COMMUNITY INFRASTRUCTURE LEVY REVIEW: QUESTIONNAIRE

Introduction

1. The British Property Federation (BPF) is the voice of property in the UK, representing companies owning, managing and investing in property. This includes a broad range of businesses – commercial property owners, the financial institutions and pension funds, corporate landlords, local private landlords – as well as all those professions that support the industry.

2. We welcome the opportunity to respond to this questionnaire and are delighted to see that the long awaited Community Infrastructure Levy (CIL) review is taking place.

3. It would, however, have been more helpful if the research undertaken by Three Dragons and the University of Reading had been published alongside the questionnaire to enable a more evidence-based approach in both the consultation and responses to it.

4. Attached to this response is appendix A setting out a number of other issues that we believe remain outstanding, in terms of CIL Regulations' amendments that are considered necessary, and/ or revised national guidance (to be included in the Planning Practice Guidance – the 'PPG').

Key concerns

- The CIL regime is not transparent – it is far too difficult to understand how CIL money is being spent. Since CIL can only ever meet part of the cost of infrastructure funding, it would be helpful for the Government to be far clearer about the other resources that will be/ should be available, perhaps even making medium/long term commitments to local capital improvements.
- The mechanism for payments in kind / infrastructure payments is procedurally 'heavy' and the relevant Regulations hence are largely unused.
- For more complex sites a more certain, but still flexible plan-based approach to infrastructure funding and other contributions e.g. to affordable housing would be more appropriate. If strategic sites could be treated separately, other smaller developments could be subject to a simpler, lower CIL charge.
- We believe CIL should be tied into the Local Plan-making process, and that a 'Local Infrastructure Plan' should be created too as a development plan document with a statutory basis, and all should be examined together.

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On infrastructure:

To what extent is CIL contributing, or will it contribute, to infrastructure to support development and is that infrastructure being delivered?

5. This question, perhaps unintentionally, identifies one of the key problems with the CIL regime. Whilst the contribution to Crossrail through the London Mayoral Levy is easily identifiable, it is, perhaps, too early to make pronouncements concerning other CIL contributions, or the infrastructure that CIL has delivered. To date the system has proven to be far from transparent – it is far too difficult for the development / property sector to understand how CIL money is being spent. In order to secure a community's support for development, it is crucial that the promises made around infrastructure delivery are kept.

6. Since CIL can only ever meet part of the cost of infrastructure funding, it would be helpful for the Government to be far clearer about the other resources that will be/ should be available, perhaps even making medium/long term commitments to local capital improvements.

Has the role of the Planning Authority changed with the introduction of CIL and if so where has this worked most effectively?

7. Yes. The role of Planning Authorities has fundamentally changed as they are now charging and/ or collecting authorities (CAs), and since 2010 planning officers have had significantly different responsibilities. It is crucial that those officers are provided with the necessary training and expertise to be able to fulfil this role. Too often the development / property sector is encountering inconsistencies between different Planning Authorities on how aspects of the Regulations are to be approached and interpreted.

8. The CA also has responsibility for the delivery of infrastructure using CIL monies, but often this is simply not happening. Or rather, as per the above point, delivery is not transparent.

9. There have been positive changes too. Where a CIL charging schedule has been put in place, it has in effect forced the CA to consider and produce an infrastructure plan - and for the most part an infrastructure delivery plan – which of necessity has increased the authority's understanding of viability and the infrastructure required to support development.

How are large items of essential infrastructure critical for key sites or growth locations being secured in the CIL and s.106 system?

10. If items of infrastructure are genuinely critical to a development then they will often still (rightly) be funded through section 106/278 arrangements.

11. Whilst the Mayoral levy in London is making large contributions to the delivery of Crossrail, in many cases, it is still too early to tell as the CIL regime has not been in place for long enough to be able to track delivery on, or in connection with infrastructure to serve key or strategic sites. There are, however, clear indications of the issues arising.

12. The mechanism for payments in kind / infrastructure payments is procedurally 'heavy' and the relevant Regulations hence are largely unused (as discussed in detail later in this response).

13. We believe that there are important changes relating to the development of generally larger scale, complex sites that could be made in the short term to the formulation of CIL charging schedules, with no initial legislative amendment required. Complex sites are often large, strategic, require significant decontamination, and need their own on-site and/or off-site infrastructure. These additional characteristics each bring complexity to a project – particularly around development phasing.

14. For more complex sites a more certain, but still flexible plan-based approach to infrastructure funding and other contributions e.g. to affordable housing would be more appropriate. The key issue is how potentially complex sites should be dealt with in the CIL regime, through allowing their 'removal' from CIL (by charging a zero rate for specified sites/ categories of sites) and instead, having infrastructure and/or other contributions delivered through s106 obligations and/or 'Framework Agreements'. An alternative would be to make it clear that authorities take responsibility for infrastructure delivery where appropriate and possible, but this would only be workable where there is capacity at local authority level, gap funding where needed and a clear programme for the delivery of the infrastructure needed to support development.

15. If complex sites were to be zero-rated in the CIL process this would involve:

    15.1. A definition of Complex Sites – this could reflect a size threshold similar to that for referrals to the Mayor of London, or sites/groups of sites identified as e.g. 'strategic' allocations in a Local Plan, or sites with major environmental constraints;

    15.2. The introduction of a mechanism for their effective 'removal' from the CIL system. Councils clearly have the ability currently to charge a lower/zero CIL e.g. for strategic sites as identified in the PPG's CIL guidance. It would be helpful to have more strongly worded guidance in this area, and to provide more clarity on how zero rating would work in conjunction with s106. It might also be sensible to allow a site to be excluded by agreement after a charging schedule has been put in place;

    15.3. Identifying how other CIL Regulations (122 and 123 in particular) would be dis-applied from such sites, for example, to remove from the Infrastructure List any infrastructure that would be funded via a s106 relating to the site, and to allow pooling of numerous s106 obligation contributions in e.g. a growth area with more than five such 'complex' sites;

    15.4. Considering how s106/ Framework Agreements for such sites might work in terms of their policy and legislative basis, in order to ensure the delivery of such sites and the infrastructure needed to serve them. It may well be the case that a Framework Agreement could be drawn up within s106 of the TCPA 1990 (as amended) to ensure that there is an enforceable obligation on landowners that would justify a low/nil CIL zone.

What role are CIL and s.106 playing alongside other sources of infrastructure funding and could changes to CIL (e.g. the ability to borrow against it or in kind contributions) allow it to be more effective?

16. We are unsure what "other sources of infrastructure funding" are being referred to. We have already referred to the unnecessary restrictions of the payments in kind process, which could be amended to give more flexibility for developers and authorities to reach agreement as to the funding by developers of infrastructure (whether or not required by the development). This could be on the basis that subsequent CIL liability will be offset, which would give developers more certainty that infrastructure will come forward in a timely manner that is consistent with its own development and taking advantage of any cost efficiencies.

17. It would be helpful for charging authorities to have an ability to borrow against future CIL receipts. This would allow them to forward fund infrastructure in appropriate cases.

What has been the impact of pooling restrictions? Is there a difference between authorities which have adopted CIL and authorities which have not adopted CIL?

18. The introduction of the pooling restrictions has not had the intended 'stick effect' on local authorities to encourage the introduction of CIL.

19. It has also delayed development control decision-taking, by resulting in a slower process for negotiating arrangements for infrastructure, as it has increased caution in how to approach the restriction, in the face of the risk of judicial review. It has also resulted in delays and uncertainty in negotiating section 106 agreements themselves due to ambiguity in the application of the pooling restriction. In short, the restriction leads to the need for more complex and sometimes unnecessarily prescriptive mechanisms. It also results in some wider infrastructure needs, which can only be met on a pooled basis, being unmet or unresolved.

What impact do exemptions and reliefs have on delivering infrastructure?

20. Overall, the current available reliefs are felt to have had little impact. The exceptional circumstances relief has yet to be introduced by more than one or two CAs, and is unnecessarily complex and hence unappealing.

21. The starter homes proposals in the Housing and Planning Bill include the removal of CIL liability and S106 affordable housing contributions for these units. Other sites in the surrounding area may however, as a consequence of these exemptions, find themselves under additional pressure to 'cope' with a resulting shortfall in (for example) pupil places and facilities in schools - and a lack of other amenities - that would have otherwise been funded by developers, alongside the provision of new homes. The Bill-related, proposed exemptions could therefore have a negative effect on the viability of other schemes.

22. Consideration should be given to the location of new starter homes, to ensure that there is adequate related infrastructure provision. An oversaturation of a site with one type of housing will create added risk for the developer and a potentially unattractive location for purchasers. In order to create attractive, balanced communities, it is crucial that a proportionate view is taken, and that additional infrastructure can be provided where necessary.

23. The mechanics around social housing relief are particularly cumbersome and should be simplified. As an alternative, affordable housing requirements should be taken into account when the charging schedule is being formulated. The current relief is procedurally heavy, so this approach in which a lower rate is set at the start of the process would be a vast improvement. Alternatively the Shropshire approach makes sense – where affordable housing is identified as a proposed use subject to a nil charge.

24. Regulation 42, 'Exemption for minor development' is not easy to interpret and has to be read in a much wider context to understand its meaning. Its end result is to have an acceptable impact on the funding of infrastructure via CIL but only by a process of deduction. An amendment to the Regulations that sets out a clear and simple approach to non-residential changes of use would be welcome, as nowhere is it stated explicitly in the Regulations that such changes of use are CIL-exempt.

25. Material changes of use require planning permission and the generally-accepted view of the development sector, on the basis of s209 of the Planning Act 2008, is that they constitute development for the purposes of CIL.

26. If existing floorspace is to be retained in a development, it is included within the Regulation 40 calculation and providing that it has been lawfully occupied for 6 of the last 36 months – whether or not it is subject of a change of use – the generally held view has been that no CIL liability would arise.

27. Since 24 February 2014, the Regulation 40 calculation has also meant that no CIL liability would arise in relation to retained and unused floorspace, where the intended use following completion of the chargeable development would be a use that could be carried on lawfully and permanently without further planning permission.

28. Regulation 42 provides for exemptions from CIL liability for minor development. Regulation 42(1) states that CIL liability does not arise in respect of a development if, on completion of that development, the gross internal area of new build on the relevant land will be less than 100 sq. m.

29. Regulation 42 states:

    'Exemption for minor development

    (1) Liability to CIL does not arise in respect of a development if, on completion of that development, the gross internal area of new build on the relevant land will be less than 100 square metres. (2) But paragraph (1) does not apply where the development will comprise one or more dwellings.

    (3) In paragraph (1) "new build" means that part of the development which will comprise new buildings and enlargements to existing buildings.'

30. As a consequence of this wording, and for changes of use to non-residential, if only a change of use is proposed, or if the overall gross internal area of any new build forming part of the development is less than 100 sq. m., then there would be no CIL payable on the whole of the development. It would not matter if the building had been empty or occupied for 6 months out of the last 36, or not – the proposed development would be CIL-exempt.

31. For changes of use to residential that comprise one or more new dwellings, the Regulation 40 calculation has to be undertaken.

How are local authorities who have not adopted CIL making provision for infrastructure and how effective are these approaches?

32. Local authorities who have not adopted CIL are using section106 to deliver infrastructure in their areas.

On Viability

Has a lack of viability resulted in a failure to develop a CIL?

33. Lack of viability has certainly played a part where local authorities do not have CIL in place. This can be seen clearly across the country where CIL implementation largely follows land value.

34. In addition, areas without a local plan are often further behind too, as without an adopted local plan that includes site allocations, the creation of an infrastructure plan is inevitably challenging.

Have viability concerns resulted in a low CIL level and has this had an adverse impact on the delivery of infrastructure to support development?

35. Viability concerns have not had any greater impact on CIL than on section106. The level of contributions is, of course, dependant on the viability of the overall scheme. Whilst this can impact upon the total amount collected, it is not the core problem.

Are there appropriate tools available for establishing viability? Would standardisation using just one methodology be helpful or feasible?

36. No, there is no single tool at the moment. We welcomed the announcement in the Spending Review on the 25 November 2015 proposing a standard approach to viability methodology. We suggest that this should be used for viability calculations in local plans and infrastructure plans too.

Do you have specific examples where non-viability on account of CIL has prevented development?

37. No.

Is CIL impacting on affordable housing provision?

38. Yes. Research by JLL in July 2015 demonstrates that CIL has a negative impact on affordable housing delivery. The analysis highlights a 14.5% fall in the total number of affordable homes delivered in the first 37 Local Authority areas to introduce CIL. This is despite a 3.6% overall increase in housing delivery in those areas.

In setting a CIL Charging Schedule has the development community played their part and been properly consulted on issues of local viability?

39. The development community has, in many cases, submitted representations and participated in examinations. However, there have been few who have submitted their own viability assessments, largely because the CIL viability test does not relate to individual sites but to 'the economic viability of development across its [the CA's] area' (Regulation 14(1)(b).

40. It is worth noting that the Purpose Built Student Accommodation (PBSA) sector has been particularly active in its CIL participation, and has contributed fully to influencing emerging schedules.

On Charge-setting:

Is the EIP process suitably robust?

41. Mostly. There is inconsistency in the degree to which examiners consider strategic i.e. complex sites. We suggest that examiners should be required for all emerging charging schedules to consider whether strategic/complex sites should be exempt and whether exceptional circumstances relief should apply. If so, the charging schedule should cite the strategic/ complex sites that are to be zero-rated, and refer to the relief – amendments to the Regulations on both counts would vastly increase certainty and transparency for prospective developers and site owners alike.

42. We believe CIL should be tied into the Local Plan-making process, and that a 'Local Infrastructure Plan' should be created too as a development plan document with a statutory basis, and all should be examined together. This would:

    42.1. set CIL rates, based on a list of required infrastructure needed to serve local plan allocations.

    42.2. programme infrastructure delivery (specifically focusing on the infrastructure required to support the strategic/key sites).

    42.3. relate funding mechanisms to the infrastructure proposed.

Should there be a requirement to review charging schedules at set times, if so when and why?

43. Yes. Charging schedules should be reviewed at the same time as Local Plans, or whenever there is a material change in circumstances.

Should partial reviews (eg. types of use or location) be possible?

44. Yes, to take into account changes in circumstances e.g. for specific land uses, and for strategic/ complex sites which may emerge post-plan adoption.

On CIL Regulations and Guidance:

Are the CIL regulations and guidance easy to use and understand?

45. No. There is a real need for a set of consolidated regulations to be published, and more detailed guidance (including sample CIL calculations, particularly for example for the complicated circumstances of s73 permissions and phased developments).It would be helpful if the Guidance reflected the law accurately rather than in an aspirational fashion.

Are there improvements that could be made to the arrangements for collecting and spending CIL?

46. CA should be under an obligation to serve liability notices properly and at required times. If this does not occur, there is a risk of the applicant losing the opportunity to claim any relief, and hence development can be delayed.

On Neighbourhood issues:

How have the requirements for the Neighbourhood proportion of CIL been implemented?

47. We do not have this information.

Is this encouraging communities' to support development?

48. We do not have this information.

Finally, on the overall system

Has the introduction of CIL made the system for securing developer contributions and delivering infrastructure simpler, fairer, more predictable, transparent and efficient?

49. CIL is now factored into land prices. This partially meets the initial objectives. However, whilst the system makes the process for smaller sites simpler, large sites still pose problems. We suggest that strategic sites should be subject to a different system (as in our response to Question iii).

Is the relationship between CIL and s.106 fit for purpose and how is this working in practice?

50. The relationship is not as clearly delineated as was initially intended. CAs tend to make their infrastructure lists (Reg 123) long, complex and overly comprehensive and there are still lengthy section 106 negotiations.

Is there a better way of funding the infrastructure needed to support development?

51. We believe that the system could be improved if the following steps were taken:

    51.1. Strategic sites would, as set out in our answer to Question iii, be subject only to bespoke arrangements made through S106.

    51.2. All other sites and uses would be subject to a low rate of CIL.

    51.3. Mitigating infrastructure would be agreed through planning conditions.

52. Whilst some may suggest that this new regime may cause issues with State Aid, we believe that such objections can be easily overcome.

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APPENDIX A: Outstanding CIL issues

1. Under s96B, instalment policies should specify dated and 'trigger' events for payment. This would allow the process to cater more flexibly for major developments with multiple phases, by having more scheme specific and suitable 'trigger' events.

2. The PPG needs to explain requirement for decision notice for phased permissions to spell out phases explicitly, so that Regulations 7 (commencement of development) and 8 (time at which permission first permits development) are more easily understood/ applied. Current guidance does not assist with understanding difference between date of grant of planning permission and 'time at which…'

3. The Guidance should contain worked examples. Whilst the VOA has some in their 'Community Infrastructure Levy Appeals Guidance Note[1]'), these are not widely publicised. The PPG would benefit from something similar.

4. The equation in Regulation 40 is inaccurate, and should be revised[2]. In some circumstances a redevelopment can end up paying CIL even if no net new space is created, and this needs further examination. Changes needed are:

   4.1. A definition of gross internal area

   4.2. Correct error in formula in 40(7) to:

$$Gr - Kr - \left(\frac{E \times (Gr - Kr)}{G - K}\right)$$

   4.3. Change (7)(ii) and definition in (11) to refer to refer to 'date of application validation', not 'day planning permission first permits the development'. Current arrangement requires an assessment of 6 months in the last 36 from a date in the future therefore difficult to pinpoint accurately.

- Include new, specified arrangements for how to apportion new floorspace in various uses in relation to lesser amount 'in use' floorspace being demolished/ retained and re-used (also for calculating social housing relief, Reg. 50). This would ensure consistency of approach.

5. The rates in a charging schedule at the point at which planning permission is first granted should be the rates that will be applied for the whole of the scheme thus permitted, including phases of outline applications (plus indexing using the retail prices index, NOT the All-in Tender Price Index

6. The Regulation 123 list should be a formal part of the Charging Schedule to resolve outstanding issues about quality/suitability of Infrastructure Lists. If this not feasible, the alternative is for the infrastructure list to have to be published in draft at time of public consultation on Preliminary Draft Charging Schedule and finalised for publication when Draft Charging Schedule published; infrastructure list and accompanying viability assessments should then be subject to same standards of evidence and examination as local plans.

[1] http://manuals.voa.gov.uk/corporate/Publications/Manuals/CommunityInfrastructureLevy/Appendices/cil-man-app1.html#TopOfPage

[2] https://barneystringer.wordpress.com/2012/11/29/new-cil-regulations-dont-add-up/

The charging authority should have to clearly distinguish on Infrastructure List/ in supporting statement between what infrastructure is to be funded by CIL as opposed to s106 obligations.

7. There should be a new regulation to bar Grampian conditions from being attached to planning permissions, relating to the completion of infrastructure provision on the Regulation 123 List, e.g. preventing commencement/ occupation of development until infrastructure in place. It is entirely unacceptable that development can be stymied by such conditions, simply because the infrastructure provider has not made up the funding gap/ provided the infrastructure, yet the development will have made its CIL contribution towards the Regulation 123 List.

8. Social housing relief procedure: The limitations in (3)(b)and (4) should be removed (in which the claim has to be made before commencement of chargeable development and where the relief lapses if development commenced before collecting authority has notified decision on claim). This should be replaced with a claim linked to date of grant of planning permission and for a sufficiently lengthy time period afterwards, and that could allow for variations to be made post-relief application. It is all too easy for social housing providers to miss these dates over which they may have little/ no control, especially if their units are part of mixed housing scheme etc. and they are not the main developer.

9. A new Regulation should be introduced to require consultation on 'Infrastructure Delivery Plan', prior to publication of preliminary draft Infrastructure List (preferably as new, statutory part of Preliminary Draft Charging Schedule). The Infrastructure Delivery Plan would relate closely to the Local Plan and clearly differentiate between infrastructure required to make up existing deficiencies and other infrastructure required to serve development allocations in the Plan.

10. When looking at Regulation 128, it is clear from (1) that there is no CIL liability when planning permission is granted, if at the time of the grant of permission, it is within an area where no charging schedule is in effect. However, the paragraph 42 in the PPG on CIL refers to 'Planning permissions which first permit development on a day when the charging schedule is in effect will be liable for the levy' – this is not consistent with the Regulations. We believe that the PPG needs to be clearer and consistent with the Regulations i.e. to state that there is no CIL liability when planning permission is granted at a time in an area where within that area no charging schedule is in effect.