BPF Response to MHCLG's consultation on the draft CIL regulations

The British Property Federation

1. The BPF represents the commercial real estate sector. We promote the interests of those with a stake in the UK built environment, and our membership comprises a broad range of owners, managers and developers of real estate as well as those who support them. Their investments help drive the UK's economic success; provide essential infrastructure and create great places where people can live, work and relax.

2. The UK's commercial real estate sector contributes about 5.4% of GDP, and directly employs 1 million people, or 6.8% of the labour force. It provides the nation's built environment and is diversifying from its core investment in the nation's offices, shops, leisure facilities and factories, to support the new economy through investments in logistics, healthcare, student accommodation, infrastructure, residential and increasingly through Build to Rent investment in new housing.

3. We welcome the opportunity to respond to this consultation on the draft CIL regulations. It is right that government continues to strive to improve the functionality and operation of CIL and a key part of this relates to the precise drafting of the regulations themselves to avoid unintended consequences. We note that this consultation in the main focuses on the implications of the legal text itself on government objectives rather than the principles of the reforms themselves. We do however maintain that in many areas, particularly in respect of CIL indexation rates, MHCLG's proposals fail the government's own test of reducing the overall complexity of CIL. Indeed, the tension between the government's desire to increase the market responsiveness of CIL and the aim of reducing complexity is clear to see.

4. As such, we set out a number of comments on the principles of the reforms themselves as well as comments on the implications of the draft legal text. We also provide a number of general comments which broadly focus on how consultation on the draft CIL regulations could be improved for the future.

General Comments

5. Publishing the consultation paper along with a conformed copy of the original regulations showing the proposed changes would have made for a more informed, transparent and even-handed consultation.

6. The draft Amendment Regulations are in many cases framed in terms of individual insertions, omissions or substitutions by reference to the original regulations. For every consultee to have laboriously to ink in the revisions being consulted on to make sense of them imposes unnecessary and unreasonable costs on consultees. This is particularly so since: (a) parliamentary draftsmen must have produced a conformed copy as the basis for their own understanding; (b) civil servants consulting on the changes could not have had a full picture without access to such a document; and (c) whilst the Consultation Paper refers to individual regulations within the draft Amendment Regulations, those draft regulations themselves often introduce amendments and consequential amendments to several of the original regulations as well as setting out new provisions which can only sometimes be read in isolation.

7. Framing most consultation questions as a test of whether or not "the proposed legislative changes include elements that prevent the Government achieving its policy intent' without unambiguously stating what the precise policy intent is and where it is articulated – for example whether (and if so where) in the current or

consultation paper or previous papers – is also considered unhelpful and asymmetric. Consultees should not have to hunt for clues as to what the policy is before answering consultation questions. By way of example, the current Consultation Paper is reasonably clear regarding what the individual amendments are intended to achieve in terms of mechanics. This is different from the policy intent which the mechanical changes are designed to bring about. Publication of draft guidance at the same time as the draft Amendment Regulations would have gone some way to curing this. Similarly, where (often complex) changes or new mathematical provisions are introduced to deal with often complex scenarios, worked examples within guidance would be helpful in enabling consultees to see clearly both the underlying policy intent and how the new provisions are intended to deliver that in practice. Particular examples of where this would be helpful include: indexation where planning permission is amended; and introduction to CIL of differential indices and indexation smoothed over three years.

8. The order of consultation questions is in some cases unhelpful by taking items out of synchronisation with how they appear in the Amendment Regulations and logical order. This is particularly the case with Question 5 which fixes on draft Amendment Regulation 6 (indexation where a planning permission is amended) and Question 6 which fixes on draft Amendment Regulation 5 (indexation of CIL as a generality) despite regulation 5 introducing changes to Original Regulation 40, which are integral to interpreting the meaning of Amendment Regulation 6 – see for example Amendment Regulation 6 where it amends Original Regulation 9 (10). Additionally, there is little logic in consulting on modifications to reliefs (Question 3) before consulting on changes to the charge itself, particularly as reliefs are dealt with in draft Amendment Regulation 7 whereas alterations to the charge appear in draft Amendment Regulations 5 and 6 (Questions 5, 6 and 7).

9. Something has gone awry with the numbering of the draft Amendment Regulations. Figures in parentheses at the beginning of draft Amendment Regulations 1, 3, 4, 5, 6, 7, 8, 9, 10, 15 and 16 are evidently not footnotes yet bear no relationship either to the sub-regulation they are presumably intended to denote or to any of the consultation questions. In addition, sub-regulations within the draft Amendment Regulations are not individually numbered.

10. It is noted that whilst the CIL Regulations themselves were subject to Regulatory Impact Assessment, the Amendment Regulations are not to have an impact assessment as "one is not required for a financial instrument". We would argue that if the regulations are not to be purely mechanical and are in practice to have a financial impact for local authorities, property owners and the development industry, that impact should, in the interests of transparency, be quantified.

11. Draft Amendment Regulation 9 introduces substitute enforcement provisions. They include the apparent removal of a right of appeal yet this is neither explained in the consultation paper nor the subject of a consultation question. An indication of what is intended and how this is intended to be translated by the draft Amendment Regulations is required for transparent consultation.

Question 1: Are there any elements in regulation 3 which will prevent the Government achieving the policy intent?

Ensuring consultation is proportionate

12. It is considered that removing the minimum period for representations is likely either to lead to authorities being overly-cautious as to consultation requirements or to those considering themselves to have had

insufficient time to respond to seek to challenge the process. Both would be counter-productive if the overall intention is to make processes under the regulations robust and capable of delivering speedy results. Retaining statutory minimum periods alongside the obligation to consult would preserve legal certainty consistent with most other consultation processes. We would argue that such a minimum period should reflect the current 4-week requirement under regulation 17(3) for Preliminary Drafts (and the proposed 4-week period for consultation on the revocation of a Charging Schedule under draft regulation 4). This would better serve the overarching policy objective.

13. Further, the range of representative stakeholder bodies currently required to be consulted under regulation 15(5) should be included for the new single stage consultation to ensure that participation is fair and effective.

14. Finally, it should be noted that the NPPF and PPG (2018) require site specific viability of strategic sites contained within strategic plans. The proposed level of CIL will directly impact the viability and delivery of strategic sites and therefore there is a strong argument the process should be aligned with the preparation of the development plan. Consultation requirements should therefore be aligned with Local Plan Regulations 2012 in such circumstances.

Question 2: Are there any elements in regulations 4 and 12 which will prevent the Government achieving the policy intent?

Removing the pooling restriction

15. It is of concern that the Amendment Regulations would enable local authorities to levy CIL, negotiate item specific Section 106 Planning Obligations and seek pooled section 106 financial contributions in relation to the same development. Whilst viability testing may obviate some of the worst excesses, recreating a system under which multiple charging in relation to individual developments and phases of development may have unforeseen detrimental effects.

16. By way of example: the process of settling CIL Schedules may be subject to greater levels of challenge and delay; protracted Section 106 negotiations may delay development and housing delivery; and Treasury-led local government funding settlements may become based on unrealistic assumptions as to how much can be loaded onto developments as distinct from being expenditure properly funded from the public purse.

17. A further consequence of the full removal of the pooling restriction, combined with the abolition of regulation 123(3), is that CIL could begin to operate as a general charge on development alongside other general charge instruments via Section 106 tariffs (such as Milton Keynes Council's "roof tax"). CIL was intended to entirely replace this kind of general charge. If further layers of infrastructure charging come forward outside of the plan-making and examination process, inevitably the result will be that the legitimacy of the additional tariff charges versus the land value expectation will be up for debate in the viability process. Given the Government's focus on increasing transparency and reducing barriers to delivery, this would undermine a fundamental policy objective.

18. To avoid the changes in regulation 12 resulting in a proliferation of tariff-style S106 charges adopted without scrutiny through an EiP process, or imposition of burdens that will impact on delivery, Government should be clear that development charges should not be adopted other than through an examined process

(i.e. CIL or Local Plans) unless authorities are prepared to accept that those charges will be adjusted for viability.

Question 3: Are there any elements in regulation 7 which will prevent the Government achieving the policy intent?

A more proportionate approach to administering exemptions

19. We have no specific comments on the draft wording. MHCLG's proposal, which seeks to make the penalty for when an applicant fails to submit a commencement notice to confirm their exception or relief, more proportionate is welcome.

Question 4: Are there any elements in regulation 13 which will prevent the Government achieving the policy intent?

N/A

Question 5: Are there any elements in regulation 6 which will prevent the Government achieving the policy intent?

Applying Indexation where a planning permission is amended

20. The formula to be introduced by draft Amendment Regulation 6 as a new Regulation 40A(2) and 40B(2) is expressed as X-Y+Z. whereas that to be introduced by draft Aendment Regulation 13 as a new Regulation 128AA(C)(13) is expressed as (X-Y)+CA. It is believed that the mathematical effect of each is intended to be similar and to correspond with that in 128AA. If so, the same form of notation should be used throughout. In any event, X-Y+Z can be read ambiguously as either (X-Y)+Z or X – (Y+Z). That the product is not the same can be demonstrated by substituting 8 for X, 9 for Y and 10 for Z. If the formula is (X-Y) +Z, the product is 9; whereas if it is X – (Y+Z) it is minus 11.

Question 6: Are there any elements in regulation 5 which will prevent the Government achieving the policy intent?

Definition of residential development for indexation purposes

21. The definition of residential development for indexation purposes is left to charging authorities to set. This will create uncertainty and inevitably lead to the adoption of a patchwork of definitions nationally.

22. There is also uncertainty about the treatment of mixed use floorspace which will further complicate CIL charging and collections.

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Formula inserted into Regulation 40(5)

23. The Formula proposed by draft Amendment Regulation 5 to be substituted into Regulations 40(5) and 50(4) seems to be mathematically correct and expressed succinctly but could be easier understood if brackets were used. As the formula is currently expressed, it is not immediately obvious that it is only the rate of CIL that is being indexed, not the amount of floorspace. It would be clearer if expressed as A x (R x IP/IC x NB/NC). This is also a clear instance of where a worked example in draft guidance published alongside the consultation on the draft regulations would have helped. A similar point applies to the formula in relation to rate indexation appearing in proposed new Regulation 121C(f)(iii)

24. Additionally, it would make for easier and quicker interpretation if Ic and Ip and Nc and Np when defined were to appear in the order in which they appear in the formula (as numerator before denominator) rather than alphabetically.

"annual index figure" inserted into Regulation 40(11)

25. It seems illogical that movements in HPI should be "smoothed" over three years, whereas those for the CPI and the BCIS Index are not. To be equitable, either smoothing should be applied across all relevant indices or it should be applied across none.

26. The test of proposed Regulation 40(11)(c)(ii) needs to be reconsidered. There is a superficial attraction in simply replicating from 40(11)(c)(i) as at present but it seems to produce result at odds with the intention of delivering smoothing over three years. In order to accurately smooth over three years, it is presumably intended that indices published on three like for like dates are used: i.e. either July in P, P minus 1 and P minus 2; or December in P, P minus 1 and P minus 2. The wording does not deliver that effect where a July figure is used in P as distinct from a December figure. The way in which (i) and (ii) operate according to their wording is that if (a) no December figure had been published for P and therefore a July figure is taken in P, but (b) at the date of calculation December figures had been published for P minus 1 and P minus 2, then the average for the purpose of amended Regulation 40 (11) (c) would be: (July in P plus December in P minus 1 plus December in P minus 2) divided by three. This would mean that any smoothing would be represented of only two and a half years rather than the three despite the sum of three figures being divided by three.

27. Again, a worked example in accompanying draft guidance would have helped make things clearer.

Question7: Do you have any further comments in relation to the Government's proposed approach to Community Infrastructure Levy indexation including, for residential development, the approach of using a smoothed index using local house prices?

Indexation of CIL rates

28. Our principle point of concern on MHCLG's proposals for CIL indexation rates is that they fail the government's own test for reducing the complexity of CIL. It should be noted that the draft regulations in their current form add significant additional complexity by having three indices instead of one (BCIS, HPI

and CPI), with each having different reference dates and for HPI, a rolling three-year average index for each individual authority.

29. The BPF would maintain that CIL rates should remain linked to the cost of infrastructure delivery i.e. the cost of construction. Charging indexation in the way proposed for residential development would link CIL more closely to uplift in land and property value, rather than accurately reflecting the cost of providing infrastructure. We would argue that the government's objective should be that of creating the conditions to enable the funding of infrastructure to make development happen rather than linking CIL to land value uplift.

30. A further approach which could prove more efficient would be to (a) index CIL to a single, simple measure (such as CPI) but (b) allow partial reviews and (c) emphasise the importance of regular reviews of CIL in light of impacts on viability. Greater value capture can be achieved from CIL both on this basis and by changing the indexation point from the year in which permission was granted under regulation 40(5), to the date of a Demand Notice. To the extent that this requires primary legislation, Government should commit to this change rather than a short-term solution that will cut across the wider policy objectives of transparency and simplicity.

31. It should be noted that MHCLG's revised proposals that link CIL rates for residential development to house price indices, in effect, provide a disincentive for local authorities to take on more development. If the supply of residential is constrained and thus house prices in the locality continue on an upward trajectory, it follows that the local authority CIL rates will too increase.

32. Finally, it should be recognised that the use of a locally based house price index would fail to reflect the variation in values across a district and changes to values. The use of a three year blended approach would also fail to reflect market changes that could prejudice viable development in lower market areas. A drop in house values could result in a significant funding shortfall to provide infrastructure via CIL.

Question 8: Are there any elements in regulation 10 which will prevent the Government achieving the policy intent?

33. On a point of detail, Regulations 121A (5) (b) and (c) to be introduced by draft Amendment Regulation 10, each refer to the annual Section 106 Report detailing the number of school places provided or to be provided. In practice, developer funding typically provides buildings with capacity for school places, in terms of numbers of forms of entry. Sometimes, especially with developments at the scale of new settlements or urban extensions, it takes time for schools to take up all of the buildings provided or to reach their full capacity according to pupil product in individual areas. It would therefore be more accurate to require the update to refer to capacity provided for new "school places" rather than school places actually provided.

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Question 9: Are there any elements in regulation 11 which will prevent the Government achieving the policy intent?

Monitoring fees

34. Monitoring fees should not exceed whichever is the lesser of (i) reasonable and proportionate to the scale and nature of the obligations being monitored; (ii) the authority's reasonable estimate of the cost of monitoring performance of obligations; and (iii) the actual cost incurred in such monitoring. Guidance should indicate that (a) where costs paid under an authority's estimate exceed those actually incurred, authorities should be obliged to repay the balance; and (b) where developments are to be phased and/or obligations are to be performed in phases phased and hence monitoring is expected to take place in phases, obligations may make provision for phased payments.