

S106 vs S278 vs CIL- your approach

Why is it important?

The new Regulations have adjusted how council's need to plan for, and implement, the use of CIL alongside S106. This has an impact on: viability evidence, Infrastructure evidence, and Regulation 123 list. So pretty much everything required to pass a successful CIL examination!

A reminder - Planning Obligations, S278 Highways Act and Reg 122 & 123 CIL

As a reminder, **S106 Planning Obligation** are obligations secured pursuant to Section 106 of the Town and Country Planning Act 1990. They are entered into as legal agreements between local planning authorities, landowners, developers and potentially other affected third parties. They can impose financial and non-financial obligations on a person or persons with an interest in the land and become binding on that parcel of land. Planning obligations are used to make acceptable development which would otherwise be unacceptable in planning.

A **278 agreement** (of the Highways Act 1980) is:

- an agreement between the Council and developer which describes proposed modifications to the existing highway network to facilitate or service a proposed development
- typically the scope of any off site works that are required to mitigate the impact of the development on the existing road network
- examples of works covered by this type of agreement could include:
 - roundabouts,
 - signalised junctions,
 - right turn lanes,
 - safety related works such as traffic calming,
 - street lighting,
 - improved facilities for pedestrians and cyclist.

CIL Regulation 122 changes the use of planning obligations, introducing the three legal test. This has not changed with the amended regulations.

Regulation 123 has been adjusted (Feb 2014) ([CIL Reg 123 Feb 14 update](#)) to encompass agreements under section 278 of the Highways Act. In summary it states that:

- Granting planning permission cannot be dependent on a S106 or S278 for infrastructure on Reg. 123 list
- Authorities cannot pool from more than five separate S106 planning obligations
- Limitations on pooling for infrastructure begins from all obligations collected since 6th April 2010
- There is no limitation on pooling for S278 agreements.

There is much discussion about the definition of a planning obligation with respect to the pooling restrictions. For example, if an authority has already entered into more than 5 obligations for education, can it then enter into

another obligation for a specific school? DCLG have clarified their view that this was within the rules and that the regulations were designed to stop double charging rather than restrict a council's ability to deliver the infrastructure that is needed.

	Regulation 122	Regulation 123
Timing	From April 2010	From adoption of charging schedule or 6 th April 2015 whichever is earlier
Impact	<p>Introduction of three legal tests</p> <p>(a) Necessary to make the development acceptable in planning terms;</p> <p>(b) Directly related to the development ;and</p> <p>(c) Fairly and reasonably related in scale and kind to the development.</p>	<p>Granting planning permission cannot be dependent on a S106 or S278 for infrastructure on reg 123 list</p> <p>Cannot pool from more than five separate S106 planning obligations</p> <p>Limitations on pooling for infrastructure begins from 6th April 2010</p> <p>No limitation on pooling for S278 agreements</p>

What does the new S106, s 278 – CIL changes mean for you?

From April 2015 you will only be able to pool S106 on a very limited basis. If a CIL is not in place your council is at risk of significantly reducing income from developer contributions.

S106, S278 and CIL Decisions

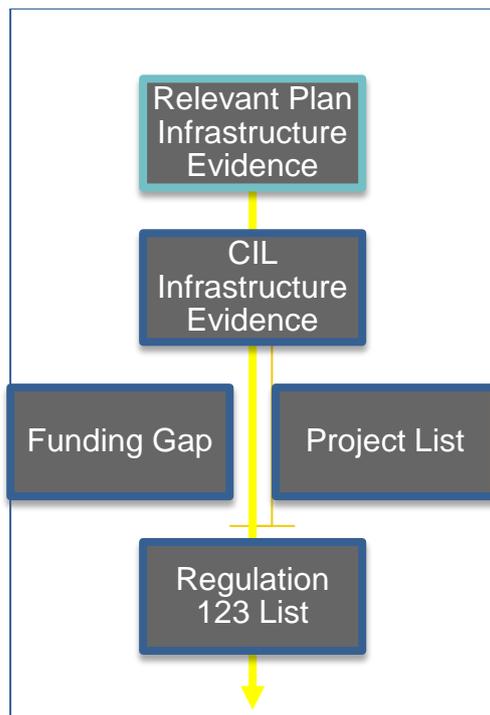
Looking at the practicalities the regulations require you to consider when you will use s106 and CIL in the future.

Some authorities have found it helpful to develop a [decision tree](#) as a planning tool. This is not something they use to assess planning applications but rather they use it during the CIL evidence gathering process.

Running through a methodical process allows local authorities to consider what S106 requirements may remain, which will inform:

- a) Viability evidence assumptions, especially for strategic sites
- b) Analysis of CIL income against income from other sources, include s106.

If you understand which mechanism you will use to deliver infrastructure on each of your sites you can generate a regulation 123 list.



Developing an Approach to s106 vs s278 vs CIL

So, there are a number of steps you will need to take to plan for CIL implementation, with respect to S106.

1. Review existing planning permissions, S106/S278 agreements to see if you have exceeded the pooling limits.
2. Have discussions with development management colleagues explore how S106 currently operates and how it could be used in the future (post CIL adoption).
3. Have discussions with developers to explore how S106 could be used in the future, particularly for strategic sites that may have significant on-site infrastructure requirements.
4. Have discussions with County (two-tier authorities) discuss how S106 could be used in the future. This will be vital for education and infrastructure provision where the practice has been to pool S106.
5. Consider how you can use the new infrastructure in lieu and phased payment provisions.

S106 vs S278 vs CIL - Local Authority examples

Wycombe have created suite of documents to support Reg 123 list:

<http://www.wycombe.gov.uk/council-services/planning-and-buildings/planning-policy/community-infrastructure-levy/spending.aspx>

- CIL and planning obligations funding decision protocol – Sets out process and protocol for allocating CIL funding
- CIL spending programme – Sets out projects set to receive CIL in this financial year
- Section 106 developer contributions spending programme – Sets out amounts and project allocations over two year period

- CIL funding available – Sets our indicative amounts and infrastructure type allocations for next financial year.

Shropshire have highly detailed reg.123 list which list individual projects - 18 place plans that prioritise the infrastructure needs at a local level:

[https://shropshire.gov.uk/planning-policy/what-is-the-community-infrastructure-levy-\(cil\)/distributing-the-levy/](https://shropshire.gov.uk/planning-policy/what-is-the-community-infrastructure-levy-(cil)/distributing-the-levy/)

TIPS for approach to delivery -CIL Reg. 123 list, s 106 or s 278

1. Methodically go through each site and determine whether you will use CIL, S106 or S278 to deliver the infrastructure (or a combination)
2. Use your understanding of the three legal tests and pooling restrictions to pick the appropriate mechanism
3. If CIL is going to be used for everything then the reg 123 list will be generic
4. If S106/S278 is going to be used for everything then the reg 123 will be very short!

You will need to be able to explain your approach as part of your CIL story at examination.