

Land North of Droitwich Appeal (December 2022)

Background

Land north of Droitwich is a non-allocated site (windfall) subject to a planning application for 102 dwellings. The site was refused planning permission at Wychavon Planning Committee and is the subject of an appeal.

This note is solely concerned with developer contributions for education for which Worcestershire Children First and Worcestershire County Council has a statutory responsibility.

The County Council as Local Education Authority has a duty to ensure sufficiency of school places. Its policy is to seek Section 106 (S106) contributions where the pupil yield of a development is such that there are insufficient existing school places in local schools to accommodate the additional pupils expected as a result of the new housing. The S106 money is used to provide capital improvements (e.g. a new school, expansion of existing schools, or core education facilities like sports pitches) to create the additional provision to accommodate the additional pupils. The local catchment area schools would require additional facilities to meet the needs generated by this development. If the funding is not provided, then the new facilities cannot be provided, and this will mean that children will have to be bussed out of the local area. This will be undesirable for the children concerned and will in itself have a cost impact on the County Council's budget. The Council cannot simply divert capital resources from elsewhere in the County. The County Council's capital programme is fully committed and cannot be expanded as borrowing more money creates additional costs. The need to expand Education facilities carries 'great weight' in decisions ([para.95\(a\) NPPF](#)), and a failure to make suitable provision by way of the S106 contribution should be accorded great weight in this case.

It must be emphasised, from the outset, that there is no intention, on the part of the County Council or the District Council, to "double dip" (i.e. to receive Community Infrastructure Levy (CIL) and S106 monies that total more than the required contributions from this development). Although local authorities can now combine S106/CIL funds to deliver infrastructure through the 2019 CIL Regulations.

Developer Contributions

Malvern Hills and Wychavon District Councils and Worcester City Council adopted a Community Infrastructure charging levy in June 2017, while Worcester City adopted theirs in September 2017.

The adopted Development Plan (February 2016) includes Policy SWDP 62 (p.271):

"A. Planning obligations through Section 106 agreements will continue to be sought to provide funding to mitigate negative impacts relating to specific developments. A Developer Contributions SPD will be produced to provide detailed guidance to be used in conjunction with the Community Infrastructure Levy charging schedule...."

At the time, restrictions on pooling more than 5 planning obligations were in place, which have now been removed. The Policy makes clear that S106 will continue to have a role, indeed an increased and complementary role.

The CIL 123 list which was published at the time of the adoption of the Levy (Appendix A1 - South Worcestershire Council's CIL Regulation 123 List), included the following details for education:

*“Types of infrastructure that may be funded, in whole, or in part by CIL
Education facilities: The provision, expansion, improvement, or replacement of new and existing state education facilities. This excludes those items of infrastructure stated as to be provided through Section 106 obligations”*

This was qualified by the following statement:

“Appendix A1 above, the Regulation 123 list, sets out the types of infrastructure that the SWC including Worcestershire County Council intends could be, wholly or partly funded by CIL. The inclusion of an infrastructure type on the list does not signify a commitment from any council to fund (either in whole or part) the listed project or type of infrastructure. The list order above does not imply any preference or priority.” (emphasis added)

Appendix A2 Regulation 123 List accompaniment

As part of the education facilities list the following is included:

“Other cumulative impacts of development on nursery provision, school age provision and special education facilities.”

The appellant contends that education contributions from their site “Land North of Droitwich” should be addressed as part of their CIL contribution because, although CIL regulations were amended in 2019, Wychavon DC have not formally withdrawn or rescinded their CIL 123 list, and it remains their published and adopted position. They assert that, because of the wording of the CIL 123 list, their site falls within the appendix A2 category above of *“Other cumulative impacts of development on nursery provision, school age provision and special education facilities”*

However, the CIL amendments in 2019 withdraw the requirement for a CIL 123 list, and instead required the collecting authorities to publish an annual Infrastructure Funding Statement (“IFS”) comprising in particular a statement of the infrastructure projects or types of infrastructure which the charging authority intends will be, or may be, wholly or partly funded ... (“the infrastructure list”);” (Regulation 121A). Wychavon DC have published such IFS as set out below but without a list of infrastructure requirements or spending proposals.

It was never intended that CIL would fund all of the infrastructure needs of Wychavon District (or those of the two other South Worcestershire authorities). This is plain from the Report on the Examination of the Community Infrastructure Levy Draft Charging Schedules for Malvern Hills District Council, Worcester City Council and Wychavon District Council dated 27th January 2017 (Inspector Clews):

“12. The key categories of infrastructure to which the Councils propose to direct CIL revenue are transport, education, and sport and recreation. Projected expenditure on these categories amounts to a total of some £399.4 million across the three Council areas. I am satisfied that the evidence shows that figure to be based on sound sources.

13. That figure includes infrastructure costs to support residential development on the strategic sites allocated in the SWDP and identified in the modified DCS. A significant proportion of those costs are expected to be met by the site promoters. The effect of this on development viability is considered further below.

14. Of the total requirement of £399.4 million, other funding obtained or identified for the key items of infrastructure amounts to some £191.9 million, leaving a key infrastructure funding gap of around £205.45 million. The Councils estimate that some £5.8 million would be raised through CIL in the period to 2030. That would make a small but appreciable contribution to filling

the infrastructure funding gap. The figures therefore demonstrate the need to levy CIL.

...

24. ... the residential CIL rate of £40/sqm applies only to development outside the main urban areas of Droitwich, Evesham, Malvern, Pershore, Tenbury Wells, Upton-upon-Severn and Worcester, and outside the strategic sites.

...

40. ... Subject to the modifications which I am recommending, the Councils' approach is realistic in achieving a reasonable level of income to address an acknowledged gap in infrastructure funding, while ensuring that development remains generally viable across the south Worcestershire area."

Further the CIL 123 list was developed to support the 2016 South Worcestershire Development Plan (SWDP), and the associated 2016 Infrastructure Delivery Plan. The SWDP is currently over 5 years old and is currently subject to review, with the revised plan proposed to be submitted to the Secretary of State for examination in 2023. The last update to the Infrastructure Delivery Plan was in 2016, this is also dated, and is no longer reflective of the infrastructure requirements or costs. Regardless of its validity, the CIL 123 list is therefore based on out-of-date documents and cannot be considered to be reflective of the current needs of South Worcestershire. Moreover, and importantly, reference must by law now be made to the IFS.

Worcestershire County Council Considerations

Education Planning Obligations Policy Worcestershire

The County's Education Planning Obligations Policy document was adopted in 2019 with updates in 2020, following public consultation which included the local planning authorities. It sets out the approach which the County Council will take to assessing the impact of development on education infrastructure. Within the Education Planning Obligations Policy the County Council state that they will use both S106 and CIL to mitigate the impact of development on education infrastructure.

Education Infrastructure and CIL

Paragraph 2.3 of the Education Planning Obligations Policy, states that "When the funding becomes available from the Community Infrastructure Levy, Worcestershire County Council will bid for projects to support education infrastructure as required."

As of 31/12/2022, the County Council have not been in receipt of CIL funding from any of the three South Worcestershire Councils. This is recorded in the published County Council Infrastructure Funding Statement 2021/22:

"WCC did not receive any CIL funding from these district councils [Malvern Hills, Worcester City or Wychavon] for the financial year 2021/22. CIL funding is therefore not included in this report and the associated data."

This statement was repeated in the previous 2020/21 and 2019/2020 County Council Infrastructure Funding Statement.

Further, Wychavon District Council included the following information in their 2021/22 Infrastructure Funding Statement setting out their intention to identify projects for CIL spend in early 2023 and confirm an internal governance process.

“The 2020/21 IFS included a statement to the effect that any identification of infrastructure projects for CIL monies was dependent on the accumulation of CIL reserves to a minimum of £500,000. Although this sum has now been exceeded the three Councils have been unable to confirm specific infrastructure projects to be supported by CIL during this monitoring year. However, there is an undertaking that projects will go through the internal governance process early in 2023 and the identified projects for CIL spending will be published as an addendum to this IFS as soon as is practicable.”

The total CIL collected in South Worcestershire 2017- 2022 is £3,604,600, significantly over the threshold set by South Worcestershire Councils themselves for this allocation of funding.

It is also of note that in the 2020/21 Infrastructure Funding Statement, Wychavon DC also stated that projects would be identified for CIL spend in early 2022 and an addendum to the IFS published. In 2019/20 Wychavon DC published the following in their initial Infrastructure Funding Statement:

“It is the council’s intention to identify and priorities CIL infrastructure spend and projects in 2021. This will be recorded in next year’s IFS.”

The Wychavon DC website as of 3rd January 2023 also reiterates this position and appears to qualify the status of the CIL 123 list by stating that it will be replaced by the Infrastructure Funding Statements.

[“The Community Infrastructure Levy \(Amendment\) \(England\) \(No. 2\) Regulations 2019](#) came into force on 1 September 2019. Under these regulations, Infrastructure Funding Statements (IFS) will replace CIL Regulation 123 Lists as the mechanism through which projects are identified for CIL funding.

The IFS will be published annually and provide a summary of all financial and non-financial developer contributions relating to S106s and CIL within the district.

For the 2021/22 IFS a statement will be provided of infrastructure projects in Wychavon District Council intends to, or may be, wholly or partly funded by CIL. It will also set out the CIL spending protocol setting out the process that the council will undertake for allocating CIL receipt”

Given that this position has remained the same through several years of Infrastructure Funding Statements, it is not certain when Wychavon DC/ South Worcestershire Councils will implement a process to allocate CIL funding. This process may be deferred further.

The County Council (and the Inspector) can also have no certainty that the proposed internal governance process will include education infrastructure. There will be a range of needs and factors for the South Worcestershire Districts to consider. As is set out in the Regulation 123 list (appendix A1) qualifying statement there is no commitment to fund any of the infrastructure types on the list. In the absence of any funding criteria or allocation process, County Council (and the Inspector) cannot conclude that the County Council will receive any funding from CIL for education infrastructure from this site or any others in South Worcestershire.

- **NPPG – Section 25 – CIL**

This provides several elements of guidance indicating that S106 is a suitable means of funding infrastructure, notwithstanding the existence of CIL. For example, (emphasis added) that:

“How does the Community Infrastructure Levy relate to other developer contributions?”

Developers may be asked to provide contributions for infrastructure in several ways.

This may be by way of the Community Infrastructure Levy, planning obligations in the form of section 106 agreements (see [National Planning Policy Guidance on planning obligations](#)), and section 278 highway agreements (under section 278 of the Highways Act 1980 as amended). Developers will also have to comply with any conditions attached to their planning permission (see [National Planning Policy Guidance on planning conditions](#)).

Local authorities should ensure that the combined total impact of such requests does not undermine the deliverability of the plan (see [paragraph 34](#) of the National Planning Policy Framework for details).

Where the levy is in place for an area, charging authorities should work proactively with developers to ensure they are clear about the authorities’ infrastructure needs.

Authorities can choose to pool funding from different routes to fund the same infrastructure provided that authorities set out in their infrastructure funding statements which infrastructure they expect to fund through the levy.

Paragraph: 166 Reference ID: 25-166-20190901

Revision date: 01 09 2019

When should planning obligations be sought?

The levy is not intended to make individual planning applications acceptable in planning terms. As a result, some site-specific impact mitigation may still be necessary for a development to be granted planning permission. Some of these needs may be provided for through the levy but others may not, particularly if they are very local in their impact. There is still a legitimate role for development specific planning obligations, even where the levy is charged, to enable a local planning authority to be confident that the specific consequences of a particular development can be mitigated.

For more information on when planning obligations should be sought see the guidance on [planning obligations](#).

Paragraph: 167 Reference ID: 25-167-20190901

...

How can planning obligations and the levy operate together to fund and deliver infrastructure?

The levy delivers additional funding for charging authorities to carry out a wide range of infrastructure projects that support growth and benefit the local community. It cannot be expected to pay for all the infrastructure required, but it is expected to make a significant contribution.

Charging authorities should work proactively with developers to ensure they are clear about the authorities' infrastructure needs and what developers will be expected to pay for through which route.

Authorities can choose to use funding from different routes to fund the same infrastructure. Authorities should set out in infrastructure funding statements which infrastructure they expect to fund through the levy and through planning obligations (see [regulation 121A](#)).

For example, a local authority may set out in their plan that they will use section 106 planning obligations to deliver a new school to serve additional pupils arising as a result of a new development on a strategic site. The local authority may also use levy funds to deliver the school and help support development elsewhere in the area.

Paragraph: 169 Reference ID: 25-169-20190901

Revision date: 01 09 2019

Is there a limit on the pooling of section 106 contributions?

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](#)).

Paragraph: 170 Reference ID: 25-170-20190901

Revision date: 01 09 2019"

Thus, the existence of CIL does not per se mean that an individual planning application is acceptable in planning terms (see PPG paragraph 25-167 above).

Education Mitigation from Land North of Droitwich

With regard to the proposed development W/22/00201/OUT Land north of Droitwich, the need for specific education provision mitigation is required. As discussed at the appeal on 21/12/2022, colleagues from Worcestershire Children First Education Sufficiency and Place Planning Team have identified that this development proposal will result in the need for specific mitigation of school places for Years groups Reception to Year 4 and Years 8 to 13.

The primary pupil yield generated by the proposed development will equate to thirty-five (35) primary aged pupils, an average of five (5) pupils per year group (Reception to Year six (6)). The Secondary pupil yield generated by the proposed development will equate to twenty (20) secondary aged pupils, which breaks down to an average of four (4) pupils per year group. For developments over the gross amount of fifty (50) dwellings, Specialist Educational Provision (SEND) contributions will be sought.

Based on the assessment of the capacity of the schools related to this development by reference to the number of pupils on roll in the largest year group(s) against the published admission number in place for the most recent September intake there are insufficient places to accommodate the additional children likely to be generated by the development, whilst still maintaining an operational surplus.

On wider assessment of the Droitwich Spa area, there are insufficient places to accommodate any additional pupils in Reception to Year 4 based on the existing known pre-school age children living in Droitwich due to start school over the next three years (2023 – 2025). There is, therefore, no spare capacity within the area for movement of pupils to other local schools.

The section 106 First School contribution sought from Land North of Droitwich is £451,550:

(Number of Liable Dwellings X Pupil Product multiplier for Primary X Number of Year Groups X Percentage of Children without an Education and Health Care Plan (EHCP)) (Rounded up to the nearest integer) X Cost Per Primary Pupil Place

$$(N \times 0.05 \times 5 \times 0.97) \text{ (rounded up to a whole number)} \times \text{£}18,062$$

$$102 \times 0.05 = 5.1 \times 5 = 25.5 \times 0.97 = 24.735 = 25 \times \text{£}18,062 = \text{£}451,550$$

The Section 106 Secondary School contribution sought from Land North of Droitwich is £499,260:

$$(N \times 0.04 \times 5 \times 0.97) \text{ (rounded up to a whole number)} \times \text{£}24,963$$

$$102 \times 0.04 = 4.08 \times 5 = 20.4 \times 0.97 = 19.788 = 20 \times \text{£}24,963 = \text{£}499,260$$

The Section 106 SEND Provision contribution sought from Land North of Droitwich is £172,100:

Primary: (Number of Liable Dwellings X Pupil Product multiplier for Primary X Number of Year Groups X Percentage of Children with an Education and Health Care Plan (EHCP)) (Rounded to the nearest integer) X Cost Per Primary Pupil Place X Four

$$(102 \text{ Dwellings} \times 0.05 \times 7 \times 0.03 = 1.071 \text{ (rounded to the nearest integer)}) = 1 \times \text{£}18,062 \times 4 = \text{£}72,248$$

*Secondary: (Number of Liable Dwellings X Pupil Product multiplier for Secondary X Number of Year Groups X Percentage of Children with an Education and Health Care Plan (EHCP)) (Rounded to the nearest integer) X Cost Per Secondary Pupil Place X Four
(102 Dwellings X 0.04 X 6 X 0.03 = 0.7344 (rounded to the nearest integer) = 1 X £24,963 X 4 = £99,852*

The Total education infrastructure contribution required: One million, one hundred and twenty-two thousand, nine hundred and ten pounds (£1,122,910).

The contribution rate is applicable from 1st April 2020 to 31st March 2023. If a planning decision is not reached within the current financial year, it may be necessary to review the level of charges

CIL in South Worcestershire was set at a “cautious” level, and in total predicted to result in an income of circa £6 million during the SWDP plan period. This figure includes the allocation for CIL administration and the percentage for parish and neighbourhood council (15% - 25%). Hence, the sum available to fund projects is reduced by a minimum of 15%.

The total CIL income from Land North of Droitwich is still to be confirmed, as is charged on a per square metre basis which will be confirmed at reserved matters. However, based on a calculation using the size of an average three bedroomed house, the charge will be around £1million gross. However, from this figure the 5% administration will be deducted, plus the neighbourhood proportion (15%) as the site is outside of an adopted neighbourhood plan.

With reference to the contributions outlined in the WDC “Delegated Officer Report” for this planning application (22/00201) contributions are also proposed for off-site sports and leisure facilities (£297 000) and a contribution towards off-site primary healthcare (£38 640). As with the proposed education contribution, the “Delegated Officers Report” makes no reference to these contributions being from CIL, and they are assumed to be from S106. However, under the current wording of the CIL 123 list both of these could be considered to fall within the projects listed in Appendix A1:

- Strategic provision of built leisure and other sports facilities
- Strategic provision of health facilities and related infrastructure to support development growth, carried out in consultation with the Clinical Commissioning Group for South Worcestershire

Notwithstanding the absence on information in CIL spend and process in South Worcestershire it is clear from the above that CIL collected from this site alone would be insufficient to offset the costs of meeting the education needs arising with a resulting funding gap. It was also acknowledged at the CIL examination by the Inspector that even with CIL there would still be a funding gap with CIL making only a small contribution to the education infrastructure needs of South Worcestershire.

Alternative Sources of Funding for Education Infrastructure.

Provision of education places is a statutory responsibility for the County Council. The Department for Education is wholly supportive of funding being sought from developers to off-set the costs of additional provision arising as a result of development. In April 2019, the Department for Education (DFE) issued non-statutory guidance on securing developer contributions for education¹. The guidance has been produced to help local authorities

¹ [Securing developer contributions for education \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

secure appropriate developer contributions for education so that new development can appropriately mitigate the cost of providing the new school places required from housing growth. This guidance has helped shape the approach Worcestershire County Council will take in assessing the impact of new housing developments on education provision and calculating the appropriate mitigation via conditions and planning obligations, as set out in Worcestershire Education Obligations policy document.

The Department for Education are clear that central government basic need grant, the DfE free schools programme and other capital funding do not negate housing developers' responsibility to mitigate the impact of their development on education.

If funding is not secured from the development, schools will be unable to accommodate new pupils generated by new housing, impacting on the ability of new and established communities to access education places, raising concerns over the viability and sustainability of such developments. Developers are therefore required to mitigate the cost of the additional need for places. The County Council education capital funds are fully committed and cannot be expanded as borrowing more money creates additional costs. The County Council has significant pressures on revenue and capital funding which has previously required borrowing and impacts the Council's revenue budgets.

If the County Council cannot secure the funding for the increase in the number of school places required as a result of this proposed development, the impact will be increased through Education Transport costs for pupils unable to secure a school place in their local catchment schools needing transporting to other surrounding education areas including Wyre Forest and Wychavon. Closer areas such as Bromsgrove and Worcester City already have sufficiency issues for school places.

As per the Worcestershire Education Obligations Policy, where it can be demonstrated that the related schools do not have sufficient capacity to absorb the additional demand, then the development cannot be considered acceptable unless appropriate mitigation is put in place. The County Council do not consider transport of pupils outside of their Education Planning Area an appropriate mitigation as a result of this proposed development.

Funding from Section 106 and CIL

The developer has expressed concerns that County Council could "double dip" to offset the education infrastructure required from this development by securing S106 contributions and subsequently securing CIL funding. This was a wide concern at the time of CIL being enacted and was initially expressly prohibited by the regulations. The County Council propose a draft clause for any S106 agreement to ensure that "double dipping" will not occur for this development.

Suggested wording:

"If the County Council receives any Community Infrastructure Levy funding towards the Education Purposes [as defined] it will reduce the Education Contribution by the same amount; or if the Education Contribution has been received by the County Council, it will reimburse the difference to the Owners within 6 months of receipt of the Community Infrastructure Levy funding."

Conclusion

Whilst Policy SWDP 62 refers to a future SPD and that SPD refers to the Charging Schedule which in effect sets out that CIL could be a mechanism through which to fund education places under specific scenarios; and the IFS continues to refer to the Charging Schedule,

- (a) the IFS is only a statement of intention, it does not prescribe the mechanism to be used;
- (b) the Education Planning Obligations Policy is a material planning consideration: it reflects the 2019 amendments and envisages that the use of either or both mechanisms may be appropriate. (Although it does say (para 2.3): “Worcestershire County Council will bid for projects to support education infrastructure as required”, it also says (para 2.5): “Section 106 obligations will still be collected for the South Worcestershire Councils where specific mitigation is required”);
- (c) no CIL has in fact been received by WCC towards educational infrastructure
- (d) crucially the facts are that
 - (i) the WDC Charging Schedule Inspector acknowledged that CIL could not provide for all (indeed most) infrastructure;
 - (ii) here CIL would not meet the infrastructure impacts/requirements of the proposed development, so would not be sufficient to make the development acceptable in planning terms.
- (e) Regulation 123 lists have been revoked through the 2019 CIL Regulations. Infrastructure Funding Statements (IFS) have replaced the CIL Regulation 123 list as the mechanism through which projects are to be identified for CIL funding.

It was not until late in the appeal process that this issue arose; and it appeared at first to relate to the appropriateness of the formula used in the calculation of the S106 contribution (see, for example, WCC’s response – Appendix 3g (Relevant Documents)). It appears to be a late forensic point and a speculative effort to avoid a contribution that is evidence-based and was in principle supported by the appellant in both its initial Planning Statement and the Planning Statement of Common Ground.

It would be wholly contrary to the public interest for the education contribution not to be paid in full. There is, moreover, no suggestion (let alone evidence) that this would render the development not viable.

The need for Education facilities is a matter of ‘great weight’ in the decision making process (para.95 NPPF). If the contribution will not be given and secured by S106, the appeal should be dismissed because the development would not be acceptable in planning terms.

Relevant documents:

[2022 11 30 WCC Annual IFS 2021 22 Final V2 \(1\).pdf](#)

[Appendix 3c Education Revised Assessment.pdf \(wychavon.gov.uk\)](#) (The need for the Education contribution is explained in this document)

[Appendix 3d Education Guidance 2020 \(Wychavon.gov.uk\)](#)

[Appendix 3f Appellant Education Queries 29.11.22.pdf \(wychavon.gov.uk\)](#)

[Appendix 3g Education Response to Appellant Queries 14.12.22.pdf \(wychavon.gov.uk\)](#)

[Community Infrastructure Levy - Wychavon District Council](#)

[Delegated Officers report \(Wychavon.gov.uk\)](#)

[South-Worcestershire-CIL-Examiners-Report-Final.pdf \(swdevelopmentplan.org\)](#)

[SWDP Infrastructure Delivery Plan](#)

[Wychavon Infrastructure Funding Statement 2022.pdf](#)