

## **COMMUNITY INFRASTRUCTURE LEVY**

### **Statutory basis of the Community Infrastructure Levy**

The statutory basis for the Community Infrastructure Levy (CIL) is contained in Part 11 of the Planning Act 2008. As the Bill progressed through Parliament the clauses relating to CIL were heavily criticised by members of both Houses as lacking sufficient detail to enable proper consideration and debate. In an effort to address this criticism the Government published, in January 2008, a report summarising its CIL proposals. In August 2008, the Government published a further report up-dating its earlier document and setting out further details in relation to the proposed working of CIL. Finally, in July 2009, the Government published a consultation document and a set of draft regulations in respect of CIL. It is intended that these regulations will come into force on 6 April 2010.

This Note provides a summary of the intended working of CIL, and is based on a consideration of Part 11 of the Planning Act 2008 and the draft regulations which have been published.

### **The drivers for change**

There have been a number of factors which have influenced the Government's desire to move from the existing system of individually negotiated s106 agreements to a developer contribution system. These include:

- a dissatisfaction among developers with the s106 demands of local authorities, the opaqueness of the quantification of planning gain payments and the time taken to negotiate agreements;
- in recent years (before the credit crunch) a booming economy especially in the house building sector, and a perception in Government that not all developers were paying their fair share, and that some were not paying at all; and
- a heightened interest on the part of the Treasury in the operation of the planning system and, in particular, their desire to capture an increasing revenue stream from the development industry.

These concerns led to a search (driven by the Treasury) for an alternative to the existing system of s106 agreements. Several different forms of charging, based on a system of developers contributions, were explored, and eventually abandoned (including the optional planning charge and planning gain supplement), before the Government alighted on and pursued the Community Infrastructure Levy.

### **CIL – what is it?**

CIL is a new financial charge which LPA's will be entitled (but not obliged) to charge on development taking place in their area. The money raised is to be spent on local infrastructure and sub-regional infrastructure i.e. infrastructure serving the area of more than one local authority e.g. a large transport project, or hospital.

Where the LPA elects to charge CIL they will be able to enter into ‘scaled back’ s106 agreements alongside their CIL charging.

### **Defining infrastructure**

Infrastructure is not exhaustively defined in the Planning Act 2008. Instead it is defined to ‘include’ a number of items. The items on the list are:

- roads and other transport facilities;
- flood defences;
- schools and other educational facilities;
- medical facilities;
- sporting and recreational facilities;
- open spaces; and
- affordable housing

The draft regulations provide for all of these items to be included within the definition of infrastructure, except for affordable housing which, at least initially, is not to be dealt with through the CIL system. Instead affordable housing is to be left to be dealt with in individually negotiated (but ‘scaled back’) s106 agreements.

Regulations may add to, vary or remove items from this list and specifically exclude particular matters.

Since there is no exhaustive definition of infrastructure it follows that it will fall to each individual LPA to determine what is to be infrastructure in its particular area. The Government have indicated that this is a deliberate decision in order to maintain ‘flexibility.’

### **Charging authorities**

The authorities who will be entitled to charge CIL will be LPA’s (including National Park Authorities and the Broads Authority) and the London Mayor (but only in respect of road and transport projects, including Crossrail).

The following will not be charging authorities: the Secretary of State, County Councils (except where unitary authorities), regional planning bodies, regional development agencies, the Infrastructure Planning Commission, the Homes and Communities Agency and UDC’s.

### **Six prerequisites to making a CIL payment**

While the CIL regulations are expected to come into force on 6 April 2010, it does not follow that CIL charging will automatically arise at that date. The reality is that at that point CIL charging will still be some years away. This is because before an obligation to pay CIL can arise there are a number of steps which need to be undertaken, and conditions which need to be satisfied, before any landowner or developer will be required to make a CIL payment. These various steps and conditions are:

- the existence of an up to date development plan;
- the carrying out of satisfactory infrastructure planning;
- the creation and approval of a charging schedule;

- the grant of a planning permission, other permission or consent;
- ...which is for specified development; and
- a commencement of development.

### **Up to date development plan**

The Planning Act 2008 and the draft regulations say little about this particular pre-requisite to CIL charging, other than that the overall purpose of CIL is to ensure that the costs incurred in providing infrastructure to support the development of an area can be funded (wholly or partly) by owners or developers of land, and that CIL is to be applied to funding the infrastructure to support the development of its area. All of this implies some pre-existing plan which will identify specific projects, or more generally types of infrastructure, which will be required to support the development of an area.

This is dealt with in more detail in the Government's July/August 2009 consultation document. It is clear from this document that CIL will be inextricably linked to the development plan making system. This consultation document indicates that guidance will be issued providing that charging authorities should only implement CIL where there is an up to date development strategy for the area and that this will mean an adopted (or draft) core strategy or the spatial development strategy (in the case of the London Mayor). It will be for the LPA to determine whether the adopted plan is sufficiently up to date. If the LPA are not satisfied that their development plan is up to date then they will need to prepare a new draft core strategy.

### **Satisfactory infrastructure planning**

Once again the Planning Act 2008 and the draft regulations say little about this particular pre-requisite to CIL charging, other than references to an LPA having regard to actual and expected costs of infrastructure and having used appropriate available evidence to inform its draft charging schedule.

As in the case of the development plan the matter is dealt with in more detail in the July 2009 consultation document. This makes it clear that an LPA will need to undertake infrastructure planning consistent with Planning Policy Statement 12 on Local Spatial Planning. This infrastructure planning will need to include identifying the infrastructure needs of the area; calculating the cost of such infrastructure; identifying the likely phasing of development; establishing responsibilities for delivery; identifying other sources of funding; and establishing the shortfall in funding. This exercise will identify a target amount of funding to be raised. Once again, the LPA are a judge in their own cause and will decide whether infrastructure planning is sufficient. If an LPA is not satisfied, its infrastructure planning is adequate it may undertake a limited and bespoke infrastructure planning exercise to facilitate the preparation of its charging schedule.

### **Charging schedule**

The charging schedule is a document prepared by the LPA setting out rates and formulas for CIL. The Government have indicated that it should be treated as part of the Local Development Framework but it is not legally part of the development plan and is not a local development document. The charging schedule will identify the total target amount intended to be raised from CIL.

In setting CIL, an LPA needs to have regard to its infrastructure planning exercise but must also have regard to the potential effects of the imposition of CIL on the economic viability of development in its area. In the case of a London Borough this is expressed to include considering any CIL rates set by the London Mayor. Otherwise in respect of all authorities this will include having regard to other costs placed on developers by e.g. affordable housing requirements which may be imposed under a separate 'scaled back' s106 agreement. It follows that the crude shortfall in funding identified by the infrastructure planning exercise will need to be tempered by an assessment of land values across the LPA's area and by other imposed costs. The Government is anxious that the target level of CIL will be an optimum level which supports development and LPAs' are urged to avoiding setting CIL at a high level, at the margins of economic viability.

The CIL charge is to be expressed as a cost per square metre of gross internal floor space across all classes of development. There will be no 'net-off' in respect of existing demolished space. The LPA can set differential rates on a geographical area, or by reference to the intended use of development. Where an LPA set differential rates over separate geographical areas they must provide a map identifying the location and boundaries of the different areas.

The levy which is set will be indexed by reference to a construction costs index (to be determined). The period of indexing is to run from the November preceding the year in which the charging schedule takes effect to the November preceding the year in which planning permission is granted. There is no provision for the index to run beyond this date eg. to the date of commencement of development.

The LPA is required to undertake public consultation when preparing its charging schedule; consulting with neighbouring authorities, residents and businesses, voluntary bodies and bodies representing business interests, and take into account representations made before issuing a draft of its charging schedule. The LPA may then publish its charging schedule (notifying the persons and bodies it previously consulted) together with supporting evidence. There is a period of not less than four weeks allowed for representations and objections and a right to be heard before an independent examiner, appointed by the LPA, at a charging schedule examination. The LPA will have the option of a standalone CIL examination (where they are dealing with an adopted development plan) or a joint CIL/development plan examination (where the development plan is only at a draft stage). The examiner may recommend approval of the charging schedule (with or without modifications) or reject the charging schedule.

If the LPA wish to operate a charging schedule it can only approve the schedule in the form recommended by the examiner (and subject to any modifications recommended). It cannot choose to approve the charging schedule ignoring the modifications it does not like. However, if the LPA does not like any changes recommended by the examiner it may choose not to approve the modified charging schedule (and as a consequence not charge CIL). Nevertheless, if it chooses to do so, it may start all over again and resubmit a revised charging schedule to a fresh examination.

The charging schedule will take effect following the passing of a full Council resolution on the date specified in the schedule. Once approved the charging schedule will remain in force indefinitely, but the LPA may resolve to cease charging CIL at any time. The Government encourage LPA's to keep charging schedules under review.

## **Planning permission**

The Planning Act refers to the grant of ‘planning permission..... and any other kind of permission or consent’. The draft regulations define this expression to mean:

- planning permission not in outline (full planning permission);
- outline planning permission;
- planning permission granted under s73 TCPA 1990 (variation of an existing planning permission);
- planning permission granted under s73A TCPA 1990 (a retrospective planning permission);
- planning permission granted on an enforcement notice appeal (under s177 TCPA 1990);
- development consent order granted by the Infrastructure Planning Commission
- deemed planning permission granted under the GPDO (except Part III of Schedule 2 – Changes of Use);
- planning permission granted by a Local Development Order;
- planning permission granted by an SPZ;
- planning permission granted by an enterprise zone scheme;
- planning permission granted under s90 TCPA 1990. This will include planning permissions accompanying Transport and Works Act Orders and consents under s36 Electricity Act 1989; and
- planning permission granted by an Act of Parliament

The ‘permissions’ which are listed include (where appropriate) permissions granted by the LPA and by the Secretary of State on appeal or following a call-in.

However, there is one exclusion from this list. The definition does not include a planning permission granted subject to a condition requiring the removal of any building or works or the discontinuance of any use of land at the end of a specified period.

## **Specified Development**

Not every planning permission will be liable to pay CIL. The new system only bites on specified development. This is defined to mean:

- the creation of a new building; and
- anything done to or in respect of an existing building (which is intended to catch changes of use).

The expression ‘building’ excludes the creation of a building or the carrying out of works to a building into which people do not normally go, or into which people go only intermittently for the purpose of inspecting or maintaining fixed plant or machinery.

## **Exemptions from and reductions in CIL liability**

The following categories of specified development will be exempt from paying CIL:

- development and changes of use of less than 100 square metres of gross internal floor space (although this exception does not apply to the creation of new dwellings i.e. any

new dwelling of less than 100 square metres of gross internal floor space will be caught and pay CIL).

- changes of use permitted by the TCP (Use Classes) Order 1987.
- registered, exempt or excepted charities and charitable institutions using the development wholly or mainly for the charity's charitable purposes; and
- works to an existing dwelling house by a resident home owner (except the creation of a new dwelling).

In addition to the exemptions described above, there are certain reductions in the amount of CIL which may be payable, which will be available at the discretion of the local planning authority. Two such reductions are:

- a reduction in CIL for development which is held by a charity as an investment where profits are applied to charitable purposes; and
- a reduction in CIL for affordable housing development which is provided by charities.

All reliefs need to be claimed before the commencement of development. The draft regulations empower LPA's to claw back CIL monies where changes have occurred so that relief would no longer be available. LPA's will be entitled to go back seven years from the date development commences and there will be an ability to claim or reclaim against successors in title to the original claimant.

### **When is CIL calculated?**

The Planning Act 2008 provides that liability for CIL is to be calculated by reference to the time when planning permission first permits development.

In respect of a planning permission which is not in outline ie. a full planning permission (which will include planning permission granting a change of use) then CIL will be calculated at the date of the grant of the planning permission. However, if the planning permission is subject to a condition requiring the applicant to obtain further approval before development can commence, then development is taken to be first permitted on the day final approval is given.

In the case of outline planning permission where the development is to be undertaken in one phase then CIL is calculated on the grant of the final reserved matter. However, in respect of outline planning permission which provides for applications for the approval of reserved matters within separate periods, for separate parts of the development, then CIL will be calculated on the grant of the final reserved matter for each separate part of the development. In such circumstances each phase will pay its own CIL.

For the permissions and consents which are not granted by LPA's eg. a deemed planning permission under the GPDO then CIL is calculated when the collecting authority receive a notification of chargeable development from the owner/developer. Such a notice must be served before development commences.

## **When is CIL payable?**

A party commencing development must give a commencement notice in respect of intended development to the collecting authority before the commencement of development. The definition of commencement of development follows that set out in s56 TCPA 1990. This is a well understood concept. As a consequence, commencement works need not be very extensive and relatively minor works will be sufficient to trigger a CIL payment. Any owner/developer making a 'protective' commencement of development to keep a planning permission alive will need to be aware that this will in all likelihood trigger a CIL payment (as well as possible s106 obligations). The collection authority will then respond to the commencement notice with a liability notice specifying a 28 day window for the payment of the necessary CIL amount.

However, there are two exceptions to this commencement rule: first, in respect of a planning permission granted under s73A TCPA 1990 (a retrospective planning permission) and secondly, in the case of a planning permission granted under s177(1) TCPA 1990 (following an enforcement notice notice appeal). In each of these instances development is treated as commencing on the day permission is granted (or as the case may) modified.

## **Who is liable to pay CIL?**

Liability can be assumed by a party giving an assumption of liability notice before commencing development. However, if no one assumes liability then this will default to the owner(s) of the land. This expression includes freeholders, and leaseholders who have a term of more than seven years unexpired. Where there is more than one freeholder/leaseholder then the LPA will make an apportionment of liability between the parties according to the value of their respective interests. The owners of the land have a right of appeal against such apportionment to the valuation office agency. Liability for payment will run with the ownership of the land. Assumed liability can be withdrawn before the commencement of development. In addition liability can be transferred, subject to conditions, by submitting a liability transfer notice to the collecting authority prior to the due date for payment.

## **Calculating the CIL payment**

The CIL payment will be a straight multiplier of the CIL 'poundage' taken from the charging schedule (indexed in accordance with the specified construction costs index); multiplied by the gross internal floor space of the CIL development, taken (in most cases) from the face of the planning permission. There is a right of appeal to the valuation office agency on matters of fact concerning this calculation.

## **Collection Authorities**

In most cases, collection authorities will be the same as the charging authority, but in London the London Boroughs will collect on behalf of the London Mayor. County Councils in two tier areas will collect in respect of chargeable development where they granted consent e.g. in respect of waste and minerals. Further, chargeable authorities may appoint the Homes and Communities Agency and UDC's as collection authorities on their behalf.

## **Enforcement**

There is a comprehensive and tough regime for the enforcement of the payment of CIL. The measures provided for include:

- payment of interest at 2.5% above Bank of England base rate;
- several different surcharges where specified notices are not given (the amounts of the surcharges varying from £50 to £2,500);
- a separate surcharge which applies on late payment of CIL monies which can equate to 5% of the amount outstanding. This surcharge is potentially payable on three separate occasions; where payment is outstanding after three months, six months and one year;
- a simple debt action;
- levying distress against goods and selling the same;
- registration as a local land charge with additional powers of sale, and to appoint a receiver;
- the making of a charging order;
- commitment to prison in the case of an individual where distress cannot be levied and a charging order and enforcement under a local land charge are not available;
- a new CIL stop notice requiring development to cease, contravention of which will be a criminal offence; and
- injunctions

## **Spending CIL**

Charging authorities will be under a statutory obligation to apply CIL receipts to funding infrastructure. This includes not only the charging authority itself spending monies on infrastructure, but also permits the charging authority to pass receipts to other infrastructure providers eg. county councils and sub-regional infrastructure providers such as the Environment Agency or a health-care trust, for them to spend on infrastructure.

Under the proposed new system, there will be a number of parties who will be interested in receiving CIL receipts. These might include the following:

- borough/district councils (in respect of open space/recreational facilities);
- county councils (in respect of roads and education);
- The Highways Agency;
- Network Rail;
- Transport for London;
- passenger transport authorities;
- Environment Agency; and
- health-care trusts

All of these bodies will have an interest in a 'pass through' of CIL receipts.

A charging authority must prepare a report each year detailing its total receipts for the financial year; its total expenditure for that year (which must include summary details of the items of infrastructure to which CIL has been applied and the amount of CIL expenditure on each item); and the total amount of CIL receipts retained at the end of the financial year.

## **Scaled back S106 Agreements**

Where an LPA elects to charge CIL it will, in addition, still be able to ask for a s106 agreement. However, the matters which may be included in such an agreement will be constrained by the Government's proposal to convert the existing Planning Obligations circular 05/2005 policy tests (relevant, necessary, directly related, fairly and reasonably related in scale and kind and reasonable in all other respects) into statutory form by incorporating them in the existing s106 TCPA 1990. The purpose of this statutory incorporation is to seek to prevent LPA's double charging for infrastructure.

The Government's intention is that where CIL is being levied s106 requests should be confined to affordable housing and 'on-site' matters including the direct replacement of facilities or amenities caused by the development. Otherwise the list of matters for inclusion in s106 agreements should be closed.

## **Advantages claimed for CIL**

The following advantages are claimed for CIL. First, it is generally fairer because it widens the contribution base, catches the 'free riders' and requires almost all to contribute. Secondly, and more specifically, it is fairer on larger developments which, where they are first in or last out of an area tend to over-pay. Thirdly, it is certain because the charging schedule combined with the planning permission will determine the amount payable reasonably precisely. Fourthly, it is faster because it removes the element of individual negotiation around the quantum of the payment. Finally, it funds sub-regional infrastructure which was more difficult to fund through traditional s106 agreements.

## **Disadvantages of CIL**

The following disadvantages are pointed out in relation to CIL. First, it is inextricably bound up with the development plan system so that there are likely to be delays in setting CIL. Secondly, because of this it lacks flexibility and will be difficult to amend quickly as market conditions change. Thirdly, it is intended to be mandatory with few exceptions. As a consequence those sites which are unable to bear the burden of CIL will not come forward for development. Fourthly, the arrangement breaks the link between development and related infrastructure. There is no opportunity for any direct covenants between the charging authority and the developer, to encourage the timely provision of infrastructure. Instead it is said that CIL is simply a cash collection system which makes insufficient provision for delivering necessary infrastructure.

## **No big bang – and no retrospective effect**

The draft regulations are intended to come into force on 6 April 2010, but the levy will be introduced by charging authorities gradually over a period of several years. Real implementation dates will vary, depending on the speed at which development plan making and infrastructure planning progress and the time taken by LPA's to prepare charging schedules.

There will be no retrospective application of CIL, so that CIL will not be payable under a planning permission which is granted before a CIL charging schedule comes into force. As a consequence, CIL charging is likely still to be some years away.

## **The end of tariffs?**

The Government's stated intention in their consultation document is to close down the tariff system and require all tariffs to migrate across to CIL. The only issue seems to be the period of time which should be allowed for this transition. In the consultation document a period of two years is suggested.

Tariffs have already been experiencing difficulties in the manner in which they have been used. In particular, many have suffered when tested before inspectors, because of their lack of evidence base and the fact that few have been independently tested through the development plan process. As a consequence tariffs are unlikely to continue to operate in their existing form. If they are to be used successfully by LPA's in the future then they will have to adapt, so that they are founded on a proper evidence base and are tested before an independent person through the development plan process. However, as a consequence of this legitimising process they will increasingly resemble CIL, and in some cases will almost be indistinguishable in substance from CIL.

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