of the community infrastructure levy, and, potentially, other rebates to the local community, as I like to call them, can be used for planning*

[2] See http://www.bbc.co.ul/blogs/nickrobinson/2010/12/follow_the_lack.html.

purposes. It is important to be clear, lest there is any doubt on the part of local authorities, that such rebates, just like under section 106, can be made when they are relevant to planning considerations…New clause 15 clarifies that it is reasonable for a planning authority to take such funds into account if they are to be used in connection with the planning application.

19. That is, the section 70(2)(b) term "could" appears able to include contributions of money termed "community infrastructure levy" for infrastructure potentially not derived *from* a *CIL schedule* but which nevertheless have a "connection with the planning application". Of course, the weight to be attributable to such sums as one of many material planning considerations is a matter for the decision maker. At the same time, money talks and, in austere times, loudly so.

20. The Ministerial consideration of the wide scope of section 70(2) is consistent with the well known Stringer decision about the Jodrell Bank telescope case (*Stringer v Minister of Housing* [1971] 1 All ER 65) where the Court of Appeal considered the breadth of the term "material consideration". The facts were as follows. The radio telescope was operated by a Manchester University department and, as local electrical installations interfered with its operation, the Jodrell Bank directorate sought for many years to persuade government departments and local authorities concerned to have regard to the efficient telescope operation when considering development in its vicinity.

21. In consequence, the policy of the Ministry of Housing and Local Government was to discourage development which would interfere with that efficient operation and certain informal agreements were made between the directorate and some local authorities. In particular, an agreement was signed in March, 1967, on behalf of the local planning authority, the rural district council and Manchester University; therein the local planning authority undertook to discourage development within the limits of its powers within a specified area of the telescope.

22. In September, 1966, the applicant, a builder, applied for planning permission to erect 23 houses on a site within the specified area. He made the application, after incurring considerable expense, in the reasonable expectation and encouraged by informal talks with planning officers, that planning permission would be forthcoming. In July, 1967, his application was refused on the ground, inter alia, that the development proposed would be likely to interfere with the efficient running of the telescope. The applicant appealed to the Minister of Housing and Local Government under section 23 of the Town and Country Planning Act, 1962.

23. An inquiry was held by an inspector at which evidence was given that to allow the appeal would give rise to a very serious danger to the continued telescope operation. The Minister dismissed the appeal on that ground.

24. The builder appealed. However, his appeal was dismissed by the Court of Appeal. This was because "material considerations":

> *were not limited to considerations relating to amenity and, in a proper case, might take into account private as well as public interests; and the fact that the proposed development would interfere with the operation of the telescope was a material consideration in determining whether or not planning permission should be granted*

25. Further, the Court of Appeal held at 77 that:

> *In principle, … any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular consideration falling within that broad category is material in any given case will depend upon the circumstances…*

26. In that case, the policy to restrain interference with the telescope, coupled with *evidence* of the potential of interference by physical development with radio waves, was a planning material consideration required to be taken into account by the decision maker.
27. The ordinary meaning of "material" is "of or pertaining to matter or substance; serious, important, of consequence" (see Shorter Oxford Dictionary, 6th Edition). This is a classic matter of subjective judgement for a decision maker. Given that section 38(6) of the Planning Act 2004 requires a determination to be made in accordance with the development plan unless material considerations indicate otherwise, there is clearly scope to essentially auction or purchase by any other name a permission in advance of or at greater cost than others in a particular location. So long as section 70(2)(a) to (c) are satisfied by fact and degree in the planning balance, and as weight is entirely a matter of the decision maker, it is difficult to see how a Court could overturn a decisions on review.

28. The National Planning Policy Framework of 27th March 2012 provides at §7 that – of 3 bullets, planning has an "economic role" which includes provision of infrastructure. §175 provides that:

> *Where practical, [CIL] charges should be worked up and tested alongside the Local Plan. The Community Infrastructure Levy should support and incentivise new development, particularly by placing control over a meaningful proportion of the funds raised with the neighbourhoods where development takes place.*

29. Local sustainable planning has national financial backing. Neighbourhoods have their rebates. A most recent example of this approach to section 70(2)(b) "could" can be found in Bolton Council's Draft CIL Schedule, published in September 2012. §2.13 states:

> *The Infrastructure Schedule 2012 is based on the IDP 2011, but it is a much shorter document, focussing on specific projects rather than including the more descriptive elements. The Infrastructure Schedule*

shows that the funding gap for strategic infrastructure projects is currently estimated to be over £200million.

30. § 3.7 provides: [My emphasis]

The purpose of CIL is to gather money in a transparent and fair way to fund infrastructure that is necessary to support the development of the area, however it does not fully replace the role of s106 agreements. The CIL regulations make it clear that developments should not be charged through both s106 and CIL for the same infrastructure; a list of infrastructure schemes to be funded through CIL must be published on the council's website to avoid any doubt or duplication. This list is commonly referred to as the 'Regulation 123 list', due to its occurrence in the CIL regulations, and can be revised as needed. This list will be prepared once the Charging Schedule has been examined. The table below lists types of infrastructure, and whether they could potentially be funded via CIL or S106 monies .

31. The Table then provides: [My emphasis]

Infrastructure	**CIL**	**S106**
Transport	Strategic junction improvements, new roads, public transport improvements, public realm, pedestrian and cycling facilities.	On-site provision of transport infrastructure, bus services, cycle routes, junctions, footpaths.
Utilities	Provision of strategic utilities: fresh water, waste water, gas, electricity, decentralised, renewable and low carbon technology and communication technology.	On-site needs are typically paid by the developer direct to the utilities provider as part of normal development, not via s106.
Health	Improvements and provision of health facilities.	On-site provision of health facilities for large/strategic sites.
Education	Off-site school expansion and improvements.	Contribution to on/near site school provision for large/strategic sites.
Social housing	*Not applicable.*	Provision of housing in accordance with planning policy (see Affordable Housing SPD).
Community & cultural facilities	Improvements and provision of cultural/community facilities.	Contribution to on/near site cultural/community provision for large/strategic sites.
Green infrastructure, SUDS, recreation space & children's play.	Improvements to strategic facilities.	Provision of local/near/on-site: green space, play equipment, SUDS; contributions to cover on-going maintenance costs.

32. What is interesting is that – of a number advancing draft CIL Schedules, this is the first English LPAs - the "section 106" column identifies the potentiality which section 70(2)(b) "could", and the Minister's "other rebates to the local community" result in development *wholly* internalizing its costs and that that internalization – in these times – can amount to a material planning consideration.

SECTION 70(2)(B) AND REGULATIONS 122 AND 123 (SECTION 106 OBLIGATIONS)

33. Regulation 122 of the CIL Regulations provides (from April 2010):

> *(1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.*
> *(2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is--*
> *(a) necessary to make the development acceptable in planning terms;*
> *(b) directly related to the development; and*
> *(c) fairly and reasonably related in scale and kind to the development.*
> *(3) In this regulation--*
> *"planning obligation" means a planning obligation under section 106 of TCPA 1990 and includes a proposed planning obligation; and*
> *"relevant determination" means a determination made on or after 6th April 2010--*
> *(a) under section 70, [73,] 76A or 77 of TCPA 1990 of an application for planning permission . . .; or*
> *(b) under section 79 of TCPA 1990 of an appeal . . ..*

34. Thus, there appears an additional hurdle before an obligation can qualify as a reason for grant (i.e. not a refusal). However, application of Regulation 122(2)(a)-(c) will be a matter of fact and degree for the relevant decision taker. Whilst there may be debate about their ordinary scope, they can be satisfied by underlying objective justification of the terms(s).

35. Regulation 123 provides (in relation to post 6th April 2010 obligations):

> *(2) A planning obligation may not constitute a reason for granting planning permission for the development to the extent that the obligation provides for the funding or provision of relevant infrastructure.*
> *(3) A planning obligation ("obligation A") may not constitute a reason for granting planning permission to the extent that—[from the earlier of Schedule publication or 6th April 2014]*
> *(a) obligation A provides for the funding or provision of an infrastructure project or 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 type of infrastructure,..*

36. Regulation 123(4) defines: "funding" as the provision of that infrastructure by way of funding; and "relevant infrastructure" as (a) the charging authority's website published list of projects or types of infrastructure it "intends will be, or may be" CIL funded, or (b) absent that list "any infrastructure". So, s.70(2)(b) and Regulation 123(3) engender a race to be one of four to prevent the Regulation 123(3)(b)(ii) bar applying; the weight attributable to a fourth Obligation (even if providing a small *sum*) may be very great. The Regulation 123(2) & (4)(a) published intention appears not barred from later republication in different terms and so can be operated to prevent (4)(b) inflexibility.

EQUALITY ACT 2010

37. The exercise of the section 70(2)(b) discretion is, of course, subject to the Equalities Act 2010 and this procedural hurdle to the grant of planning permission and to CIL consideration also needs to be borne in mind.

38. From 5th April 2011, the Equality Act 2010 is in force, and section 149 requires public authorities:

> *(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—*
>
> *(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;*
> *(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;*
> *(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.*
>
> *(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.*

39. By section 149(7) relevant protected characteristics include disability.
40. In R (oao of *Harris) v Haringey LBC* [2010] EWCA Civ 703 at §37 and §39, the Court applied race equality to a grant of planning permission. The CA held that a planning decision could impact on equality matters in the Race Equality Act and that policy may not be specific enough to cover the statute criteria terms. It quashed that permission because the decision maker did not have the information before it to take into account in advance of granting its permission. That Act is superceded by the terms of the Equality Act 2010.
41. In the new fiscal planning context, section 149 terms must be populated by information in advance of Members resolving to make their draft CIL schedule, as, otherwise, that decision may be vulnerable to subsequent challenge by judicial review or later challenge to the inspector's decision.

A NEW APPROACH TO POLICY: THE DUNDEE CASE

42. The Court has adopted a more intrusive approach to consideration of policy. Recently, in *R (oao Manchester Ship Canal Company) v Environment Agency* [2012] EWHC 1643 Admin, Lang J held: [Emphasis added]

> *69. The role of the court in considering whether a decision-maker has acted lawfully in accordance with policy has recently been considered in a planning context by the Supreme Court in Tesco Stores Limited v Dundee City Council [2012] UKSC 13. Lord Reed (with whose judgment Lord Brown, Lord Hope, Lord Kerr and Lord Dyson agreed) said, at [17] – [21]:*
>
> > *"17. It has long been established that a planning authority must proceed upon a proper understanding of the development plan: see, for example, Gransden & Co Ltd v Secretary of State for the Environment (1985) 54 P & CR 86, 94 per Woolf J, affd (1986) 54 P & CR 361; Horsham DC v Secretary of State for the Environment (1991) 63 P & CR 2319, 225-226 per Nolan LJ. The need for a proper understanding follows, in the first place, from the fact that the planning authority is required by statute to have regard to the provisions of the development plan: it cannot have regard to the provisions of the plan if it fails to understand them. It also follows from the legal status given to the development plan by section 25 of the 1997 Act. The effect of the predecessor of section 25, namely section 18A of the Town and Country (Planning) Scotland Act 1972 (as inserted by section 58 of the Planning and Compensation Act 1991), was considered by the House of Lords in the case of City of Edinburgh Council v Secretary of State for Scotland 1998 SC (HL) 33, [1997] 1 WLR 1447. It is sufficient for present purposes to cite a passage from the speech of Lord Clyde, with whom the other members of the House expressed their agreement. At p.44, 1459, his lordship observed:*
> >
> > > *"In the practical application of sec. 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it."*
> >
> > *18. In the present case, the planning authority was required by section 25 to consider whether the proposed development was in accordance with the development plan and, if not, whether material considerations justified departing from the plan. In order to carry out that exercse, the planning authorioty required to proceed on the basis of whta Lord Clyde described as "a proper interpretation" of the relevant provisions of the plan. We were however referred by counsel to a number of judicial dicta which were said to support the proposition that the meaning of the development plan was a matter to be determined by the planning authority: the court, it was submitted, had no role in determining the meaning of the plan unless the view taken by the planning authority could be characterised as perverse or irrational. That submission, if correct, would deprive sections 25 and 37(2) of the 1997 Act of much of their effect, and would drain the need for a "proper interpretation" of the plan of much of its meaning and purpose. It would also make little practical sense. The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. These considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On*

the contrary, these considerations suggest that in principle, in this area of public administration as in otehrs (as discussed, for example, in R (Raissi) v Secretary of State for the Home Department [2008] QB 836), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.

19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisons of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of the planning authorities, and their exercise of judgment can only be challenged on the ground that it is irrational or perverse (Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759, 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.

20. The principal authority referred to in relation to this matter was the judgment of Brooke LJ in R v Derbyshire County Council, Ex p. Woods [1997] JPL 958, at 967. Properly understood, however, what was said there is not inconsistent with the approach which I have described. In the passage in question, Brooke LJ stated:

> *"If there is a dispute about the meaning of the words included in a policy document which a planning authority is bound to take into account, it is of course for the court to determine as a matter of law what the words are capable of meaning. If the decision maker attaches a meaning to the words they are not properly capable of bearing, then it will have made an error of law, and it will have failed properly to understand the policy."*

By way of illustration, Brooke LJ referred to the earlier case of Northavon DC v Secretary of State for the Environment [1993] JPL 761, which concerned a policy applicable to "institutions standing in extensive grounds". As was observed, the words spoke for themselves, but their application to particular factual situations would often be a matter of judgment for the planning authority. That exercise of judgment would only be susceptible to review in the event that it was unreasonable. The latter case might be contrasted with the case of R(Heath and Hampstead Society) v Camden LBC [2008] 2 P & CR 233, where a planning authority's decision that a replacement dwelling was not "materially larger" than its predecessor, within the meaning of a policy, was vitiated by its failure to read the policy correctly: read in its context, the phrase "materially larger" referred to the size of the new building, compared with its predecessor, rather than requiring a broader comparison of their relative impact, as the planning authority had supposed. Similarly in City of Edinburgh Council v Scottish Ministers (2011) SC 957 the reporter's decision that a licensed restaurant constituted "similar licensed premises" to a public house, within the meaning of a policy, was vitiated by her misunderstanding of the policy: the context was one in which a distinction was drawn between public houses, wine bars and the like, on the one hand, and restaurants, on the other.

21. A provision in the development plan which requires an assessment of whether a site is "suitable" for a particular purpose calls for judgment in its application. But the question whether such a provision is concerned with suitability for one purpose or another is not a question of planning judgment: it is a question of textual interpretation, which can only be answered by construing the language used in its context. In the present case, in particular, the question whether the word "suitable", in the policies in question, means "suitable for the development proposed by the applicant" or "suitable for meeting identified deficiencies in retail provision in the area" is not a question which can be answered by the exercise of planning judgment: it is a logically prior question as to the issue to which planning judgment requires to be directed."

70. Although the legal and factual context of this case differs from that in Tesco Stores Limited, I consider that the principles helpfully expounded by Lord Reed are applicable to my task of deciding whether the Defendant acted unlawfully in classifying the sluices as formal flood defences under its policies.

43. The Court of Appeal has recently given permission to appeal from the decision of Lang J. and it will hear that appeal in mid-April 2013.

44. The emergence of an objective approach to planning policy brings the approach to the scope of such considerations into line with the law concerning the interpretation of planning permissions. As a public notice which may be relied upon by third parties, the express terms of a planning permission is required to be construed objectively as between its four corners (see *R(oao Ashford BC), ex parte Shepway* [1998] EWHC Admin 488 at §27/1), and by an objective approach whereby the (subjective) intentions of the (applicant and local authority) parties are irrelevant (see *Carter Commercial Developments Limited v Secretary of State for Transport, Local Government and the Regions* [2002] EWCA Civ 1994 at §§27-28). Extrinsic documents may be included within the four corners of the planning permission by express incorporation: such as "in accordance with" (*Ashford* at § 27/3).

45. Thus, there appears no room today for a subjective planning judgement as to the 'spirit' of the policy. Consequently, care is required in formulating policies underpinning CIL since their financial consequences may be very different by reference to what the policy terms express as opposed to (subjectively) infer.

CIL: YOUR LOCAL 'FLEXIBLE FRIEND'

46. What then of CIL *itself*? Well, a tax is a tax is a tax and a levy is a levy and a levy is a species of tax. "Levy" is also consistent with the charge applying upon a grant of permission as opposed to a tax being a charge on existing earnings.

47. After its 1947 landslide victory, the Labour Government nationalized development land value in post-War austerity Britain. In 2010, consistent with its historic taxation approach, the outgoing Labour Government introduced the planning tax: "Community Infrastructure Levy" ("CIL"); requiring developers to fund local "infrastructure" when the national purse (again) cannot. Whilst first proposing its abolition, the Conservatives agreed a Coalition and discovered empty coffers.

48. The 18th November 2010 Financing Infrastructure Standard Note states:

For 60 years Labour Governments have been trying to introduce a development tax to take some of the increase in land value resulting directly from the grant of planning consent.

49. Since then, the most recent May 2011 CLG Guidance provides at:

4. The Government has decided that this tariff-based approach provides the best framework to fund new infrastructure to unlock land for growth. The Community Infrastructure Levy is fairer, faster and more certain and transparent than the system of planning obligations which causes delay as a result of lengthy negotiations. Levy rates will be set in consultation with local communities and developers and will provide developers with much more certainty 'up front' about how much money they will be expected to contribute.
5. Under the system of planning obligations only 6 per cent of all planning permissions brought any contribution to the cost of supporting infrastructure1, when even small developments can create a need for new services. The levy creates a fairer system, with all but the smallest building projects making a contribution towards additional infrastructure that is needed as a result of their development.
6. The Community Infrastructure Levy also has far greater certainty. It provides the basis for a charge in a manner that the planning obligations system alone could not easily achieve; enabling, for example, the mitigation of cumulative impacts from development...
7. Almost all development has some impact on the need for infrastructure, services and amenities - or benefits from it - so it is only fair that such development pays a share of the cost. It is also right that those who benefit financially when planning permission is given should share some of that gain with the community which granted it to help fund the infrastructure that is needed to make development acceptable and sustainable.
8. However, developers should have more certainty as to what they will be expected to contribute, thus speeding up the development process, and that the money raised from developer contributions should be spent in a way that developers will feel worthwhile; namely, on infrastructure to support development and the creation of sustainable communities set out in the local development framework. This is what the levy will do.

50. The levy is truly a flexible friend:

9. The introduction of the levy has the potential to raise an estimated additional £1bn a year of funding for local infrastructure by 2016 (the impact assessment on the Community Infrastructure Levy published on 31 January 2011 sets out further details).The levy will make a significant contribution to infrastructure provision. The levy is intended to fill the funding gaps that remain once existing sources (to the extent that they are known) have been taken into account. Local authorities will be able to look across their full range of funding streams and decide how best to deliver their infrastructure priorities, including how to utilise monies from the levy. This flexibility to mix funding sources at a local level will enable local authorities to be more efficient in delivering the outcomes that local communities want.
10. Local authorities are required to spend the levy's funds on the infrastructure needed to support the development of their area and they will decide what infrastructure is needed. The levy is intended to focus on the provision of new infrastructure and should not be used to remedy pre-existing deficiencies in infrastructure provision unless those deficiencies will be made more severe by new development. The levy can be used to increase the capacity of existing infrastructure or to repair failing existing infrastructure, if that is necessary to support development.

51. §15 underscores the *flexible* approach by which CIL raised within one area to outside of it:

15. Charging authorities may pass money to bodies outside their area to deliver infrastructure which will benefit the development of their area, such as the Environment Agency for flood defence or, in two tier areas, the county council, for education infrastructure.

> *16. If they wish, charging authorities will also be able to collaborate and pool their funds from their respective levies to support the delivery of 'sub-regional infrastructure', for example, a larger transport project where they are satisfied that this would support the development of their own area.*

52. §24 also provides:

> *In order to provide flexibility for charging authorities to respond to changing local circumstances over time, charging authorities may spend their monies raised from the levy on different projects from those identified during the rate setting process.*

53. To ensure timely infrastructure delivery, an authority need not wait actual CIL collection:

> *17. It is important that the infrastructure needed by local communities is delivered when the need arises. Therefore, the regulations allow authorities to use the levy to support the timely provision of infrastructure, for example, by using the levy to backfill early funding provided by another funding body.*
> *18. The regulations also include provision to enable the Secretary of State to direct that authorities may 'prudentially' borrow against future income from the levy, should the Government conclude that, subject to the overall fiscal position, there is scope for local authorities to use monies from the levy to repay loans used to support infrastructure.*

54. Further, §67 et seq. the flexibility of unilateral obligations will cease:

> *67. On the local adoption of the levy or nationally after a transitional period of four years (6 April 2014), the regulations restrict the local use of planning obligations for pooled contributions towards items that may be funded via the levy. The levy is the government's preferred vehicle for the collection of pooled contributions.*
> *68. Pooled contributions may be sought from up to five separate planning obligations for an item of infrastructure that is not locally intended to be funded by the levy. The limit of five applies as well to types of general infrastructure contributions, such as education and transport. In assessing whether five separate planning obligations have already been entered into for a specific infrastructure project or a type of infrastructure, local planning authorities must look over agreements that have been entered into since 6 April 2012.*

55. CIL is also intended to be administratively self-financing:

> *11. Charging authorities will be able to use funds from the levy to recover the costs of administering the levy, with the regulations permitting them to use up to 5 per cent of their total receipts on administrative expenses to ensure that the overwhelming majority of revenue from the levy is directed towards infrastructure provision. Where a collecting authority has been appointed to collect a charging authority's levy, as will be the case in London where the boroughs will collect the Mayor's levy, the collecting authority may keep up to 4 per cent of the revenue from the levy to fund their administrative costs, with the remainder available to the charging authority up to the 5 per cent ceiling.*

56. The CIL Regulations (as amended) do what they say on the tin. They raise revenue by money (or land in kind) for specified "infrastructure" from grants of planning permission for development whilst leaving planning obligations for other contribution types. Whilst historically the preserve of section 106 obligations (and linked section 278 of the Highways Act), Regulation 123(3) expressly confines future utility of s.106 by giving primacy to CIL as such obligations cannot justify planning permission to "the extent that": a) *they* duplicate *funding* or *provision* of "infrastructure"; and b) there are more than five obligations for a particular "infrastructure" project or project type. Once disentangled, this may create short term races to be one of five but, as forecasting competition is difficult, reliance on obligations for "infrastructure" is discouraged and CIL encouraged.

WHERE IS CIL *TODAY*, IN 2012?

57. During 2011 there was some progress in CIL implementation as decision makers have grasped the current financial nettle and a new fiscal planning map is emerging.

58. On 17th January 2011, the London Mayor published for 6 weeks a Preliminary Charging Schedule intended to raise £300,000,000 towards the delivery of Crossrail. This proposed:

> *... to charge the Levy on most developments in London at the following rates:*
>
> ***Zone 1 boroughs - £50 per square metre***
>
> *Camden, City of London, City of Westminster, Hammersmith and Fulham, Islington, Kensington and Chelsea, Richmond-upon-Thames, Wandsworth*
>
> ***Zone 2 boroughs - £35 per square metre***
>
> *Barnet, Brent, Bromley, Ealing, Greenwich, Hackney, Haringey, Harrow, Hillingdon, Hounslow, Kingston upon Thames, Lambeth, Lewisham, Merton, Redbridge, Southwark, Tower Hamlets*
>
> ***Zone 3 boroughs - £20 per square metre***
>
> *Barking and Dagenham, Bexley, Croydon, Enfield, Havering, Newham, Sutton, Waltham Forest*

59. On 27th January 2012, after a 4 day hearing in December 2011, the inspector issued his report which concluded that, whilst marginal schemes may be at risk, London's CIL is only a "very small part" of the overall cost of development and thus would not seriously threaten development viability across London. He concluded that the schedule was an appropriate basis for collection of London CIL. That is a lot of money via a 4 day hearing. Planning applications approved after 1st April 2012 appear subject to CIL.

60. Further afield, in March 2011, a Draft Schedule of Shropshire Council applied to:

> *The geographical extent of the urban and rural Levy Charging zones is defined in the 20 annexes, which form part of the statutory Charging Schedule. The urban zones include Shrewsbury and the settlements named in Core Strategy Policy CS3, namely Albrighton, Bishops Castle, Bridgnorth, Broseley, Church Stretton, Cleobury Mortimer, Craven Arms, Ellesmere, Highley, Ludlow, Market Drayton, Minsterley, Much Wenlock, Oswestry, Pontesbury, Shifnal, Wem and Whitchurch.*
> *The urban zones include a buffer around the existing development boundaries to ensure that any future allocations of land for development, including the sustainable urban extensions, and any amendment to the development boundaries that occurs as a result of the Site Allocations and Management of Development DPD (SAMDev) process will be included within the urban zone. The Levy Charging zones are without prejudice to future decisions on allocations of land for development through the SAMDev.*

61. Within the identified urban zones, the CIL rate is set for residential development (excluding social housing) at £40m^2, and within rural areas at £80m^2. This provides a fiscal *stimulus* to the urban areas and a *disincentive* to develop rural areas.

62. To date:

a) Newark & Sherward, Shropshire, Redbridge and Portsmouth Schedules are examined;

b) Huntingdonshire DC has submitted its charging schedule for examination including:

   i) a fallback of £85/m^2;

   ii) retail (A1-5):

      1) <500m^2 at £40/m^2 ; and

      2) >500m^2 at £100/m^2;

   iii) D1 health at £65/m^2;

   iv) B1, 2 and 8 at £0/m^2;

c) Wandsworth LBC has resolved to procure submission of an amended CIL schedule to examination (by *removal* of a proposed £100 per square metre for office and retail development outside of Nine Elms but which reduces CIL revenue by £500,000). Nine Elms appears as a priority for stimulus;

d) Some Norfolk councils are preparing a joint CIL schedule and will *reduce* residential charges by 20% *in and around Norwich* (from £160 per square metre of residential floor space down to £115) with a two year review with a view to raising rates to account for market recovery. Norwich appears a priority for stimulus;

e) Some Lancashire Councils (South Ribble, Chorley and Preston) have published a joint charging schedule with:

   i) £160 per square metre for convenience retailing;

   v) £70 for residential;

   vi) £40 for retail warehousing; and

   vii) other changes of use up to £10 per square metre;

f) Wycombe District Council's CIL Schedule was recently approved in September 2012 (with minor amendments clarifying the definition of superstores and retail warehouses) for two Zones: A and B; where A follows the developed District valley and charges reflect brownfield:

   i) £125/sqm (but in Zone B: £150/sqm): Residential (C3; C4 including sheltered accommodation)

ii) £200/sqm: Convenience based supermarkets and superstores and retail warehousing (net retail selling space of over 280 sq metres)

iii) £125/sqm: All other retail A1 – A5 and sui generis uses akin to retail*

iv) £0: All other development including B, C1, C2 and D uses.

* sui generis akin to retail includes petrol filling stations; shops selling and/or displaying motor vehicles; retail warehouse clubs.

g) Trafford Borough Council published in September 2012 a draft Schedule focusing on its housing market;

h) Bolton Council published in September 2012 a CIL Schedule as follows:

Development type	**Levy rate £ / m2**
All development types unless stated otherwise in this table	**Basic CIL rate: £5**
Bolton Town Centre retail	**£5**
Convenience retail out of Bolton Town Centre	**£150**
Comparison retail out of Bolton Town Centre	**£50**
Hotels	**£5**
Residential dwellings	**£50**
Student Accommodation	**£50**
Education, health & community facilities	**£0**

It proposes:

Two charging zones are proposed for retailing uses. The boundary is Bolton town centre, as identified in the emerging Allocations Plan; this boundary is shown on the following page. Within this boundary, retailing uses will be charged at the basic charge rate. Within the rest of the borough, retailing will be charged at two different rates; the variable rates for retail uses reflect the differences in viability highlighted in the supporting evidence.
For all other instances, the charge will be uniform across the whole of the borough.

63. The fiscal stimulus resulting from the absence of CIL (or lower rates) is clear.

64. Other groups of councils working jointly include: Greater Norwich Development Partnership, the Black Country councils of Dudley, Sandwell, Walsall and Wolverhampton, central Lincolnshire councils of Lincoln City, West Lindsey and South Kesteven. From 1 April 2013 Barnet Council will set the flat rate at £135 per square metre for a three year period. Its approach will "prioritise economic growth *in the borough* whilst recognising the need to deliver the critical infrastructure

required to ensure that Barnet keeps moving", and "will enable *critical services* to continue". Consultation runs to 23rd April 2012.

65. Progress now is quickening. It can be seen that a new fiscal planning map of England and Wales is now emerging where CIL is deployed to encourage investment to brownfield areas, to regeneration areas, and which can be altered over time going forward. That is, as the economy improves, so CIL rates can be increased.

66. Teething problems are emerging. For example, in relation to differential charging (see for example, Poole and Portsmouth but also Wycombe). The Government plans technical amendments to CIL to clarify and improve its operation and these are said to be introduced in the autumn. That pledge came as a Dorset planning authority dropped proposals for a differential charge for new retail development which would have meant only large superstores would have had to pay under the new CIL regime. Poole Borough Council had proposed that only superstore developments of more than 3,000 sq m of floor space would be eligible for the CIL charge planned to be set at £200 per square metre. After a challenge during the examination, the proposal has been dropped.

67. There can be no doubt that this tax is both certain and here to stay. Mere disagreement with that fact does not result in the Levy being unlawful. Rather, its existence demands new approaches to development and more sophisticated financial planning in funding of new buildings.

THE EMERGING FISCAL PLANNING MAP

68. England is largely covered by the plans and terms and criteria of the development plan and core strategies of each local planning authority which together regulate land development. A separate layer is now emerging: the fiscal planning map. *Zone edge* development may well emerge.

69. Each planning authority adopts a particular approach to establishing map parameters including:

    a) Newark and Sherward District Council in September 2011 proposed zones based on wards, joining several wards together by colour, and different colours for residential and commercial zones. It then uses the different colours to attribute different CIL rates;

    b) Shropshire Council in 2011 proposed a 2 zone approach: i) identified key centres; ii) the remainder of its administrative area;

    c) Wycombe District Council in September 2012 proposes 2 zones: 'A' comprising its developed linear valley (bounded by a road and a railway) and 'B' the balance of area on each side;

d) Trafford Council in September 2012 proposes residential zones based on the *housing market* temperature of its administrative area, dividing this into: i) cold market; ii) moderate market; c) hot market; (and also separates dwellings from apartments). Hot does abut cold.

e) Bolton Council in September 2012 proposes two zones: i) Bolton Town Centre: ii) the remainder of its administrative area.

STATUTORY BACKBONE: CIL REGIME

70. The start point for CIL is the statute. Part 11 of the Planning Act 2008 is the *backbone* of this new tax and the scope of its *purpose*, and that scope is *broad*. At its heart, by section 216(1) (as amended by the Localism Act) (and to which CIL Regulation 2(1) refers back):

> *(1) Subject to sections 216A(1), 216B(2) and s219(5), CIL regulations must require the authority that charges CIL to* ***apply it, or cause it to be applied****, to ~~funding infrastructure~~*[3] ***supporting development by funding the provision, improvement, replacement, operation or maintenance of infrastructure****.*
>
> *(2) In subsection (1) "infrastructure" includes--*
>
> *(a) roads and other transport facilities,*
>
> *(b) flood defences,*
>
> *(c) schools and other educational facilities,*
>
> *(d) medical facilities,*
>
> *(e) sporting and recreational facilities, [and]*
>
> *(f) open spaces. . .*
>
> *(g) . . ..*

71. Clearly, the Localism Act *broadens* significantly the scope of infrastructure related matters to which funds can be applied. The definition masks the scope of the requirement on the charging authority to also "apply" garnered CIL to the potentially wide breadth of 216(1).
72. Interestingly, the new section 216A(1) enables CIL Regulations to require CIL received is passed "to a person *other than* the" charging authority. Subsection (3) indicates this obligation may relate to a charging authority's area in whole or in combination with other areas, or part of such an area or a combined areas. Perhaps a foreshadow of local Mayors or others being entitled to require funds to be applied to their own projects?
73. New section 216B(1) assumes the presence of the section 216A(1) requirement and that there is also an "uncovered area" to which that duty does *not* relate. If so, section 216B(2) enables CIL

Regulation to entitle a charging authority to apply CIL revenue to an "uncovered" area or cause it to be applied to:

a) Support development by funding the provision, improvement, replacement, operation or maintenance of infrastructure, or

b) Support development of the uncovered area, or any part of that area, by funding anything else that is concerned with addressing demands that development places on an area.

(3) [Such] provision … may relate to the whole, or part only, of the uncovered area.

74. That is, the application of revenue is broadened to 'support' in certain circumstances.

75. The statutory scope is also widened as follows. The Localism Act amended section 216(4) so that matters which can be specified in Regulations now may include:

> *(aa) maintenance activities and operational activities (including operational activities of a promotional kind) in connection with infrastructure that may or are to be, or may not be funded by CIL..*

76. Section 219(5) provides:

> *(5) CIL regulations may permit or require a charging authority to apply CIL (either generally or subject to limits set by or determined in accordance with the regulations) for expenditure incurred under this section.*

77. The ordinary meaning of "infrastructure" is (*widely* cast) (see Shorter Oxford English Dictionary):

> *The foundation or basic structure of an undertaking; (a) the collective permanent installations (airfields, naval bases, etc) forming a basis for military activity; (b) the installation and services (power stations, sewers, roads housing etc) regarded as the economic foundation of a country.*

78. The July 2009 (New Labour/Pre-Coalition) consultation paper made clear that breadth:

> *Communities and Local Government and the Department for the Environment, Food and Rural Affairs, together with the Environment Agency and Natural England, are continuing to assess how environmental (such as flood management, water, waste water and sewerage) and green infrastructure will be delivered effectively in support of new homes, whilst maximising housing supply's contribution to the Government's environmental objectives (especially those set out in PSA28, the Natural Environment PSA).*

79. Further, at paragraphs:

> *2.23 The [New Labour] Government favours a wide definition of infrastructure to give local communities flexibility to choose what infrastructure they need to deliver their development plan. Priorities will vary from place to place. In one authority, a new housing estate might require a new road bypass, while in another authority, a similar housing estate might require an additional drainage system.*

[3] Strike through denotes the former statutory text; bold denotes the amended text.

2.24 Pressures placed on natural resources through water consumption, waste and car use mean that authorities will need to think innovatively in the future about how they plan for and meet their infrastructure requirements...

2.43 Some of the infrastructure needed to support the development of 2.43 an area is likely to serve more than one local authority area (this is referred to here as 'sub-regional infrastructure'). Examples might include hospitals, larger transport projects, or waste facilities. Sub-regional infrastructure is often larger infrastructure to which a number of authorities and developers need to contribute in order to make it affordable.

80. At paragraph 3.8:

County councils which are not unitary authorities prepare plans for minerals and waste development but these will not be CIL charging authorities. This is because the infrastructure needs generated by minerals and waste development authorities in an area are best planned for alongside the infrastructure needs of other forms of development by the district authority in preparing its development plan. This does not mean that CIL revenue cannot be collected for and spent on waste infrastructure (for example, a new waste processing plant) or on the infrastructure needed to support minerals and waste development (for example, a road upgrade to accommodate heavier vehicles). Infrastructure demands such as these can form part of the charging authority's infrastructure planning requirements for growth and the charging schedule can reflect these costs as it would other infrastructure demands. The county council will be able to make a case for additional waste management infrastructure as part of that infrastructure planning process. Waste infrastructure may serve the needs of new communities in more than one charging authority area and the county council may need to work with several district charging authorities to ensure that any costs to be attributed to CIL for such infrastructure are appropriately allocated across them.

81. Since then, the May 2011 (Coalition) CLG Guidance provides at §2:

The money can be used to fund a wide range of infrastructure that is needed as a result of development. This includes new or safer road schemes, flood defences, schools, hospitals and other health and social care facilities, park improvements, green spaces and leisure centres.

82. §12 further expands this list:

... This definition allows the levy to be used to fund a very broad range of facilities such as play areas, parks and green spaces, cultural and sports facilities, district heating schemes and police stations and other community safety facilities. This gives local communities flexibility to choose what infrastructure they need to deliver their development plan.

83. The guidance illustrates the considerable utility of CIL revenue. It also indicates the potential breadth of infrastructure beneficiaries who might knock on the door of the charging authority seeking application of CIL funds to their provision of infrastructure. For example, the Highways Agency, other developers, and waste or water utilities.

THE CHARGING AUTHORITY

84. Just as the scope of the purpose is broad, so too is the *discretion* of the charging authority to set a CIL charge rate. Regulation 59(1) requires the charging authority ("CA") (ordinarily the district or borough council) to apply CIL to "funding infrastructure" (subject to its Regulation 60(1) power to

reimburse expenditure already incurred on infrastructure" and Regulation 61(1) power to apply CIL to administrative expenses "in connection with CIL".

85. By section 206(3)(a) of the Act, the London Borough is "local planning authority" is the CA for its area. Further, the Mayor can also be a CA, and the LPA can collect his CIL.

86. By Regulation 10(1), the charging authority is the also the collecting authority for CIL charged in its area. This is subject to Regulation 10(4) where the County Council is the *collecting* authority for CIL charged in its area in which there is more than one district authority.

87. Under the CIL regime, the Planning Act 2008 expressly requires members to approve by the declaration of a majority of those present in respect of its:

    a) section 212 (4) draft submission to the examiner (see below) required accompanied by the declaration by the CA that it has complied with Part 11 and the CIL Regulations, has used appropriate available evidence to inform the draft charging schedule; and in dealing with Regulation prescribed matters; thereafter

    b) Section 213(1) approval of a charging schedule; and potentially thereafter

    c) Section 214(3) charging schedule cessation.

88. In this respect, not only is the Act's definition of "infrastructure" wide, but so too is the charging authority's discretions thereunder.

89. For example, in *R (oao Morge) v Hampshire County Council* [2010] EWCA Civ 608 the Court of Appeal considered bats and badgers which had moved into an old railway line closed in 1969. More recently, a bus route was proposed along the line. The council granted planning permission for the route. The claimant sought judicial review for of that decision and the High Court dismissed the claim. The Claimant/Appellant submitted that the Local Planning Authority *must* be guided by its experts and that it was irrational for a decision maker to disagree with them. "This point underpins his whole submission." However, the Court of Appeal rejected this as follows:

> *It is an attractive but beguiling submission. In my judgment, however, it goes too far. It confuses a conclusion which is reached against the weight of evidence and a conclusion which is unlawful. The foundation of the argument is the assumption that reaching a contrary conclusion constituted an error of law because as a matter of law the Committee must willy nilly accept the experts' opinions, no other option being available to it. That must be wrong because it would emasculate the members' duty themselves to decide the question. It is their decision to make, not the experts. Whilst of course they must pay high regard to the evidence before them, they are not bound to follow it. The weight to give the reports is a matter for the members to assess. "Significant" is, after all, a value laden word and views may reasonably differ as to whether an effect truly is significant or not. The members must exercise their independent judgment about the significance of the effects looking at the information overall. I can readily accept that if*

> *Mr George had been presenting the evidence to them, he may well have procured some change of view. He may even have persuaded me. But seven members were not persuaded on the day and only five thought that the proposal was an EIA development. That disparity of view makes it in my judgment a case more accurately characterised as one where there is a generous ambit for reasonable disagreement, and not a case where no reasonable member could have concluded that the effects were other than significant. If I am right about this, it may of itself dispose of the third ground of appeal.*

90. It held that:

> *There was no certain answer. Views may reasonably differ. That is demonstrated by the votes cast. This was quintessentially a matter for the Committee to exercise its planning judgment and form its independent opinion. In those circumstances it cannot be said that the decision was irrational.*

91. The Supreme Court did not disturb that approach on a further appeal (itself dismissed).

92. In *R(oao Cala Homes (South) Ltd) v Secretary of State for CLG* [2011] EWCA Civ 639 at 31, the Court of Appeal recently held that:

> *In most cases the constraint of Wednesbury rationality will be a very light rein because the Courts normally give a very wide latitude to planners' judgement as to the weight to be given to planning considerations.*

93. The cases are, a reminder that, ultimately, the local decision as to how (in those cases to grant planning permission), in general terms, to exercise a planning discretion, was and remains ultimately the decision of democratically elected members (not officers or developer advisors).

TO *WHAT* DOES CIL APPLY?

94. To what does CIL apply? Again, just as the scope is wide, the discretion to set a charge wide, so too is what it captures: every type of grant of planning permission (save for a few exclusions and some limited refinements).

95. By section 206(1) of the Act:

> *A charging authority may charge CIL in respect of development of land in its area.*

And, by Regulation 40(1), the collecting authority is required to *calculate* the CIL payable in respect of the "*chargeable* development". That term is a key element of the Regulation 40(5) formula.

96. In respect of the "development" component, and for the purposes of liability, section 209 defines key terms including at (1) that "development" means (a) "anything done by way of or for the purpose of the creation of a *new* building", or (b) anything done in respect of an existing building". The scheme provides for exclusion from these wide definitions by regulations as follows.

97. Regulation 6 provides:

> *[(1) The following works are not to be treated as development for the purposes of section 208 of PA 2008 (liability)--*
>
> *(a) anything done by way of, or for the purpose of, the creation of a building of a kind mentioned in paragraph (2);*
>
> *(b) the carrying out of any work to, or in respect of, an existing building if, after the carrying out of that work, it is still a building of a kind mentioned in paragraph (2);*
>
> *(c) the carrying out of any work to, or in respect of, an existing building for which planning permission is required only because of provision made under section 55(2A) of TCPA 1990; and*
>
> *(d) the change of use of any building previously used as a single dwellinghouse to use as two or more separate dwellinghouses.]*
>
> *(2) The kinds of buildings mentioned in paragraph (1)(a) and (b) are--*
>
> *(a) a building into which people do not normally go;*
>
> *(b) a building into which people go only intermittently for the purpose of inspecting or maintaining fixed plant or machinery.*

98. The May 2011 CLG Guidance provides that:

> *7. Almost all development has some impact on the need for infrastructure, services and amenities - or benefits from it - so it is only fair that such development pays a share of the cost. It is also right that those who benefit financially when planning permission is given should share some of that gain with the community which granted it to help fund the infrastructure that is needed to make development acceptable and sustainable...*
>
> *38. Most buildings that people normally use will be liable to pay the levy. But buildings into which people do not normally go and buildings into which people go only intermittently for the purpose of inspecting or maintaining fixed plant or machinery, will not be liable to pay the levy. Structures which are not buildings, such as pylons and wind turbines, will not be liable to pay the levy. The levy will not be charged on changes of use that do not involve an increase in floorspace.*
>
> *39. The levy must be charged in pounds per square metre on the net additional increase in floorspace of any given development. This will ensure that charging the levy does not discourage the redevelopment of sites.*
>
> *40. Any new build – that is a new building or an extension – is only liable for the levy if it has 100 square metres, or more, of gross internal floor space, or involves the creation of additional dwellings, even when that is below 100 square metres. Whilst any new build over this size will be subject to the Community Infrastructure Levy, the gross floorspace of any existing buildings on the site that are going to be demolished will be deducted from the final liability. Any floorspace resulting from the development to the interior of an existing building will similarly be deducted. Floorspace subject to demolition or resulting from change of use will only be disregarded where it has been in continuous lawful use for at least six months in the 12 months prior to the development being permitted.*

99. Development here, therefore, appears to exclude open air development. For example, race tracks. But could catch buildings within such "development" because, on race days people do normally go into them. That open air development may not qualify as a net CIL contributor may be a factor relevant to setting CIL rates.

100. Further, the demolition provision is of interest: the new finance of planning ties in the physical circumstances of the area. Circular 10/95: Planning Controls Over Demolition, the Secretary of State provided within Appendix A a Demolition Direction with descriptions of development deemed not be "development" for the purposes of section 55(1) of the Planning Act 1990. It will be recalled that last year (2011) an EIA challenge by *SAVE* succeeded in the demonstrating that the Direction breached the EIA Directive so that much of that Direction in greater part remains today of no effect. In that context, the CIL regime operates to discourage demolition clearance of sites (to create a form of blight) and instead justifying an planning authority from *excluding* from the reduction the demolished floor area not qualifying within paragraph 40 of the Guidance. i.e. ensuring that only lawful uses are taken into account and where those have had a active currency of 6 months in the previous year to the planning permission. This means that demolition of a building in, say, month 5 of 12 ahead of permission, may be *disregarded* from a net sum.

101. In respect of the "*chargeable"* component of the "chargeable development" criteria, this is defined by Regulation 9(1) as *development for which planning permission is granted*.

102. Regulation 5(1) defines "planning permission" to mean that granted under section 70, 73, 73A of the Planning Act 1990, including on appeal to the Secretary of State, and on an enforcement appeal. Permission also includes where a permission is modified. It will be recalled that the Environmental Permitting Regulations 2008 (and 2010) require either a planning permission or a section 191 or 192 certificate to be in force before the decision maker can grant an environmental permit. Presently, section 191 and 192 certificates are not expressed as within the CIL scope of "planning permission". This means that, whilst an historic waste related site may have some advantages, the subsequent grant of planning permission in relation to it could trigger chargeable development.

103. In this respect, Regulation 9(4) treats each phase of an outline permission as a separately chargeable development, whilst Regulation 9(5) maintains the original chargeable development where a section 73 application is concerned with extending time alone.

104. On 15th October 2012, the Government published draft regulations to amend the CIL regime (anticipated in force during November 2012), principally to refine its application to section 73 applications by reference to rules so as to avoid CIL charge double-counting. The new draft Regulations change this so that if a charging schedule is in place both at the time the original planning permission is granted and the time a s.73 permission is granted, CIL will be payable only once, according to the following rules:

- if the CIL charge calculated at the time of the original permission is the same as the CIL charge calculated at the time of the section 73 permission, CIL will be payable on the chargeable development under the original planning permission only;
- if there is a change in the CIL charge between the original planning permission and the section 73 permission, and if that change is due to a change in a condition under the section 73 permission, CIL will be payable only on the chargeable development which is the most recently commenced or re-commenced chargeable development;
- for the purposes of such section 73 calculations, the date on which the s.73 permission 'first permits development' should be regarded as the same as the date at which the 'planning permission first permits development' for the original permission.

If a CIL payment has already been made in relation to the original permission, and the charging authority issues a new liability notice in relation the s.73 permission because the CIL liability has changed, it will be possible to off-set the CIL already paid against the new CIL charge.

105. As may be expected from a levy/taxing regime, transitional provisions if a planning permission is granted when there is no current CIL charging schedule, and a later section 73 permission is granted when there is a charging schedule is current, the CIL actual charge will be: CIL payable on the chargeable development under the section 73 permission less the CIL that would have been payable under the original permission (using, for purposes of calculation, the charging schedule in force at the time of the section 73 permission). Therefore a CIL charge will only be incurred if the section 73 permission results in an *increase* in CIL payable.

106. Thus, the levy remains focused on *the* net new development.

107. In relation to applications to extend time for implementation only of grants before 1st October 2010 (i.e. extant but not implemented), CIL will not be chargeable where the original permission was granted before a charging schedule was in place and the replacement permission is granted when a charging schedule is in place.

108. Under the proposed draft amendments, by draft Regulation 3(1), the scope of "planning permission" is broadened to include development consented under a neighbourhood development order (under s.61E of the Town and Country Planning Act 1990, as amended by the Localism Act 2011), meaning CIL is potentially payable.

109. Since permission may be granted by a general consent, current Regulation 64 requires the council to publish a notice of chargeable development *before* the specified development commences. In turn, the "planning permission" defines the "relevant *land*" for other Regulator tests.

110. The May 2011 CLG Guidance provides that:

> *42. The levy will be charged on new builds permitted through some form of planning permission. Examples are planning permissions granted by a local planning authority or a consent granted by the Independent Planning Commission. However, some new builds rely on permitted development rights under the General Permitted Development Order 1995. There are also local planning orders that grant planning permission, for example simplified planning zones and local development orders. Finally, some Acts of Parliament grant planning permission for new builds: the Crossrail Act 2008 is one such Act. The levy will apply to all these types of planning consent.*
>
> *43. The planning permission identifies the buildings that will be liable for a Community Infrastructure Levy charge: the 'chargeable development'. The planning permission also defines the land on which the chargeable buildings will stand, the 'relevant land'.*

111. Part 6 of the Regulations excludes (where conditions are met), essentially, minor development (less than 100sqm gross internal floor area). CLG's May 2011 Guidance provides for this at §40 (see above). Increased application terms *precision* is anticipated.

***WHO* PAYS?**

112. Since land is immobile, and planning permission enures for the benefit of the land, so too does CIL run with the land. Thus, there can be no escape from this tax for the landowner.

113. By section 208(1) of the Act liability to pay CIL may be *assumed* by anyone (under subsection (2)(a) *before* development commences and (b) must be done so in accordance with the Regulation procedure. Regulation 31(1) requires a party assuming liability to submit specified notices and his liability is deemed on receipt by the CA of a valid notice. Regulation 32 entitles a person to transfer assumed liability on notice to the CA.

114. Otherwise, section 209(7) defines for the purposes of section 208: (a) "owner" of land means a person who owns an interest in the land, and (b) "developer" means a person who is wholly or

partly responsible for carrying out a development. Subsection (8) provides that regulations may provide for exclusions of qualification as an owner or a developer in certain circumstances.

115. Regulation 33(2) imposes CIL liability by the taxation device of apportionment between the "*material interests*" in the land. Regulation 4(2) defines these as a freehold estate owner, or lessee with an interest exceeding seven years from the date of the planning permission. Regulation 41(1) defines an "apportionment assessment" (made under Regulation 34) to be an assessment (by the CA) of *how* liability to pay CIL in respect of the chargeable development should be apportioned between *each* material interest in the relevant land.

116. Failing an assumer of liability, Regulation 36(2) entitles the CA (after all reasonable efforts have been made) to attribute CIL liability to the *owner of the relevant land*.

117. The May 2011 CLG Guidance provides;

> *49. The responsibility to pay the levy runs with the ownership of land on which the liable development will be situated. This is in keeping with the principle that those who benefit financially when planning permission is given should share some of that gain with the community. That benefit is transferred when the land is sold with planning permission, which also runs with the land. The regulations define landowner as a person who owns a 'material interest' in the relevant land. 'Material interests' are owners of freeholds and leaseholds that run for more than seven years after the day on which the planning permission first permits development.*
>
> *50. Although ultimate liability rests with the landowner, the regulations recognise that others involved in a development may wish to pay. To allow this, anyone can come forward and assume liability for the development. In order to benefit from payment windows and instalments, someone must assume liability in this way. Where no one has assumed liability to pay the levy, the liability will automatically default to the landowners of the relevant land and payment becomes due immediately upon commencement of development. Liability to pay the levy can also default to the landowners where the collecting authority, despite making all reasonable efforts, has been unable to recover the levy from the party that assumed liability for the levy.*

WHO MAY BE *EXEMPT*?

118. *What* can be outside of the CIL scheme? The tax net is invariably wide and so too is CIL.

119. The first question is: outside *when*? CIL assumes that a decision is taken at the outset to set a rate for development, and subsequently, that developers might apply for exemption. That is, development *descriptions* are decided by CIL and not developer descriptions.

120. After the CIL Schedule has described the development which may be subject to CIL, the statute provides machinery for exemptions premised upon the particular nature of the developer, or who already qualify within the 'block exemption', or exceptionally.

121. Section 210(1) of the Act requires the Regulations to exempt from liability development a *person* who (whilst otherwise liable) is a relevant charity, and the building or structure is to be used "wholly or mainly for a charitable purpose" as defined by section 2 of the Charities Act 2006.

122. Part 6 of the Regulations specifies express exemptions and reliefs where, by fact and degree, conditions are met, essentially, in relation to qualifying charities, social housing, and those showing exceptional circumstances. See the Regulations for the particular criteria.

123. The proposed amendments published on 16th October 2012 include a formula for social housing relief in substitution of the current Regulation 50(6):

> *The value of NR in paragraph (5) must be calculated by applying the following formula—*
>
> $$Q_R - K_{QR} – ((Q_R \times E)/G)$$
>
> *where—*
> *Q_R = the gross internal area of the part of the chargeable development which will comprise the qualifying dwellings, and in respect of which, but for social housing relief, CIL would be chargeable at rate R;*
> *K_{QR} = an amount equal to the gross internal area of all buildings (excluding any new build) on completion of the chargeable development which—*
> *(a) on the day planning permission first permits the chargeable development, are situated on the relevant land and in lawful use;*
> *(b) will be part of the chargeable development upon completion; and*
> *(c) will be chargeable at rate R but for social housing relief;*
> *E = an amount equal to the aggregate of the gross internal area of all buildings which—*
> *(a) on the day planning permission first permits the chargeable development, are situated on the relevant land and in lawful use; and*
> *(b) are to be demolished before completion of the chargeable development; and*
> *G = the gross internal area of the chargeable development.*

124. The May 2011 CLG Guidance identifies that:

> *51. The regulations give relief from the levy in two specific instances. First, a charity landowner will benefit from full relief from their portion of the liability where the chargeable development will be used wholly, or mainly, for charitable purposes. A charging authority can also choose to offer discretionary relief to a charity landowner where the greater part of the chargeable development will be held as an investment, from which the profits are applied for charitable purposes. The charging authority must publish its policy for giving relief in such circumstances. Secondly, the regulations provide 100 per cent relief from the levy on those parts of a chargeable development which are intended to be used as social housing.*

52. To ensure that relief from the levy is not used to avoid proper liability for the levy, the regulations require that any relief must be repaid, a process known as 'clawback', if the development no longer qualifies for the relief granted within a period of seven years from commencement of the chargeable development.

125. In granting otherwise exceptional relief, CLG appreciated that exceptional *disapplication of* a financial levy may burden other tax payers and qualify as impermissible "State Aid". In this respect, the May 2011 CLG Guidance provides:

53. Given the importance of ensuring that the levy does not prevent otherwise desirable development, the regulations provide that charging authorities have the option to offer a process for giving relief from the levy in exceptional circumstances where a specific scheme cannot afford to pay the levy. A charging authority wishing to offer exceptional circumstances relief in its area must first give notice publicly of its intention to do so. A charging authority can then consider claims for relief on chargeable developments from landowners on a case by case basis, provided the following conditions are met. Firstly, a section 106 agreement must exist on the planning permission permitting the chargeable development. Secondly, the charging authority must consider that the cost of complying with the section 106 agreement is greater than the levy's charge on the development and that paying the full charge would have an unacceptable impact on the development's economic viability. Finally, relief must not constitute a notifiable state aid.

126. The CLG CIL Information Document Guidance May 2011 provides:

71. The charging authority can only give exceptional circumstances relief where the eligibility criteria are fulfilled:

- *the charging authority has made exceptional circumstances relief available in its area*
- *the claimant owns a material interest in the relevant land*
- *a section 106 agreement has been entered into in respect of the planning permission which permits the chargeable development*
- *the charging authority considers that:*
  - *the cost of complying with the section 106 agreement is greater than the charge from the levy payable on the chargeable development*
  - *requiring payment of the charge would have an unacceptable impact on the economic viability of the chargeable development and*
  - *granting relief would not constitute a notifiable state aid (for further information please see state aid section)*

72. In addition to the above criteria, the charging authority may only give exceptional circumstances relief where the following criteria are met:

- *an exceptional circumstances claim has not already been previously granted to bring the development back into viability*
- *the independent person undertaking the viability assessment has suitable qualifications and has been appointed by the claimant with the agreement of the charging authority …*

127. The "State Aid" section provides:

63. The UK Government considers that the provision of social housing is a Service of a General Economic Interest. Relief from the levy for social housing has been designed so that it complies with the requirements of the EU Block Exemption for Services of a General Economic Interest. Charging and collecting authorities will need to be aware of this block exemption when implementing these regulations…
87. The regulations prohibit the giving of exceptional circumstances relief from the levy where it would constitute a notifiable state aid…
88. … It is the responsibility of aid givers to reassure themselves that the actions they take are state aid compliant.
89. State aid is a member state's support to undertakings which meets all the criteria in Article 107(1) of the Treaty on the Functioning of the European Union (Lisbon Treaty 2009). Article 107(1) declares that state aid, in whatever form, which could distort competition and affect trade by favouring certain undertakings or the production of certain goods, is incompatible with the common market, unless the Treaty allows otherwise. A copy of the most recent advice on state aid can be found at: www.bis.gov.uk/policies/business-law/state-aid

90. Four criteria must all be satisfied for aid to constitute state aid:
• Criterion 1: It is granted by the state or through state resources. State resources include public funds administered by the Member State through central, regional, local authorities or other public or private bodies designated or controlled by the State. It includes indirect benefits such as tax exemptions that affect the public budget.
• Criterion 2: It favours certain undertakings or production of certain goods. In other words it provides a selective aid to certain entities engaged in an economic activity (an "undertaking"). Economic activity is the putting of goods or services on a given market. It can include voluntary and non profit-making public or private bodies such as charities or universities when they engage in activities on a market. It includes self-employed/sole traders, but generally not employees as long as the aid does not benefit the employers, private individuals or households.
• Criterion 3: It distorts or threatens to distort competition. It potentially or actually strengthens the position of the recipient in relation to competitors. Almost all selective aid will have potential to distort competition - regardless of the scale of potential distortion or market share of the aid recipient.
• Criterion 4: It affects trade between Member States. This includes potential effects. Most products and services are traded between Member States and therefore aid for almost any selected business or economic activity is capable of affecting trade between States. This applies even if the aided business itself does not directly trade with Member States. The only likely exceptions are single businesses. For example, hairdressers or dry cleaners with a purely local market not close to a Member State border. The case law also demonstrates that even very small amounts of aid can affect trade.
…
91. All relief from the levy must be given in accordance with state aid rules. For charitable exemptions, discretionary charitable relief and exceptional circumstances relief this means a collecting or charging authority must determine whether or not giving the exemption or relief constitutes a state aid.
92. The state aid criteria need to be considered carefully when deciding whether an exemption or relief is a state aid. The collecting authority must bear the following in mind for each of the state aid criteria:
• Criterion 1: Is the relief granted by the state or through state resources? Relief from the levy will always be granted by the State and therefore this criterion is always met.
*• Criterion 2: Does the relief **favour** certain undertakings or the production of certain goods? Charging and collecting authorities should determine whether the claimant is an entity engaged in economic activity i.e. the putting of goods or services on a given market.*
• Criterion 3: Does relief distort or threaten to distort competition? Relief from the levy is by its nature a selective aid and will invariably have the potential to distort competition where a body is engaged in economic activity. Where criterion 2 is met it is likely that this criterion is also met.
• Criterion 4: Does relief affect trade between Member States? Again, where criterion 2 is met, it is likely that this will also be met. It may be possible to argue that aid will not affect trade between Member States, as the organisation's activities are purely local, but charging and collecting authorities will need to manage this risk. While the European Commission's interpretation of this test is broad and the legal threshold low there are examples of Commission decisions which identify certain economic activities as local. They

include small scale businesses serving the local community only such as local garages, retail shops, hairdressers, childcare facilities and cafes. Local small scale cultural or heritage venues are also considered not to affect trade between Member States. However, it is rare to find a good or service that is traded that is purely local. A charity, for example, is most likely not to be operating as an undertaking at all where its activities are purely local.
93. The Claiming Exemption or Relief form contains a questionnaire designed to elicit information that will help the charging or collecting authority in identifying state aid. The information will not always provide a clear indication of relief constituting state aid. The collecting authority may need to ask the claimant for further information.

128. The Guidance provides information on the block exemption requirements in respect of disapplying State Aid. However, the strong indication is that a CA should avoid CIL relief.

WHEN IS CIL DUE?

129. The timing of CIL payments will have a profound effect on development funding and require careful consideration. By section 208(3) of the Act, for a person who has assumed CIL liability, his liability is triggered when development *is commenced* in reliance on planning permission. However, section 208(3) and (5) make provision for CIL liability where nobody has assumed liability and also its apportionment. Subsection (6) requires that the amount of CIL liability is calculated by reference to the time *when* planning permission *first* permits the development as a result of which the levy becomes payable.

130. Regulation 7(2) deems development begun at the earliest date on which any section 56(4) TCPA 1990 “material operation” begins to be carried out.

131. Oddities may arise. As demolition today qualifies within section 55(1), and (1A)(a) of the 1990 Act, and also as a material operation within section 56(1)(a), (2), and (4)(aa) “any work of demolition of a building”, CIL may become due earlier in the construction period.

132. Regulation 9(4) treats each phase of an outline permission as a separately chargeable development, whilst Regulation 9(5) maintains the original chargeable development where a section 73 application is concerned with extending time alone.

133. Since permission may be granted by a general consent, Regulation 64 requires the council to publish a notice of chargeable development before the specified development commences.

134. Section 217 requires the regulations to provide for CIL collection. So that the CA can know *when* in fact development triggers CIL, Regulation 67(1) requires the authority to be served with a commencement notice to notify it when CIL is due, whilst the fallback position is provided by

Regulations 68 and 69. These latter require the CA to determine the day when chargeable development is commenced, and to serve a demand notice on each liable person.

135. The May 2011 CLG Guidance provides:

> *45. The levy's charges will become due from the date that a chargeable development is commenced in accordance with the terms of the relevant planning permission. The definition of commencement of development for the levy's purposes is the same as that used in planning legislation, unless planning permission has been granted after commencement.*
>
> *46. When planning permission is granted, the collecting authority will issue a liability notice setting out the amount of the levy that will be due for payment when the development is commenced, the payment procedure and the possible consequences of not following this procedure.*
>
> *47. The levy's payment procedures encourage someone to assume liability to pay the levy before development commences. Where liability has been assumed, and the collecting authority has been notified of commencement, parties liable to pay the levy will always benefit from a 60 day payment window on any instalments policy a local authority may have in place. However, payments are always due upon commencement if no party assumes liability and/or no commencement notice is submitted before commencement.*
>
> *48. If a charging authority wishes to set its own levy payment deadlines and/or offer the option of paying by instalments, it must publish an instalments policy on its website and make it available for inspection at its principal offices. If the charging authority wishes to publish a new policy or withdraw the policy it must give at least 28 days notice before the new policy takes effect and/or old policy is withdrawn.*

SETTING THE CIL CHARGE: HOW *MUCH* IS DUE?

136. How much is then due?

137. By section 206(1) of the Act, a charging authority may charge CIL. Therefore, the question of how much is, really, a matter *for it*. Mayor Boris asked for and got £300,000,000 after a 4 day hearing.

138. In advance of its charging schedule, the Act requires by section 211(2) that:

> *(2) A charging authority, in setting rates or other criteria, must have regard, to the extent and in the manner specified by CIL regulations, to--*
>
> *(a) actual and expected costs of infrastructure (whether by reference to lists prepared by virtue of section 216(5)(a) or otherwise);*
>
> *(b) matters specified by CIL regulations relating to the economic viability of development (which may include, in particular, actual or potential economic effects of planning permission or of the imposition of CIL);*
>
> *(c) other actual and expected sources of funding for infrastructure.*

139. This key provision is the tool by which *the funding gap* is revealed: "actual and expected costs of infrastructure".

140. Regulation 40(1) requires the CA to calculate the CIL payable.

141. Regulation 40(2) deems the sum payable to equate to the aggregate CIL sums chargeable at the relevant rates taken from *charging schedules* in effect at the time planning permission first permits chargeable development.

142. Regulation 12(2)(b) requires the rate set (at pounds per square metre) at which CIL is to be chargeable in the authority's area.

143. Regulation 40(5) (as currently amended) applies (the first of two) algebraic formula for calculating the *chargeable amount* which aggregates different CIL due to different authorities, and, essentially, by reference to the internal area of a building:

Chargeable amount =

Chargeable Development (A) x Levy rate (R) x inflation measure (I)

[Where a development involves a mix of types of development to which different Levy rates apply, the chargeable development of each type is calculated separately and then added together to provide the *total* chargeable amount.]

144. Subject to the draft amendments proposed on 16th October 2012, Regulation 40(6) presently applies a second formula to engender within the first formula term "(A)" a value as follows (as amended by the April 2011 amendments):

The "Chargeable Development (A)" component is calculated using the following said formula:

$$A = \frac{CR \times (C-E)}{E}$$

where

[(CR) = the gross *internal* area of the chargeable development chargeable at rate R, less an amount equal to the aggregate of the gross internal area of all buildings (excluding any new build) on completion of the chargeable development which —

(a) *on the day planning permission* first permits the chargeable development, are situated on the relevant land and in lawful use;

(b) will be part of the chargeable development upon completion; and

(c) will be chargeable at rate R.] (as amended from 6th April 2011)

(In other words, existing (permitted) uses are deducted from the calculation. This means that changes of use will generally not be liable. In the case of conversions of existing buildings only the additional new build floorspace, such as an extension to the existing building, will be liable for

the Levy. However, the requirement that the lawful use be "in" use connotes that credit satisfaction occurs only where there is in fact a subsisting activity at the date of permission and not a mere subsisting (but inactive) lawful use.)

C = the gross internal area of the chargeable development .

E = the aggregate of the gross internal areas of all buildings which, on the day planning permission first permits the chargeable development, are situated on the relevant land and in lawful use, and are to be demolished before completion of the chargeable development. Such buildings must have been in use for a continuous period of at least six months in the twelve months prior to the day planning permission first permits the chargeable development.

The Levy rate (R) is the applicable rate (as set by the CA).

145. The proposed amendment changes the formula establishing "A" by substituting Sub-Regulation (6):

The value of A in paragraph (5) must be calculated by applying the following formula—

$$G_R - K_R – ((G_R \times E) / G)$$

where—
G = the gross internal area of the chargeable development;
G_R = the gross internal area of the part of the development chargeable at rate R;
E = an amount equal to the aggregate of the gross internal areas of all buildings which—
(a) on the day planning permission first permits the chargeable development, are situated on the relevant land and in lawful use; and
(b) are to be demolished before completion of the chargeable development; and
KR = an amount equal to the aggregate of the gross internal area of all buildings (excluding any new build) on completion of the chargeable development which—
(a) on the day planning permission first permits the chargeable development, are situated on the relevant land and in lawful use;
(b) will be part of the chargeable development upon completion; and
(c) will be chargeable at rate R.

146. The practical effect of this proposed change is that a developer who develops the same site both retaining buildings whilst demolishing others will not be financially burdened by CIL where a developer who cleared the site would not be. That is, there will be no overcharging for a single development involving both the retention of *some* existing buildings and the demolition of *others*.

147. The (2011) currently amended Regulation 40(11) defines at (12) :

"new build" means that part of the chargeable development which will comprise new buildings and enlargements to existing buildings.

148. Thus the focus of the levy is the net new development. Credit is given for (some) demolition (see demolition above). It follows that where a building has been demolished or in part *prematurely*, the CA may recoup additional CIL by ignoring from account it floor area. The application of the Regulations to the particular facts of a matter may well trigger the law of unintended consequences but that is different to the law itself being wrong.

149. Regulation 40(7) applies to the Regulation 40(5) formula the inflation measure (I %) is based on the annually updated national All-In Tender Price Index of construction costs published by the Building Cost Information Service of the RICS. This measure ensures that account is taken of the timelag between the bringing into effect of the Charging Schedule and the grant of planning permission. The inflation measure is the index figure for the year in which planning permission was granted divided by the index figure for the year in which the charging schedule took effect.

150. Section 211(1) requires a CA to issue a "charging schedule" setting rate, or other criteria, by reference to which the amount of CIL chargeable in respect of its area is to be determined.

151. Regulation 12(1) entitles the CA to determine the format and content of a charging schedule.

152. Regulation 13(1) enables a CA to set differential rates for development zones or by reference to different uses of development.

153. For example, as we have seen emerging across England, residential and retail and brownfield land are becoming differentiated within each district. A fiscal planning map is emerging over England and Wales. In future, differences may be further refined by reference to other Use Classes, or by reference to historic areas, or relief from certain rates may be attributed to listed building development.

154. Regulation 13(2) underscores this potentially complicated approach by entitling an authority to set supplementary charges, nil rates, increased rates or reductions. In practice, one can imagine a fiscally zoned land use planning map emerging for each authority to which different rates apply and which is modified over time as the market changes to raise more CIL from property hotspots whilst reducing rates elsewhere.

155. Importantly, Regulation 14(1) requires the CIL setting authority to strike "what appears to [it] to be an appropriate balance" in respect of two factors including viability (see regulation for detail).

156. As we have seen above in *Cala Homes*, the scope of this rate setting discretion is extraordinarily wide ("very wide"). This key balancing provision enables the authority to squeeze

funds from grants of permission in its area, whether by express grant or from the exercise of residual (unused) permitted development rights. The big question will be: how tight to squeeze? This will, inevitably, be a question of fact and degree for the charging authority, and in consequence, a political decision for Members to later account for.

157. The May 2011 CLG Guidance provides:

> *21 Charging authorities should normally implement the levy on the basis of an up-to-date development plan .... A charging authority may use a draft plan if they are planning a joint examination of their core strategy or local development plan and their Community Infrastructure Levy charging schedule.*
>
> *22. Charging authorities wishing to charge the levy must produce a charging schedule setting out the levy's rates in their area. Charging schedules will be a new type of document within the folder of documents making up the local authority's local development framework in England, sitting alongside the local development plan in Wales and the London plan in the case of the Mayor's levy. In each case, charging schedules will not be part of the statutory development plan.*

158. The CIL rate is considered at §§23 and following:

> *23. Charging authorities wishing to introduce the levy should propose a rate which does not put at serious risk the overall development of their area. They will need to draw on the infrastructure planning that underpins the development strategy for their area. Charging authorities will use that evidence to strike an appropriate balance between the desirability of funding infrastructure from the levy and the potential effects of the levy upon the economic viability of development across their area.*
>
> *24. In setting their proposed rates for the levy, charging authorities should identify the total infrastructure funding gap that the levy is intended to support, having taken account of the other sources of available funding. They should use the infrastructure planning that underpinned their development plan to identify a selection of indicative infrastructure projects or types of infrastructure that are likely to be funded by the levy. If a charging authority considers that the infrastructure planning underpinning its development plan is weak, it may undertake some additional bespoke infrastructure planning to identify its infrastructure funding gap. In order to provide flexibility for charging authorities to respond to changing local circumstances over time, charging authorities may spend their monies raised from the levy on different projects from those identified during the rate setting process.*

159. There must be, of course, *some* objective evidence underpinning the CA's rate. CLG provides at its May 2011 Guidance that:

> *25. Charging authorities will need to strike an appropriate balance between the desirability of funding infrastructure from the levy and the potential effects of the imposition of the levy upon the economic viability of development across their area. Charging authorities should prepare evidence about the effect of the levy on economic viability in their area to demonstrate to an independent examiner that their proposed rates, for the levy, strike an appropriate balance.*
>
> *26. In practice, charging authorities may need to sample a limited number of sites in their areas and in England, they may want to build on work undertaken to inform their strategic housing land availability assessments. Charging authorities that decide to set differential rates may need to undertake more fine-grained sampling to help them to estimate the boundaries for their differential rates.*

160. Further, since not all areas are the same, differential rates may be set:

28. Charging schedules may include differential rates, where they can be justified either on the basis of the economic viability of development in different parts of the authority's area or by reference to the economic viability of different types of development within their area. The ability to set differential rates gives charging authorities more flexibility to deal with the varying circumstances within their area, for example where an authority's land values vary between an urban and a rural area.

CIL RATE *SETTING* PROCEDURE

161. Sections 211(7) of the Act gives the CA a discretion to consult or to take steps in connection with the preparation of a charging schedule (subject to the Regulations).

162. Section 212(1) requires the CA to appoint "the examiner" to examine its draft charging schedule. Subsection (2) requires the examiner to be independent of the CA and to have appropriate qualifications and experience. That person may also be assisted by persons appointed by the CA (assuming the examiner agrees).

163. Section 212(8) requires the CA to publish its recommendations and reasons, and by subsection (9) the Regulations may require those making representations about a draft charging schedule to be heard by the examiner. Subsections (10) and (11) provide respectively for error correction and withdrawal of the draft charging schedule.

164. Since (aside from stealth taxes) there is no taxation without representation, Regulations 15-27, and in particular 17, provide a consultation and examination regime. Given the breadth of discretion to set the rate, developers and landowners may bewell-advised to make timely Regulation 17(1) representations on the draft schedule as to viability and to submit relevant expert evidence including future financial forecasting.

165. The May 2011 CLG Guidance provides:

29. The process for preparing a charging schedule is similar to that which applies to development plan documents in England and local development plans in Wales. Charging authorities are also able to work together when preparing their charging schedules.
30. Charging authorities must consult local communities and stakeholders on their proposed rates for the levy in a preliminary draft of the charging schedule. Then, before being examined, a draft charging schedule must be formally published for representations for a period of at least four weeks. During this period any person may request to be heard by the examiner. If a charging authority makes any further changes to the draft charging schedule after it has been published for representations, any person may request to be heard by the examiner, but only on those changes, during a further four-week period.
31. A charging schedule must be examined in public by an independent person appointed by the charging authority. Any person requesting to be heard before the examiner at the examination must be heard in public. The format for the levy's examination hearings will be similar to those for development plan documents and the independent examiner may determine the examination procedures and set time limits for those wishing to be heard to ensure that the examination is conducted in an efficient and effective manner.

32. Where a charging authority has chosen to work collaboratively with other charging authorities, they may opt for a joint examination of their charging schedule with those of the other charging authorities. In addition, an examination of one or more charging schedules may be conducted as an integrated examination with a draft development plan document.

166. 2011 saw very few CIL schedules *examined*. But the pace is gathering momentum through 2012. The wide regulatory discretion for the CA to choose its evidence base appears from the Mayor's CIL examiner acceptance of "established use value" (EUV) "plus a margin" as an acceptable basis for CIL viability methodology, despite objectors seeking an alternative use of market values (evidenced by recent transactions). Since the Mayor will premise CIL schedule adoption on the examiner's report, it is difficult to see how that schedule's basis could in future be challenged. The examiner also rejected previously agreed site values where CIL would prevent development and noted that:

The difficulty with that argument is that if accepted the prospect of raising funds for infrastructure would be forever receding into the future."

... As with profit levels there may be cries that this is unrealistic, but a reduction in development land value is an inherent part of the CIL concept.

167. This being so, it remains the case that it is as important to sell at the right price as it is to buy in at the right price. Further, representations may be directed to preservation of Regulation 123(4)(b) *flexibility* so that Obligations can provide for (unlisted) infrastructure.

168. Section 213(1) entitles the CA members to approve the charging schedule if the examiner has recommend approval and subject to his recommended modifications.

169. The May 2011 CLG Guidance provides:

33. The independent examiner will be able to recommend that the draft charging schedule should be approved, rejected, or approved with specified modifications and must give reasons for those recommendations. A charging schedule may be approved subject to modifications if the charging authority has complied with the legislative requirements, but for example, the proposed rate for the levy does not strike an appropriate balance given the evidence.

34. The independent examiner should reject a charging schedule if the charging authority has not complied with an aspect of the legislation (and this cannot be addressed by modifications), or if it is not based on appropriate available evidence. The examiner's recommendations will be binding on the charging authority, which means that the charging authority must make any modifications recommended if they intend to adopt the charging schedule and cannot adopt a schedule if the examiner rejects it. However, the charging authority is not under an obligation to adopt the final charging schedule, but can, if it prefers, submit a revised charging schedule to a fresh examination.

170. Section 213(2) requires the CA to approve the charging schedule (see above). This is said to ensure democratic accountability.

171. Section 214(1) provides that an approved charging schedule may not come into effect before it is published, and under subsection (3) the CA may determine the schedule is to cease to have effect. However, cessation is subject to a determination by the CA approved as before, and in accordance with any regulation requirements.

172. Subsequently, Regulation 28(1) deems the charging schedule to take effect on the day specified in the schedule and its remains current unless a revised schedule takes effect. Tax certainty enables financial planning on land acquisitions.

ABATEMENT

173. Some relied is provided by the proposed Regulation 74A where:

(a) CIL has been paid in respect of a chargeable development;

(b) a new planning permission is later granted in relation to that development under section 73 of TCPA 1990; and

(c) the collecting authority has issued a new or revised liability notice in respect of that development because the chargeable amount has changed.

174. Assuming these criteria met, proposed Regulation 74A(2) provides that: Where this regulation applies a person liable to pay CIL for that chargeable development may request that the charging authority credits the CIL already paid against the amount due under the new or revised liability notice. Assuming, as Regulation 74(3) requires, accompanying proof of the amount of CIL that has already been paid, Regulation 74A(4) will require the charging authority grant any valid request made under paragraph (2).

ENFORCEMENT

175. Still can't pay, won't pay?

176. Section 218 requires that the regulations to provide for CIL enforcement. Further, section 218(8) provides for and also caps the surcharge or penalty in respect of CIL not more than the higher of (a) 30% of the CIL amount or (b) £20,000. Subsection (11) enables offences and fines for non-payment. Further, subsection (13) provides for administrative expenses of enforcement.

177. Regulations 80 to 88 require various surcharges and interest be levied on late CIL payments.

178. CIL is given very sharp teeth by:

a) Regulation 90 stop notices;

b) Regulation 96 liability orders; and

c) Regulation 103 charging orders.

179. Further, whilst there is potential in Regulation 36(2) to transfer liability to "owners", Regulation 66(1) deems the chargeable amount to be a local land charge so that incoming "owners" will have notice of a future liability.

180. Assuming CIL due remains unmet (whether by payment under Regulation 72 of money or under Regulation 73 in kind by land) the CA may serve a stop notice which (by Regulation 90(4)(e)) may require cessation of the relevant activity, being "any activity connected with the chargeable development". The practical effect of a notice is to suspend operation of development pending CIL payment and shut down a site pending payment. Naturally, contravention of a notice is an offence and, for those sentenced, accrued financial benefits are relevant to fine determination so that non-compliance may be costly. Clearly, it will pay to pay.

181. Further, Regulation 94(1) entitles an authority to injunct an actual or apprehended breach of a notice, whilst and liability and charging orders can be sought from the Magistrates' Court. The *de minimis* Regulation 107(1) enables enforcement of the CIL local land charge for chargeable development where CIL is above £2,000.

182. The May 2011 CLG Guidance provides:

> *56. The vast majority of parties liable to pay the levy are likely to pay their liabilities without problem or delay, guided by the information sent by the collecting authority in the liability notice. In contrast to negotiated planning obligations which can cause delay, confusion, and litigation over liability, the levy's charges are intended to be easily understood and easy to comply with. However, where there are problems in collecting the levy, it is important that collecting authorities have the means to penalise late payment and deter future non-compliance. To ensure payment, the regulations provide for a range of proportionate enforcement measures, such as surcharges on late payments.*
> *57. In most cases, these measures should be sufficient. However, in cases of persistent non-compliance, the regulations also enable collecting authorities to take more direct action to recover the amount due. One such measure is the Community Infrastructure Levy Stop Notice, which prohibits development from continuing until payment is made. Another is the ability to seek a court's consent to seize and sell assets of the liable party. In the very small number of cases where a collecting authority can demonstrate that recovery measures have been unsuccessful, a court may be asked to commit the liable party to a short prison sentence.*
> *58. The payment and enforcement provisions of the regulations add substantial protection for both charging authorities and liable parties compared with the existing system of planning obligations, particularly for small businesses which may not have easy access to legal advice.*

APPEALS

183. Is there any appeal? Yes. Section 215(1) of the Act requires the regulations to provide for appeals on a question of fact in relation to the application of CIL calculation methods to a person appointed by the Commissioners for Her Majesty's Revenue and Customs.

184. The regulations are required to ensure that that person is a valuation officer of a district valuer. The Commissioners are the 'defendant' in the event of a judicial review.

185. Section 219(1) enables the regulations to require the CA (or other public authority) to pay compensation in respect of loss or damage suffered as a result of enforcement action (and such action is defined as a suspension or cancellation or planning permission, or the prohibition of development pending an assumption of CIL liability or CIL payment). Subsection (3) and (4) provide for regulatory provision as to compensation.

186. By section 219(6), compensation disputes are referred to and determined by the Upper Tribunal, and in respect of which section 4 of the Land Compensation Act 1961 applies subject to any necessary modifications and the CIL Regulations.

187. Foreshadowing a new era of planning tax appeals, Regulation 113(1) entitles a qualifying interested person to apply for review of the chargeable amount *calculation* within 28 days of liability notice issue (i.e. are the mathematics correct), whilst Regulations 114-119 provide for appeals in respect of: the chargeable *amount* (i.e. the Regulation 40(5) equation); *apportionment* (i.e. who from a range of people should pay what); charitable relief; surcharges; deemed commencement; and stop notices. The Regulations require the first *three* appeal types be heard a valuation officer or district valuer; and the remainder by the Secretary of State or his appointed person.

188. Regulation 14(2) assumes CIL self-financing, so that administrative expenses may extend to fund any expected appeal expenses by conditional supplementary charge.

CONCLUSIONS

189. So what CIL? As one of life's two certainties, CIL is here to stay, with significant impact for developers, land owners and their advisors; whilst a most flexible friend for charging authorities subject to (no doubt) increasing political pressure to use this charge card.

190. The future? Once CIL schedules are published, the question becomes: what if a developer contributes through its development a sum of money to – in effect – *accelerate* the provision in time of some related infrastructure? If no schedule is published, enquiries may be made of a local planning authority's accounts to identify gaps in funding. Absent the flexibility of Regulation 123(4)(b) by project list, assuming it is material to the application, there seems nothing to prevent the planning decision maker giving such a financial consideration significant weight and granting a particular development planning permission. Conversely, (whether one of four or where there is no published list, simply a piece of infrastructure), an interesting out turn relates to defining the material consideration as a condition precedent to attribution of weight to it. Consider the last £1 of £100 contribution to a bridge. Should one attribute that little weight to a mere £1, or a lot due to its small but nevertheless enabling role? That is a question of Members with whose rational decision the Court attributes a wide discretion and is unlikely to interfere with where reasonable.

191. *Parliament* has rewritten the Planning Act's fundamentals. Planning by auction is here and money talks.

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