

**IS THE WATER WARM ENOUGH? THE END OF
DOUBLE-DIPPING.
THE PRACTICAL IMPLICATIONS OF THE
REMOVAL OF REG. 123 OF THE CIL REGULATIONS**

“Necessity bath no law.”

Oliver Cromwell in a speech to Parliament, September 1654.

On 1st September 2019 a number of sweeping changes to the Community Infrastructure Regulations 2010 were brought into force. In a shining example of economical legislative drafting (“omit Regulation 123”), the provision which prevented authorities from relying upon funding for the same infrastructure from more than 5 planning obligations was revoked. This regulation formerly prevented ‘double-dipping’; an insistence that a developer pay for the same piece of infrastructure through CIL and a financial contribution secured by a s.106 obligation. It was also the source of Regulation 123 lists (“R123 Lists”) of infrastructure that CIL would fund.

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Some local planning authorities (mainly shire counties) have latched on to this change and are now seeking s.106 contributions as well as CIL monies, sometimes for the same piece of infrastructure. Can they do this? In this article, we shall endeavour to provide an answer.

Local authorities are creatures of statute and their powers and duties devolve from legislation. The collection and distribution of CIL monies is no different. Regulation 59(1) provides that “*A charging authority must apply CIL to funding the provision, improvement, replacement, operation or maintenance of infrastructure to support the development of its area*”. Thus, a charging authority is not lawfully able to apply CIL monies other than to such infrastructure.

The problem now is that one does not know explicitly what ‘infrastructure’ can be funded in the absence of the link with Regulation 123.

There seem to be two initial answers. **First**, given that CIL must have been calculated to make up a funding shortfall to deliver particular schemes or types of infrastructure and will have been independently examined on that basis, where CIL was adopted before 1st September 2019 then Regulation 59 means that a collecting authority can only apply CIL monies to infrastructure on the R123 list. That makes common sense but does not deal directly with the removal of Regulation 123. We will return to this issue below.

The **second** answer is to approach the issue from the s.106 angle. If the local planning authority seek money through a s.106 obligation then they need to show that the Regulation 122 tests are met: *i.e.* that the contribution is necessary to make the development acceptable in planning terms; is directly related to the development; and is fairly and reasonably related in scale and kind to the development.

If the removal of R123 list means that CIL monies can go to any project at all (even one that was not on the original R123 list), then who is to say that it (CIL) will not fund a new school or much needed link road? On one analysis, the removal of Regulation 123 allows collecting authorities to apply CIL monies to anything at all so long as it goes to “*the provision, improvement, replacement, operation or maintenance of infrastructure to support the development of its area*”: see Regulation 59(1).

In those circumstances, how can a charging authority show that an education contribution (say) is necessary when CIL *might* fund any shortfall? One obvious answer is that CIL monies are

accounted for or committed through the current R123 list (in effect) and therefore any additional amount is unnecessary in Regulation 122 terms. If an authority maintain an insistence on ‘double charging’, then a developer’s rational response would be to say that they will only pay CIL and nothing extra through a s.106 because no one can be satisfied that the project/infrastructure will not be funded by CIL now that the authority are unfettered by the R123 list.

Unfortunately, the Government’s position on this issue is not entirely clear or helpful. In its response to the “Reforming Developer Contributions” consultation, DHCLG said this:

“The Regulations will allow authorities to use funds from both the Levy and planning obligations to pay for the same piece of infrastructure, regardless of how many planning obligations have already contributed towards it.”¹

No further guidance or clarification has been provided by the Government as to the status of R123 lists prior to the introduction of Infrastructure Funding Statements (“IFSs”) at the end of December 2020.

The key to this point is the scope of Regulation 59(1) and the expression “*the provision, improvement, replacement, operation or maintenance of infrastructure to support the development of its area*”. The expression is not further defined in the Regulations so we need to delve into the Regulations themselves.

First, the 2019 amending Regulations contained transitional provisions. They did not appear to consider the interim period between the revocation of Regulation 123 and the requirement to publish an IFS nor do they expressly consider the status of adopted R123 lists during this period. Regulation 13(1) of the 2019 Regulations provides as follows:

“Part 3 of the 2010 Regulations continues to apply, in relation to a draft charging schedule which is published in accordance with regulation 16(1) of the 2010 Regulations before the commencement date, as if the amendments in regulation 3 had not been made.”

Regulation 13(1) has the following effect: if a draft charging schedule has been published before 1st September 2019, Part 3 of the Regulations will continue to apply. Part 3 sets out the

¹ §68 Government Response.

procedural requirements relating to the publication of a draft CIL charging schedule, its examination and subsequent adoption.

At this point, we should make a brief detour to the parent legislation. Section 211(2) Planning Act 2008 (“PA”) provides that:

“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)”

This section has not been repealed. NB – the CIL Examiner must consider whether s.211(2) PA has been complied with: see s.212(4) PA.

‘Lists prepared by virtue of section 216(5)(a) or otherwise’ must include reference to the R123 lists. It would therefore appear that CIL charging schedules will continue to be examined having regard to published R123 lists, until an IFS list has been devised.

However, there is a difficulty here. A charging authority (and hence a CIL Examiner) must only consider the R123 list *“to the extent and in the manner specified by CIL regulations”*. As matters currently stand, the revocation of R123 arguably means that there is nothing *“specified by CIL regulations”* to which local authorities and examiners must have regard.

Nonetheless, it would be bizarre if a charging authority were required to publish a draft charging schedule designed to make up a funding shortfall by reference to a specific infrastructure list but that that list became meaningless upon adoption of CIL. In our view, although it is not expressed clearly, the legislative intention is revealed through the transitional provisions. It is this: R123 lists – or at least some form of list which identifies projects or types of infrastructure – should remain in force and guide decisions as to how CIL is applied and whether s.106 contributions meet the Regulation 122 tests unless and until an IFS is published.

Second, Regulation 73B provides some idea as to the position regarding R123 lists:

- “(1) *A charging authority which wishes to allow infrastructure payments in its area must—*
- (a) issue a document which—*
 - (i) gives notice that it is willing to accept infrastructure payments in its area;*
 - (ii) states the date on which the charging authority will begin accepting infrastructure payments, and*
 - (iii) includes a policy statement setting out the infrastructure projects, or types of infrastructure, which it will consider accepting the provision of as infrastructure payments (this may be done by reference to the charging authority's infrastructure list)”* (my emphasis)

“Infrastructure list” is defined by Regulation 2 as follows:

- “‘infrastructure list’ —
- (a) before 31st December 2020, means the list, if any, published by a charging authority of the infrastructure projects or types of infrastructure which it intends will be, or may be, wholly or partly funded by CIL (other than CIL to which regulation 59E or 59F applies);*
 - (b) on or after 31st December 2020, has the meaning given in regulation 121A.”*

We should note that an ‘infrastructure payment’ has a particular meaning in the revised Regulations; it is a transfer of land or payment of money in lieu of a CIL payment. However, the definition in Regulation 2 underscores the fact that the draftsman saw there being a transitional period between the 2019 reforms coming into effect and the publication of an IFS. Again, we acknowledge that this is not determinative since there is no express provision in the amended Regulations to deal with the ‘double dipping’. Nonetheless, it would be extremely odd if the Regulations prohibited the receipt of an ‘infrastructure payment’ unless the project or infrastructure was listed as a specific project or type of infrastructure by the local authority but allowed the application of CIL monies to a much broader category.

Third, the PPG says this:

“The 2019 amendments to the regulations removed the previous restriction on pooling more than 5 planning obligations towards a single piece of infrastructure.

This means that, subject to meeting the 3 tests set out in CIL regulation 122, charging authorities can use funds from both the levy and section 106 planning obligations to pay for the same piece of infrastructure regardless of how many planning obligations have already contributed towards an item of infrastructure.

Authorities should set out in an infrastructure funding statement which infrastructure they intend to fund and detail the different sources of funding (see regulation 121A).”² (emphasis added)

Thus, the PPG expressly contemplates a situation whereby CIL monies are combined with site specific planning obligations in order to deliver the ‘same piece of infrastructure’. We have a number of difficulties with this piece of guidance in the current case:

- a. It will be extremely difficult to conclude that a s.106 obligation is ‘necessary’ unless it can be shown that the particular piece of infrastructure will not be funded by CIL. Unless and until an IFS is produced, it is not possible to know how much money is in ‘the pot’ and how it will be spent. In the interim, only the existing R123 list will be able to inform a decision taker about the necessity for extra funding;
- b. The PPG appears to assume that an IFS is in place since that will enable a decision taker to assess whether a particular piece of infrastructure will be funded wholly or partly by CIL. It does not address the interim period until an IFS must be published.

Fourth, stepping back for one moment it seems that the particular provisions we have considered above should give some assistance in determining what is meant by “*the provision, improvement, replacement, operation or maintenance of infrastructure to support the development of its area*” in Regulation 59(1). This is important since the ability of any charging authority lawfully to charge

² PPG Paragraph: 170 Reference ID: 25-170-20190901

CIL (as opposed to seeking s.106 contributions) is constrained by Regulation 59(1) and the scope of the expression contained within it.

Some form of sense check seems appropriate. A broad interpretation of the expression in Regulation 59(1) could allow any developer to argue that – pending an IFS - no s.106 financial contribution should ever be sought because the CIL payments *could* be used to provide any infrastructure so long as it supported the development of a local authority’s area: *i.e.* it is potentially very wide in scope indeed, especially now that Regulation 123 has been revoked. If this argument is accepted, no decision taker could be satisfied that extra money via a s.106 obligation could be ‘necessary’ *per* Regulation 122.

However, this interpretation would undermine significantly both the operation of Regulation 122 which acknowledges that s.106 obligations still play an important role in securing the delivery of infrastructure and the apparent intent of Government to retain some form of framework which avoids double-charging.

Fifth, our interpretation is consistent with the broader principle that general taxation cannot be levied with a specific finance bill passing through Parliament. For example in *Vestey v Inland Revenue Commissioners* [1980] AC 1148 , Lord Wilberforce said at 1172D/E:

“Taxes are imposed upon subjects by Parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined.”

It is arguable that the ‘broad approach’ is tantamount to an interpretation of the CIL Regulations as the source of general taxation without any specific goal or project in mind. Put another way, the broad approach suggests that the Regulations are simply a means by which local planning authorities are able to raise general revenue albeit with a broad restriction of the use of those monies.

SUGGESTED RESPONSES

One obvious response **for local authorities** would be to produce an IFS in advance of the 31st December 2020 ‘deadline’, even if it is not more than to “adopt” their previous R123 schedule as an interim IFS (see below). Regulation 121A does not provide any bar on producing an IFS before that date.

The early production of an IFS may be extremely beneficial for a number of reasons:

- a. The IFS should include “*a statement of the infrastructure projects or types of infrastructure which the charging authority intends will be, or may be, wholly or partly funded by CIL (other than CIL to which regulation 59E or 59F applies) (“the infrastructure list”)*”: Regulation 121A(1)(a). On this basis, the ‘infrastructure list’ should set the parameters for the infrastructure that can be funded by CIL for the purposes of Regulation 59;
- b. With an IFS in place, it will be extremely difficult to argue that s.106 contributions for items already in the infrastructure list will be ‘necessary’ within the meaning of Regulation 122. This may not be particularly helpful for some authorities (and for applicants and land buyers who require certainty about the liability for potentially very large sums of money) but it will provide some clarity where there is currently ambiguity;
- c. Whilst some work will be required in order to produce an IFS - on the basis that there is already a R123 list in place - there is no reason (as we see it) why the ‘infrastructure list’ should not mirror the adopted R123 list.

For developers asked for both CIL and s.106 contributions, the relevant authority should be required to demonstrate how the s.106 meets the Regulation 122 tests. This is now routine in planning appeals where local planning authorities are regularly asked to produce CIL compliance statements to justify contributions which are being sought. It may well be difficult to show that a s.106 payment meets the Regulation 122 tests if CIL could potentially fund the same piece of infrastructure.

A further idea that has gained some traction is to enter into a s.106 agreement which includes a recoupment provision without a time limit. If the local authority spend CIL monies on the particular infrastructure at any future point in time then the developer can ask for their money back or at least the proportion that is not spent, whatever the internal accounting issues might be for the LPA. In reality we doubt that this would help since the funds are more likely to go into a big pot (pay for ‘schools’ or a bypass) and one could never identify that the money was being paid other than as a component of a wider picture. Similarly, it depends upon a bilateral planning obligation, which is not always possible – especially in the context of an appeal.

It is entirely conceivable that the Government's intention was to remove the restrictions on double-dipping and consign R123 lists to the annals of (very) specialist legal history. It is equally conceivable that the full reach of the legislative amendments was not thought from. On either basis, we beg to differ with the Lord Protector: necessity doth have many laws.

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