



# **CIL and Infrastructure Planning**

**An advice note**

**October 2011**

**The Planning Officers Society**  
**Registered Office: 20 - 22 Bedford Row, London WC1R 4JS**  
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### Introduction

The Society published an advice note "*Infrastructure planning and the community Infrastructure levy*" in February 2009. Since then the position has changed significantly with the CIL regulations now on the statute book and uncertainties following the general election of 2010 resolved.

The importance of good infrastructure planning to support development is undiminished and with restraints on spending across the board, identifying and delivering funding opportunities has become even more critical. For most local planning authorities the implementation of CIL represents one such opportunity that should not be ignored. This places yet another demand on planning resources, which makes it even more important to use them effectively and demonstrate this positive aspect of planning.

This advice note is intended to provide sound and practical advice to authorities on what is needed in terms of infrastructure planning to underpin the local planning process and to implement CIL. It outlines the measures that are needed to take CIL forward, recognising that this is a new initiative with little in the way of good practice or successful examples to fall back on. However POS is in the fortunate position of being able to draw on the experience of working with over 50 authorities on this subject over the past two years and working alongside CLG on its implementation. We can therefore put forward this advice note with confidence that it is based on the most up to date information available, tempered with a solid grounding in the current context within which local authorities are working.

*This advice note was prepared for the Planning Officers Society by Graham Jones of POS Enterprises*

*POS Enterprises is the operational arm of the Society, providing support and training directly to planning authorities*

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# 1 Infrastructure Planning

## Context

- 1.1 Infrastructure planning is the process for ensuring that the physical needs of the area are delivered to keep pace with its population's requirements. It will include utility services, transport, education, health, community and leisure provision.
- 1.2 It should have a direct and integral relationship with local and neighbourhood plans and Sustainable Community Strategies. To be successful it should involve a variety of agencies, partners and service providers. Including these bodies in a systematic and coherent way requires a level of engagement and commitment which can be challenging to all parties, but this is not an exercise which can be undertaken independently by planners if there is to be any certainty that plans will be delivered. Established local strategic partnerships and the emerging local enterprise partnerships can help support and embed the process. Recognising the community and neighbourhood dimension will be important to the delivery of the localism agenda.
- 1.3 Gaining the support and confidence of the range of partners, both within and outside of local authorities, requires ongoing involvement and commitment at the highest levels. This note should assist LPAs in grasping the significance of infrastructure planning and to get the message across to key internal decision makers including chief executives and corporate managers. With their support engagement with the necessary level of commitment among external partners and providers is possible, without it the task will prove very difficult.
- 1.4 The introduction of the Community Infrastructure Levy should provide a compelling option for most if not all authorities. The potential for gaining access to a substantial and regular income stream to spend on infrastructure to help meet their community needs should prove compelling to both senior officers and members. For planners the initial challenge will be secure the resources to have an up to date local plan in place with solid infrastructure planning evidence to justify the CIL. Where CIL may not be initially attractive, or where there is no up to date local plan, it would still be prudent for authorities to consider what would be needed to introduce CIL quickly as circumstances change.
- 1.5 This advice note recognises that different authorities will be at different stages in their local and infrastructure planning. Many have a core strategy in place and are developing their CIL charging schedules. For others the corporate decisions to proceed have yet to be taken. The note is therefore intended to assist all through the infrastructure planning and CIL processes. It can be used to help draft reports and to inform and advise existing and potential partners. It is intended to provide essentially practical advice and help avoid some of the potential problems. What is important is that infrastructure planning and CIL are not seen as ends in themselves or 'one off' exercises; but as mechanisms for delivering facilities and services for the benefit of local communities.

## Planning as a delivery mechanism

- 1.6 The Government sees the planning system to have 3 main functions:-
- to give people the opportunity to shape the look and feel of their communities, including protecting and promoting important environmental and social interests;
  - to provide sufficient housing to meet demand; and
  - to support economic development through the provision of infrastructure and by using land use planning to support economic activity
- 1.7 The Government's vision for planning is a combination of localism, allowing local people to set priorities about the future of their area, and incentivising growth to ensure that communities understand and benefit from development. Developing a community vision which reflects local aspirations and needs is to be taken forward through the local planning process including the option of 'bottom up' neighbourhood plans. Having an up to date local plan in place which sets out the vision for the area underpinned by a robust evidence base and infrastructure planning is fundamental. The local plan, including a clear strategic framework underpinned by cooperation with neighbouring authorities, will be the vehicle for establishing housing and growth figures which reflect a local analysis of need and demand, rather than adopting the top down targets from Regional Spatial Strategies. The new neighbourhood plans will provide an opportunity to shape development in their area in line with their local aspirations.
- 1.8 The Government is committed to a planning system which positively encourages growth including incentivising development through such measures as CIL, the New Homes Bonus and retaining locally raised business rates. The proposed presumption in favour of sustainable development is another indication of its approach. The new local enterprise partnerships (LEPS) are also seen as promoters of economic development through a strategic approach to planning and transport and infrastructure delivery.
- 1.9 To succeed in this ambitious role planning needs to be at the heart of local government and to have a major influence on the delivery of services by a broad range of partner organisations, agencies and other providers. Change will primarily be delivered by development, and the Government has recognised that incentives can encourage communities to recognise the benefits of growth. Guiding development, of the right quality, in the right place and supported by the right infrastructure, will require planners with communities and partners, to work with private sector developers to achieve their vision. A well considered infrastructure plan which demonstrates what is needed, where, when and how it will be provided is a prerequisite of this process.

### **Key message**

*Get the whole story right – the local plan, infrastructure delivery planning, corporate objectives and planning processes – and working with LEPS*

## **The NPPF**

- 1.10 The Government is committed to preparing a national planning policy framework, which brings together existing planning policy statements and guidance in a simplified and coherent form. This will among other things supersede the 2008 version of PPS 12 which set the national framework for infrastructure planning.
- 1.11 The NPPF will continue to emphasise the role of planning as a delivery mechanism and the part infrastructure planning plays in this. Local planning is seen as a key policy tool setting the infrastructure requirements required to meet national and local objectives by working with other authorities and providers.

## **The Government's growth agenda**

- 1.12 The Government White Paper "*Local growth – realising every place's potential*" and the 2011 budget set out an agenda for economic growth and the role that the planning system should play in its promotion. Measures to achieve this include the new duty to cooperate in plan-making which will include infrastructure providers, incentives to deliver economic development and share in the gains, and culture change to a default position in favour of development.
- 1.13 Government planning reforms are intended, inter alia, to encourage the provision of the right land for economic development, increasing the supply of housing and ensuring the timely delivery of infrastructure. Local plans are to establish the key strategic framework on infrastructure which will support local economic growth and housing requirements.

## **Local plans**

- 1.14 Local Plans will be the prime delivery mechanism for the overall vision for the area, their significance enhanced by the proposed abolition of the Regional Spatial Strategies. (In London the Mayors Plan remains as an essential element of the development plan). They should include a delivery strategy for achieving the strategic objectives and clear arrangements for managing as well as monitoring delivery.
- 1.15 The delivery strategy should be underpinned by robust infrastructure planning evidence. This can take the form of an infrastructure delivery plan (IDP), but whatever document or documents are involved it should provide an ongoing guide for delivery as well as support for the strategy. The evidence may be compiled as a single document, but can also be a record of process, decisions and programmes. Whatever form it takes it should supply the evidence base to demonstrate the infrastructure requirements of the strategy and how they are to be provided.
- 1.16 Inevitably over a fifteen year plan period infrastructure provision (and growth projections) will change and the further into the future one looks the less certainty there will be. In recognition of this infrastructure planning can be set out in eg 5 year tranches where the first five years is most detailed and clear about funding, and the 10-15 year period indicative. As long as the assumptions and basis for the work are clearly set out this should be accepted at examination as the most appropriate and reasonable way forward.

- 1.17 This also demonstrates the need for a continuing infrastructure planning process where programmes can be monitored and reviewed and which can then provide the basis for decisions on implementation. It becomes even more important when authorities are developing and implementing the CIL. Many authorities use consultants to prepare or assist with infrastructure planning so the need for monitoring, review and updating should be carefully considered when preparing briefs for such work. Authorities should avoid wherever possible the need for expensive review processes which can only be undertaken by the original consultants. A clear briefing process and outcome specification can usually avoid this happening.

### **Key message**

*Infrastructure planning and delivery are fundamental to local planning and CIL which should use the same processes and evidence, tailored for the specific purpose where necessary.*

## **2 Community Infrastructure Levy**

### **Where are we now?**

- 2.1 The CIL came into force on the 6<sup>th</sup> April 2010 through the Community Infrastructure Levy Regulations 2010. After somewhat of a hiatus following the General Election in May 2010, the Coalition Government decided that it would proceed with the levy, with some relatively minor amendments incorporated into amended regulations effective from April 2011.
- 2.2 The levy is a means of securing funding for infrastructure through the planning process. The levy gives CIL charging authorities the option of introducing a charge on new buildings in their area, and to spend the funds raised on infrastructure to support new development. The potential income stream from CIL is likely to be significant and regular, and as such should be of great value to the authority. Measures to put CIL in place should be high on the list of corporate priorities and as such of much wider interest than just to planners.
- 2.3 This note sets out the context for CIL and its relationship to infrastructure planning, the main elements of the levy, its pros and cons, what charging authorities should be doing to introduce the charge, and some of the key issues to be taken into account. This is a completely new measure and as such there is no best practice or examples to follow as yet, but there are some sensible and practical approaches which will be of assistance in taking the CIL forward.

### **Key messages**

*Corporate buy-in is essential - make sure the right people know about CIL - Chief Executive, Director of Finance, political leaders*

*Ensure it is seen and presented as a corporate initiative, not just something for the planners*

*Get a high profile project sponsor*

*Set a programme for introducing CIL, with costs and realistic timescales*

*Potentially CIL can produce a significant income stream, but don't raise unrealistic expectations*

*Don't expect CIL to fund all your needs (or solve your budget problems!)*

## **CIL charging authorities**

- 2.4 CIL charging authorities are restricted to those responsible for preparing development plans - district and unitary authorities, London boroughs, national parks authorities and the Broads Authority. The Mayor of London has charging powers but elsewhere upper tier authorities in two tier areas do not. Counties wishing to fund infrastructure through CIL will need to work in cooperation with districts that are responsible for both the raising and the spending of the levy.
- 2.5 CIL remains optional. Charging authorities can decide for themselves whether they wish to implement the levy. In making this decision they need to fully appreciate the implications for the proper planning and delivery of infrastructure for their area, including the scaling back of the scope for S106 benefits and the potential income stream from CIL. There may still be authorities where circumstances are such that CIL may not be attractive, but for the majority this is unlikely to be the case.

### **Key message**

*Compare current S106 benefits with potential CIL income – can you afford to do without it?*

## **CIL and infrastructure planning**

- 2.6 CIL will secure a funding stream for infrastructure and as such should be seen as complementary to the other sources of funding. Mainstream funding, such as Council capital programmes, service providers investment programmes, and government grant, will continue to provide for the bulk of infrastructure spending. However, CIL together with other initiatives such as the New Homes Bonus and provision through S106 (albeit scaled back) and S278 for transport works, can provide a substantial resource for locally determined priorities. While CIL should produce an income of several hundreds of millions annually at a national level it remains a mechanism for 'topping up' funding to allow a wider delivery of projects than would otherwise be possible.
- 2.7 CIL differs in two important respects from S106 obligations. Where adopted, it extends the liability to a much wider spread of development than is the case with S106, so picking up payments based on the incremental, cumulative effect of development on infrastructure needs. It also breaks the link which is fundamental to S106 between the development and delivery of the obligation. Whereas with S106 obligations there is now a legal requirement that any payment, whether in cash or kind should be directly related to the development generating it, with CIL



the payment goes into an accumulated fund to finance infrastructure projects as determined by the CIL authority.

- 2.8 When an authority has a CIL charge in place there is a legal liability on the developer or owner to pay the charge. The level of charge payable is not negotiable. This is a significant difference to S106 payments in two respects, firstly the absolute liability to pay and secondly the primacy of the charge over other development costs (such as on site S106 including affordable housing, or S278 requirements) which will impact on viability considerations. There are some limited provisions for exceptions and exemptions which are dealt with later.

### **Key messages**

*CIL can provide a significant income stream for infrastructure, but will only provide top up funding – not replace mainstream sources*

*Manage CIL as part of overall infrastructure delivery, alongside mainstream Government and Council funding and other sources such as New Homes Bonus (NHB), Tax Increment Financing (TIF) S106 and S278*

### **Spending the money**

- 2.9 CIL Authorities have considerable discretion and flexibility in how they can spend CIL funds. They must be spent on infrastructure needed to support the development of their area, but within this broad context authorities have complete control over what it is spent on, where and when. CIL funds can be spent on infrastructure projects outside of the local authority boundaries, as long as it can be justified as benefitting the authority's residents. Funds can be passed on to others as long as they are used to provide infrastructure, and can be pooled between authorities to fund strategic projects.
- 2.10 Monies should be spent on new infrastructure (ie supporting development) not remedying existing deficits, and can be used to support the ongoing costs of the infrastructure provided. The Government has introduced provisions in the Localism Bill which will require authorities to allocate a 'meaningful proportion' of revenue raised within a neighbourhood back to that neighbourhood, to projects to be determined locally. A consultation on how this will work in practice began in October 2011, but it will not come into effect before April 2012.
- 2.11 In setting their CIL charge authorities will need to demonstrate the type and range of likely projects needed in their area which could receive CIL funding. The infrastructure planning evidence underlying their development plan strategy will normally provide the basis for this. However they are not restricted to spend CIL in line with this evidence base. While it would be good practice to use this work to inform decisions about spending, priorities can change – with availability or withdrawal of other funding regimes for example, or changes in timescales for development. The final decision on how CIL funds are spent rests with the charging authority, but in practice it should take such decisions in full consultation with a wide range of partners.

- 2.12 How to spend levy funds will still be some way off for authorities just embarking or yet to embark on developing charging schedules. However developing systems and processes for making spending decisions, including consultation and engagement procedures will avoid potentially difficult situations arising further downstream. In two tier areas, and where there are sub-regional groupings with cross boundary projects, early agreement on how and when CIL decisions will be made is essential. While the ultimate spending decisions rest with the charging authority, other infrastructure providers will want to ensure their requirements are given full consideration. Charging authorities will also want to ensure that in passing over CIL funds that they are spent in accordance with their decisions. Having agreed governance arrangements in place at the outset will help avoid later problems.
- 2.13 The charging authorities have the statutory duty of reporting annually on CIL, setting out income, expenditure and accumulated funds. This need not be a separate document and could be included for example within the Council's annual monitoring report or annual report and accounts. The annual reporting requirement is the mechanism by which developers, infrastructure providers and the local community can judge the efficiency and effectiveness of the authority's CIL regime.

### **Key messages**

*Where there is no up to date local plan, progressing the plan in tandem with CIL will ensure complementarity and make effective use of resources*

*Governance of spending decisions should be decided at an early stage – don't wait till the money is coming in and then try to sort it out*

*CIL charging authorities control the purse strings but should involve partners, providers in the decision making*

*Set up systems for prioritising expenditure using infrastructure planning processes – this will provide a rationale to advise decision makers*

### **Setting the charge**

- 2.14 CIL charges are expressed in terms of pounds per sq metre of new building (gross internal floorspace). Only net additional floorspace after demolition of any existing buildings is counted. The charge applies to all development over 100 sq m, except in the case of residential development where a single dwelling is chargeable whatever the floorspace.
- 2.15 Liability is determined at the time of the grant of planning permission, and is payable on commencement – either in full or in instalments if agreed beforehand. Some developments not requiring planning permission are also liable for CIL – these are dealt with later.
- 2.16 Charging authorities can set differential rates – either for different parts of their area or for different uses. Where they intend to set such rates they must be justified in terms of viability.

- 2.17 Charging Authorities can recover their administrative costs from CIL income, up to a total of 5%, and this should be taken into account in calculating the charge. The set up costs of CIL, including fees involved in setting the charge and any training, can be included and defrayed against the first 3 years income.

**Key message**

*Keep it simple!*

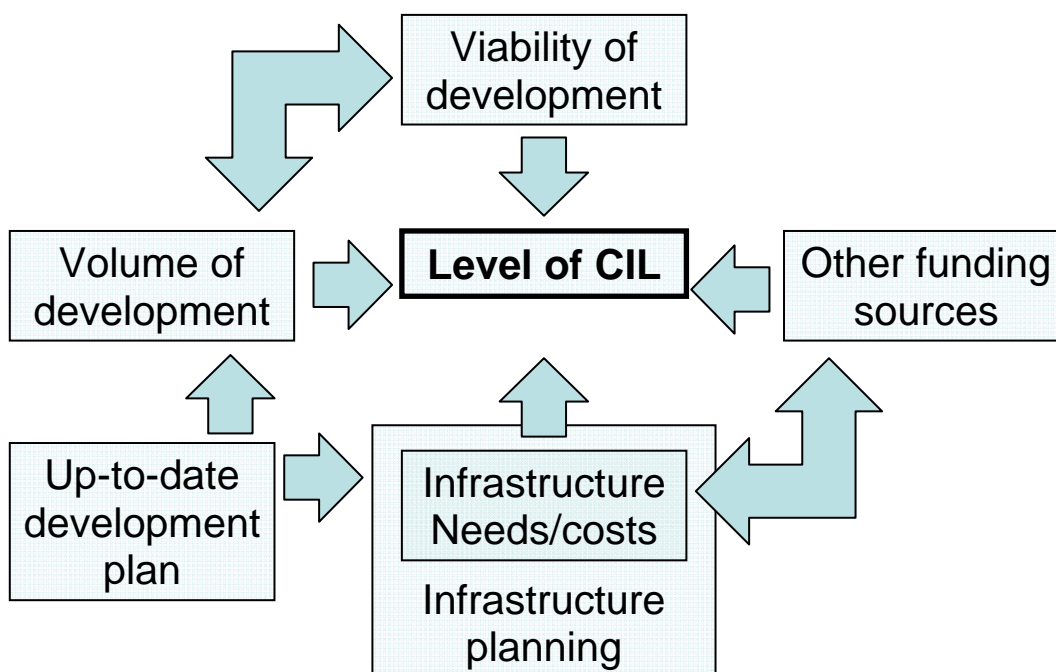
What rate to charge

- 2.18 The main issue which examiners will be testing is whether the rate(s) proposed put “development at serious risk”. This test is exercised at an authority-wide strategic level; and does not mean that no developments that would otherwise be viable should be prejudiced. The Government recognises that in marginal cases CIL could be the determining factor in whether a development goes ahead, but representations relating to individual sites and proposals are not in themselves sufficient for rejecting proposed charges. Examiners will need to be convinced that the rates are not so high that the level of development as a whole, across the authority, is put at risk. (reg 14 (1))
- 2.19 To calculate the proposed rate an authority will need to have identified and costed the infrastructure needs which underpin its development strategy as set out in its ‘up to date’ plan. It is for the authority to decide whether its plan is up to date and in coming to such a conclusion it will need to take account of whether the level and patterns of development set out in the plan are still soundly based and the infrastructure needs robust and justifiable. The plan can then be used to estimate the volume of development likely to be delivered over the plan period. Funding sources available for infrastructure will need to be estimated, demonstrating what shortfall (the funding gap) is likely which CIL can help meet. The ‘funding gap’ divided by the volume of development will provide an upper limit to the CIL rate.
- 2.20 At any time the accuracy of information is going to be ‘best guesstimate’ and with the current and future uncertainty of public spending regimes this is even more so. Examiners will be aware of this and will expect authorities to come forward with reasonable assumptions based on available information.
- 2.21 In very simplistic terms the process is:-

$$\begin{array}{c} \text{COST OF INFRASTRUCTURE} \\ \text{Minus} \\ \text{FUNDING FROM MAINSTREAM SOURCES} \\ \text{Equals} \\ \text{FUNDING GAP} \\ \text{Divided by} \\ \text{VOLUME OF CHARGEABLE DEVELOPMENT} \\ \text{(Net additional floorspace after demolition)} \\ \text{Equals} \\ \text{MAXIMUM RATE PER SQ METRE} \\ \text{Subject to} \\ \text{VIABILITY TESTING} \end{array}$$

- 2.22 Where to pitch the CIL rate and how much of the funding gap can be 'plugged' will be determined by testing the viability of development at varying rates and deciding on a rate which in the authority's view strikes an 'appropriate balance' between delivering infrastructure and 'choking off' development. This process is shown diagrammatically below.

### Matters to take into account in setting CIL



- 2.23 To demonstrate the need for CIL at examination it is necessary to demonstrate that the availability of funding from other 'mainstream' sources is insufficient to provide the infrastructure to support the development of the area, hence a funding gap which CIL can contribute towards. It is arguable that this creates a potential contradiction between the arguments to be employed at CIL examination and that at core strategy or local plan examination, where to demonstrate soundness the LPA should be able to show that infrastructure needs can be delivered. Authorities should review any potential difficulties this may cause, particularly if they are considering a joint local plan/CIL examination.

#### **Key message**

*Viability is the key – but there are choices to be made in setting the 'appropriate balance'*

#### **Assessing economic viability**

- 2.24 Decisions on the rates to be set in the charging schedule should be based on assessments of viability. Government advice is to use an area-based approach, which involves broad testing of viability across the authority area. Authorities should take a strategic view and should not focus on the particular implications for individual development sites.

- 2.25 Some development on some sites may not be viable as a result of CIL being set at a particular level. This is recognised by Government. The decision for the authority is to decide on the appropriate balance for their area and how much potential development they are prepared to put at risk. This will need to be judged against the potential level of CIL income and the consequent amount of infrastructure it will deliver. Too high a rate could have an adverse impact on the ability to meet development plan targets, while too low a rate could prejudice the provision of infrastructure to support development.
- 2.26 Deciding where the balance lies is for the authority and the legislative requirements and Government advice recognise that this is not an exact science. Section 212 (4) (b) of the 2008 Act requires only that the charging authority has used 'appropriate available evidence' to 'inform' the charging schedule. CLG guidance on charge setting (2010) para 8 advises that charging authorities 'should explain briefly why they consider that their proposed CIL rate (or rates) will not put the overall development across their authority at serious risk'.
- 2.27 At present CIL cannot be spent on affordable housing as it specifically excluded by regulation. It remains to be dealt with through S106 provisions along with site specific mitigation. In setting CIL rates it will be important that charging authorities take account of S106 costs including affordable housing in their overall assessment of viability to ensure that development is not put at risk. The Government is consulting on whether CIL should be available for spending on affordable housing so the situation may change in 2012.
- 2.28 Taking a strategic view on viability does not require the authority to undertake viability studies for all development sites. It may wish to sample some sites to supplement existing data, on either a historic basis (developments already in place) or hypothetical modelling of potential sites. The results can be set alongside other readily available information such as Valuation Office property market reports and sales data, property price information and information from the Council's property services. Affordable housing studies, strategic housing land availability assessments and strategic housing market assessments may also provide useful sources of information.
- 2.29 In developing their charging schedules authorities should review what information and evidence they have available before considering whether they need any additional specialist advice and what form it should take. This will also depend on what expertise is available within the authority and the approach it intends to take in terms of differential rates, as each will need to be justified. Employing consultants can be expensive so carefully defining the brief to specify what is required and in what format can save time and money. Having evidence that can be readily updated in the future without substantial costs will also save time and money. Having a degree of expertise within the authority, to assist in formulating briefs, reviewing reports and being able to update information without further external advice can be very valuable.

### **Key messages**

*There are different approaches to viability testing which can be used to support charges*

*Review readily available evidence before doing fresh work*

*Only seek external advice when you know exactly what you need*

*Think about updating of evidence before commissioning*

*Internal expertise can be very valuable – try not to be entirely reliant on outside advice*

### **Differential rates**

- 2.30 Charging authorities may set differential rates, either on a zonal or a use basis (reg 13). There is no requirement to do this, and authorities may wish to set uniform rates, based on an overall generalised assessment of viability across the authority area. A single rate has the advantages of simplicity, for developers and for the administration of the levy.
- 2.31 Alternatively authorities may consider that there are differing local economic factors which suggest that differential rates may be appropriate. This may be on the basis of use – the market for residential development may be more buoyant than commercial for example and therefore capable of bearing a higher rate – or locations where there are clear market differences. Where an authority sets differential rates they will need to justify them by reference to the economic viability of development, not to support particular policy objectives or to reflect the likely costs of infrastructure in a part of the area or arising from a particular development. For example it would not be appropriate to have a higher rate for a town centre on the basis that it had greater infrastructure requirements, or for residential development on the basis that it generated greater infrastructure needs.
- 2.32 In setting differential rates authorities also need to avoid ‘State Aid’ problems. In this context State Aid can be interpreted as giving one use, or development in one area, preferential treatment which is in effect a state subsidy. This can be avoided if there is clear justification in terms of viability for each rate.
- 2.33 The ability to set differential rates allows the flexibility for CIL to reflect local conditions. Some authorities may decide to have both zonal and use differentials, where this can be justified. Such an approach can be of benefit where it would enable income to be maximised, but the more complex the charging schedule becomes the more detailed the analysis and justification required. Each zone has to be clearly marked on a map and the boundary justified in viability terms, and each use in each zone justified similarly. CLG advice is to avoid undue complexity - “*Charge setting and charging schedule procedures*” CLG 2010 - but at the same time authorities will want to maximise income and achieve an acceptable balance.
- 2.34 The CIL regulations refer to ‘use of development’. ‘Use’ in this context is not therefore defined in terms of the Use Classes and can be more generic. For example commercial uses can be grouped together. Until the position is tested

through examination or legal cases, what does or does not constitute 'use of development' remains open to interpretation. The examiner at Newark and Sherwood's examination found that it's proposed charges which differentiated between commercial uses above and below a threshold of 500 sq m was not justified because there was insufficient viability evidence – he tacitly accepted that uses could be differentiated by threshold, but not without the necessary viability evidence.

- 2.35 There may be a case for distinguishing between residential development which includes affordable housing from other residential development in terms of viability. However, this turns on the whether different types of housing can be treated as different 'uses of development', and is currently seen as problematical. The situation may change if the CIL regime is changed to allow affordable housing to be treated as infrastructure following the current consultation.

### **Key messages**

*The more differentials the more complexity in administration and transparency*

*Each differential needs to be justified in terms of viability evidence*

*Understanding the local area and markets from 'available evidence' should guide the approach to differential rates*

*However, differential rates can produce higher levels of CIL income where there are clear market differences*

*Keep it as simple as possible*

### **Exemptions and exceptions**

- 2.35 Exemptions and exceptions from paying CIL are restricted to limited and specific circumstances:-
- charities – where the development is to be used for charitable purposes it is exempt from CIL (reg 43)
  - charities – where the development is to be held by a charity for investment purposes the authority **may** give relief (reg 44)
  - social housing – the authority **must** give relief on that part of the development intended for social housing (reg 49)
  - Exceptions – Where a specific scheme cannot afford to pay CIL the authority may give relief in exceptional circumstances (reg 55)
- 2.36 **Charitable relief:** In the case of charities there is a clear distinction between mandatory relief, where development is to be used by a charity for charitable purposes, and discretionary where the authority may decide whether to give relief for development to be held by a charity as an investment. If an authority intends to give discretionary relief to charities it must make an in principle decision in advance, setting out the circumstances in which relief will be available and publish a statement of policy on its website. The decision as to whether to give relief, at what percentage rate, and in what circumstances, is for the authority alone.

- 2.37 Where an authority has adopted a scheme for discretionary charitable relief, a claim must be submitted and determined before the commencement of development.
- 2.38 **Social housing relief:** Social housing relief is available for dwellings let by a private registered provider of social housing, a registered social landlord or a local housing authority, including shared ownership properties, where the tenancy and shared ownership conditions set out in Reg 49 are met. Again a claim must be submitted and determined before commencement of development.
- 2.39 **Exceptional Circumstances:** The Government has recognised that while authorities must set their charges at an acceptable level across their area, some developments may no longer be viable as a result of the CIL charge. Charging Authorities may decide that they will consider granting exceptional circumstances relief, but must adopt a scheme setting out that relief may be applied for from a start date before entertaining any claim. The authority must publicise the availability of relief on its website. This is not a part of the charging schedule process, and can be published at any time.
- 2.40 An authorities can only give exceptional circumstances relief where -
- It has adopted a scheme for relief prior to an application, and
  - The claimant has an interest in the land, and
  - A S106 agreement is in place, and
  - The cost of complying with the S106 agreement is greater than the CIL charge payable, and
  - Payment of the CIL charge would have an unacceptable impact on the economic viability of the development, and
  - Granting relief would not constitute notifiable state aid
- 2.41 It is for the authority to decide if these conditions are met. The claimant must appoint an independent suitably qualified person to undertake the viability assessment, but the appointment must be agreed with the authority. The charging authority has the discretion to judge whether the economic viability has been sufficiently compromised.

### **Key messages**

*Reliefs for development for a charity's own use and for affordable housing are mandatory – they can be applied for up to the commencement of development*

*Relief for a charity's investment development is discretionary*

*Exceptions relief is discretionary*

*Charging authorities need to publish policy statements on discretionary charitable relief and exceptions in advance prior to considering any relief applications*



## Examinations of charging schedules to date

- 2.42 As at October 2011 three examinations had been completed, at Newark and Sherwood, Shropshire and Redbridge. All three have resulted in the proposed charging schedules being found appropriate, in the case of Newark and Sherwood with one amendment. The three authorities had very different approaches, with Newark and Sherwood proposing a matrix of differential rates for a range of uses and zones whereas Redbridge proposed a single rate for all uses across the whole Borough. None of the representors at Redbridge exercised the right to be heard and the examination was conducted by written representations.
- 2.43 The authorities also had different approaches to viability testing. Redbridge used a residual valuation approach for residential development and a range of affordable housing targets. There was little consideration of commercial development on the basis that there was so little evidence of recent development that a detailed assessment would not be useful. Shropshire also had low levels of activity for commercial and retail development and its viability assessment was based on modelling a number of site typologies using rental and land values. Newark and Sherwood undertook detailed viability appraisals of all significant forms of new build development, based on generic testing of various scenarios in each part of the district. All three approaches were considered by the examiners to be sufficient to support the charges proposed.
- 2.44 The examiners in each case concluded that the proposed charges struck an appropriate balance between delivering infrastructure and impacting on development viability.

### **Key messages**

*Examiners will be looking for demonstration of a funding gap and viability evidence to support the charges – concentrate on the key issues*

*Different approaches and methodologies are acceptable – there is no one way of doing things*

*Viability can be tested in a variety of different ways*

*'Appropriate balance' is a matter for the charging authority within the margins set by viability*

*Examiners are looking for a reasonable proposal – recognising that infrastructure funding and viability are not exact sciences.*

*As yet there has been little challenge on viability grounds – the key test*

## State Aid

- 2.45 State Aid is Government support which could distort competition and affect trade by favouring certain undertakings. In the context of CIL this could occur where an exemption or relief from the levy would financially benefit the undertaking by giving a market advantage, thus distorting competition. Authorities have to consider when giving relief whether the state aid criteria have been complied with.
- 2.46 Exemptions and exceptions will normally be classified as state aid, but there is a de minimis block exemption which requires only state aid in excess of 200000 Euros (over a three year rolling period) as notifiable to the EC. Regulations and procedures for assessing state aid are set out in European legislation and can be complex and are administered by the Department for Business Administration and Skills.
- 2.47 An overview of the provisions for relief is set out in the CLG information document 'Community Infrastructure Levy Relief' May 2011.

### Key messages

*State Aid could be an issue but it will be a rare occurrence*

*If it comes up take advice – it can be very complex*

## Collection

- 2.48 Collecting authorities will need to have robust systems in place for the day to day administration of CIL. Although the liability for CIL is determined through the planning process, there are also legal and financial dimensions and charging authorities will need to determine how these respective responsibilities are to be integrated and administered.
- 2.49 The basic processes involve the following stages-
- is the application for development which would be liable for CIL?
  - what will be the charge liability? (subject to any amendments to the application)
  - Assumption of Liability Notice (from owner/developer)
  - issue of liability notice (on grant of planning permission)
  - is there a claim for exemption?
  - receipt of Commencement Notice from developer on start of development
  - issue of Demand Notice by collection authority
  - receipt of payment and allocation to CIL fund
  - notification that levy has been discharged
- 2.50 POS has produced a CIL Collection Process Flow Chart which can be accessed at [http://www.planningofficers.org.uk/POS-Library/POS-Publications/CIL-Collection-Process-Flow-Chart\\_277.htm](http://www.planningofficers.org.uk/POS-Library/POS-Publications/CIL-Collection-Process-Flow-Chart_277.htm)

- 2.51 The early stages of identifying CIL development and assessing liability are best undertaken in tandem with the planning registration processes and linked in to the authority's existing planning systems. The major planning system providers are developing modules for CIL.
- 2.52 CIL can only be charged against net additional floorspace taking into account demolition. However the definition of existing floorspace is constrained – it only relates to floorspace which has been in use for 6 months of the preceding 12 months. Establishing whether this is the case will be an important aspect of determining liability and will need to be built in to the administrative process from the outset.
- 2.53 After April 2013 CIL can be payable for development which does not need express consent, where it is covered by general consent provisions. This will be relatively rare for most authorities, but they should be aware of the possibility and review processes for identifying where permitted development leads to a CIL liability. Development in Enterprise Zones covered by Local Development Orders are the most likely category. Another example would be agricultural development.
- 2.54 Authorities should also consider whether standing orders or schemes of delegation may need revision. A process will be required for dealing with 'payments in kind' where a developer offers land as all or part of its CIL liability. In kind payments, which are at the discretion of the authority, must be made to the same timescales as cash payments and with the potentially protracted valuation procedures, having procedures in place to deal with this in a timely fashion will be necessary if development is not to be delayed.
- 2.55 A charging authority can finance its administrative expenses from CIL receipts up to a maximum of 5% per annum. Expenses can include set up costs as well as ongoing expenses, and initially these can be 'rolled up' and paid out of the first three year's income. From year four only the in-year costs can be paid from the annual income.
- 2.56 CIL monies will need to be accounted for separately and reported on an annual basis setting out income, expenditure (including expenses) and accrued sums.
- 2.57 Whereas Counties are not charging authorities for CIL they will be collecting authorities for developments for which they are the decision maker. They will be responsible for collecting CIL but will then pass it on to the charging authority in whose area the development is located. In London the Boroughs are collecting authorities in respect of the Mayors CIL, which will be passed on to the Mayor.

### **Key messages**

*Resourcing the administration of CIL can be significant and will impact across the authority – finance and legal in particular*

*Think about internal processes and responsibilities when developing the charging schedule*

*Integration of processes between departments will be essential for effective administration*

*Up to 5% of the income can be used for set up and administration.*

## **Payment by instalments**

- 2.58 The CIL Amendment Regulations 2011 provide for the payment of CIL in instalments. If an authority wishes to allow payment by instalments (and it is at the sole discretion of the authority) it must publish on its website a policy statement setting out how this will operate in terms of the number of instalments, proportion of CIL liability to be paid at any one time, the timescales for payment and any minimum amount to trigger the policy.
- 2.59 Payment by instalments will have the effect of easing the burden on developers and improving development viability. It can result in bringing development forward more quickly. At the same time it will also delay the availability of funds for infrastructure provision, and authorities will want to consider the implications and take them into account in their charge setting calculations and delivery programmes.

### **Key messages**

*Allowing instalments will affect cash flow – understand the impact*

*A policy statement must be adopted and published on the website before the policy can be applied*

## **Enforcement**

- 2.60 The enforcement of the CIL regulations will place additional demands on planning enforcement, recovery and legal services. Authorities will be expected to ensure that they receive all the CIL monies due to them, just as they would with Council Tax... Some LPAs do not monitor development as a matter of course and will need to put processes in place to identify commencement and therefore the liability for CIL payment. While developers will normally act responsibly and serve the CIL authority with a notice of chargeable development which identifies who is liable to pay CIL, and a commencement notice which triggers the timetable for payment, the authority must have processes which will monitor compliance and identify the small minority of defaulters.
- 2.61 If development does commence without the appropriate CIL payment there are enforcement provisions which include surcharge and could ultimately result in a CIL Stop Notice, prohibiting development from continuing until payment has been made. CLG has issued an information document '*Community Infrastructure Levy – collection and enforcement*' October 2011 setting out enforcement procedures but it will be for authorities to decide, for example, when it is expedient to serve a stop notice. Appropriate policy, procedures, standing orders and delegations will need to be in place to allow effective and timely enforcement.

## **Managing spending**

- 2.62 CIL charging authorities have considerable discretion and flexibility in how they spend CIL funds. Reg 59 (1) sets out the basic requirement that CIL must be spent on 'infrastructure to support the development of its area'. Reg 59 (3) allows authorities to fund infrastructure 'outside its area where to do so would support the development of its area'. CIL may be spent on the ongoing costs of infrastructure. This is the current position, but is clarified to remove any doubt in the Localism Act.
- 2.63 The definition of infrastructure is in S216 of the 2008 Planning Act. Para (2) states that Infrastructure includes:-
- roads and other transport facilities
  - flood defences
  - schools and other educational facilities
  - medical facilities
  - sporting and recreational facilities
  - open spaces
- 2.64 The definition also includes affordable housing, but at present this has been excluded by regulation 63 (4).
- 2.65 The important point to note is that apart from affordable housing the Act gives examples of what is included but is neither exhaustive nor restrictive. Without any case law or further regulations 'infrastructure' can be interpreted by the authority as what would reasonably and normally be so defined.
- 2.66 The phrase 'to support the development of the area' is to be interpreted as to deal with the impact of and to facilitate new development – not to remedy existing deficiencies. CIL is intended to support and encourage growth.
- 2.67 Charging authorities may spend funds themselves or pass the money to another body to spend for CIL purposes. (Reg 59 (4)) This can be another public body or a private enterprise. It can use CIL to reimburse expenditure already incurred and to repay borrowed money used to finance infrastructure expenditure.
- 2.68 The legislation and regulations provide a broad permissive framework for spending CIL. They **do not** require authorities to spend it on the projects or priorities that have been used to support the setting of the charge. There is no legal link between development which gives rise to the liability to pay CIL and expenditure of CIL funds.
- 2.69 Good practice would suggest that the infrastructure delivery planning process should form the basis for determining spending. It will be essential that CIL authorities have governance and decision making processes in place at an early stage to determine CIL expenditure. Ideally this should be built on the processes used to prepare infrastructure delivery plans and include external infrastructure providers from both public and private sectors. The robust monitoring and updating of infrastructure delivery plans will be crucial to assessing priorities for expenditure both for CIL and other funding streams to ensure that they are properly coordinated and effectively managed. To maximise the effectiveness of CIL and other income streams (eg capital programmes, the New Homes Bonus)

the systems for infrastructure delivery should have the necessary terms of reference and powers to manage all spending streams in a coordinated way.

- 2.70 While there is no statutory requirement to maintain, monitor or report on infrastructure delivery planning (only to report annually on CIL expenditure) it should be an important and integral part of authorities' corporate and financial planning. The planning service should have a continuing and significant input into these processes.
- 2.71 The annual reporting requirements make it important for the CIL authority to establish the authority and responsibility for the spending, monitoring and reporting of expenditure. There will need to be robust systems in place which provide a continuous recording of the CIL process from initial assessment of CIL liability through to expenditure.
- 2.72 Where CIL is passed on to other bodies such as County Councils, LEPS or utility companies, charging authorities will want to put in place procedures such as service level and/or legal agreements to ensure the monies are spent in accordance with agreed priorities and in a timely manner. There should also be a requirement to report back on expenditure for inclusion in the annual report.
- 2.73 In the first year after adopting CIL, and possibly longer, developments coming forward will have been granted permission pre-CIL and will not be liable for payment. In developing funding programmes authorities will need to take account of the build up of funds over time and the low income during the transitional period.

### **Key messages**

*Build on existing IDP processes*

*Establish governance systems and processes as part of the CIL project from an early stage*

*CIL is one of many funding streams for infrastructure – it should be managed with the others as a coordinated process*

*Funds will take time to accumulate – programmes should take account of this*

### **Working in two tier areas and across boundaries**

- 2.74 In two tier areas County Councils have responsibility for the provision of much of the infrastructure, including highways and education. Many district authorities have S106 tariffs in place for taking developer contributions towards county council services which are then handed over to the County for implementation. There will be legal agreements in place to govern expenditure and timescales. With CIL, S106 based tariffs will become much more difficult to justify and will eventually be phased out in most instances.
- 2.75 To provide for the continuing effective provision of infrastructure through CIL it will be imperative that County Councils are involved in the CIL governance arrangements. The CIL charging authorities, the Districts in two tier areas, will

have the exclusive legal responsibility for determining CIL expenditure, but also have the duty to spend CIL in support of the development of the area. Good governance should ensure that Counties have the ability to influence investment decisions affecting their services, including through the preparation of infrastructure plans and spending priorities.

- 2.76 In the short term the position will be complicated by the differing rates of progress towards CIL between authorities. Where some authorities within a County have CIL in place and others do not, it is likely to prove difficult to agree on strategic priorities for expenditure. This will become particularly problematic when S106 income is limited post 2014 and districts without CIL will be getting very limited funding through planning agreements.
- 2.77 Similar issues may arise where there are cross boundary and sub-regional infrastructure issues. There are many groupings of authorities working jointly on infrastructure planning and delivery, and the local enterprise partnerships (LEPs) will add to this as they develop. How to pool funding for cross boundary/sub-regional strategic requirements will be of great interest in deliberations on the use of CIL. There will be no 'one size fits all' solution. These issues will need to be addressed by the authorities involved and solutions tailored to individual circumstances. There is more likelihood of finding acceptable solutions where there is early engagement and shared understanding of the issues.

### **Key messages**

*Involve Counties from the outset in two tier areas*

*Talk to Counties neighbours, Counties, LEPs as early as possible*

*Think about spending decision making processes **before** the money comes in*

*Use existing partnerships and groupings where they already exist*

### **CIL and S106**

- 2.78 The CIL regulations have important repercussions for the use of S106 obligations which are consistent with the intention to limit S106 to site specific mitigation and use CIL for general infrastructure contributions. Specifically the regulations:-
- make the test for the use of S106 obligations statutory (S122)
  - ensure that there is no overlap in the use of CIL and S106 (S123)
  - limit the use of pooled S106 obligations post April 2014
- 2.79 CIL is discretionary for Local Planning Authorities. However the scaling back of S106 obligations is not, and will have significant implications for those LPAs electing not to adopt the CIL. It will have a particular impact on the potential use of tariff payments secured through S106 agreements. These already have to meet the statutory tests introduced in April 2010, and post 2014 there will be further restrictions on pooling. These will limit to five the number of planning obligations which provide funding for a project or type of infrastructure. If an authority has collected five or more contributions towards eg education provision between April

2010 and April 2014 it will not be able to collect further contributions for that purpose. If the authority adopts CIL before April 2014 this provision will apply from the date of adoption.

- 2.80 The regulation refers to ‘a project or type of infrastructure’. Authorities can therefore, for example, collect five contributions towards providing a specific project, such as a school extension, and another five towards education provision generally (providing they meet the statutory tests). To maximise the use of tariff contributions authorities will need to consider how best to identify projects in their agreements, and keep generic contributions to a minimum.
- 2.81 In the future CIL will be the preferred method for collecting pooled contributions to fund infrastructure and the continuing use of S106 based tariffs will become increasingly problematic. Authorities with tariffs, or which are considering adopting tariffs, should be looking to move to CIL as a priority.
- 2.82 At present the regulations specifically exclude the use of CIL funds to provide affordable housing. This will continue to be provided through S106 agreements. However the CLG Consultation published in October 2011 ‘*CIL Detailed proposals and draft regulations for reform*’ raises the possibility of allowing local authorities the option of including affordable housing for CIL expenditure.
- 2.83 For on site mitigation measures which meet the statutory tests, S106 obligations will continue. LPAs will need to carefully consider how best to deal with infrastructure provision, particularly on large strategic sites where facilities could be provided either through S106 or CIL. The restrictions imposed on spending CIL through Regulation 123 will be relevant in determining how LPAs use the respective powers available to them. This is dealt with in more detail in the next section ‘Avoiding Overlap’.
- 2.84 A more detailed advice note on S106 and CIL was published in March 2011 and is available on the POS website at [http://www.planningofficers.org.uk/POS-Library/POS-Publications/Section-106-Obligations-and-the-Community-Infrastructure-Levy\\_222.htm](http://www.planningofficers.org.uk/POS-Library/POS-Publications/Section-106-Obligations-and-the-Community-Infrastructure-Levy_222.htm)

### **Key messages**

*The scaling back of S106 will have a major impact on tariff based generic contributions – if the authority has these in place start thinking about CIL now – April 2014 isn’t far away*

*S106 will continue for site specific remediation – don’t expect the number of agreements to significantly reduce*

*S106 obligations have the force of law but little flexibility – carefully consider whether CIL or S106 works better and in what circumstances*

### **Avoiding overlap – the Regulation 123 statement**

- 2.85 Authorities adopting CIL are required under R123 of the CIL Regs to prepare and publish a statement on those items or types of infrastructure that it intends to fund



through CIL... To avoid double charging, the planning authority cannot then seek a planning obligation contribution towards the same infrastructure.

- 2.86 Thus if an authority were to state that it intends to provide for public open space through CIL, it could not then seek to secure an open space on a development site through a planning obligation, even where it could be considered necessary as a site specific remediation requirement. The intention is to ensure that developers are not required to contribute towards the same measures twice, once through CIL and the second time through S106.
- 2.87 Should the authority consider that for a particular development the open space requirement could best be secured through S106, taking account of the legal tests and any viability issues, it can specifically exclude the provision from CIL funding through a provision to that effect in the R123 statement, opening the way to provision through a planning obligation.
- 2.88 The R123 statement is therefore key to the operation of CIL and S106 obligations. Authorities will need to carefully consider at an early stage which sites and what infrastructure could best be dealt with through CIL, and which through planning obligations. In particular authorities should look at what large strategic sites may be in the pipeline which would require significant on site facilities and be of sufficient scale to fund these through S106 obligations.
- 2.89 There is no prescribed process for compiling or amending the R123 statement. The statement must be published on the authority's website but otherwise the format, amendment process and consultation are a matter for the LPA. Thus authorities will have considerable flexibility to change it to deal with changing circumstances or unforeseen sites coming forward. The statement does not need to be in place prior to adopting a charging schedule; indeed compiling the list in advance could unnecessarily complicate the examination process.
- 2.90 If an authority does not publish a R123 statement all infrastructure is deemed to be provided through CIL funding, which would restrict the scope of all S106 obligations to non-infrastructure items.

### **Key messages**

*The Reg 123 statement will determine what an authority can require to be provided through planning obligations – it is fundamental to how the authority operates its S106 agreements*

*It may be better to exclude some sites from CIL funding through the R123 statement if they can support on site infrastructure provision through S106*

*Statements can be amended at any time*

*In the absence of a published statement the default position is that all infrastructure will be funded from CIL – no infrastructure could be provided through S106*

### **Further changes**

- 2.91 The Localism Bill currently going through parliament includes a number of provisions which will affect CIL. These will:
- clarify that CIL can be spent on the ongoing costs of providing infrastructure and provision for regulations specifying what may or may not be funded
  - require CIL charging authorities to allocate CIL to other persons or bodies which will provide the basis for regulations which will require a 'meaningful proportion' to be transferred to local communities
  - place limits on the binding nature of CIL examiners reports
  - provide for Mayoral Development Corporations to be CIL charging authorities
- 2.92 CLG is consulting on possible further changes to the CIL regime. These are -
- the passing on of a "meaningful proportion" of CIL to neighbourhoods. The issues for consultation are the proportion of receipts to be passed on, who should receive the funds, how payments should be managed, and the relationship to planning obligations
  - whether CIL funds should be available to spend on affordable housing
  - arrangements for Mayoral Development Corporations in London to implement and operate CIL
  - amendments to reporting procedures and to make Neighbourhood Development orders and Community Right to Build Orders CIL liable
- 2.93 Following consultation changes will require amendments to Regulations and will therefore not be implemented until April 2012 at the earliest. However authorities should be aware of the potential changes that could result. Arrangements for the transfer and spending of CIL at a neighbourhood level and options for spend on affordable housing could have a significant impact on how CIL operates, including the formulation of charging schedules and spending considerations.

### 3 References

Planning Act 2008 (chapter 29 part 11)

The Community Infrastructure Levy Regulations 2010

The Community Infrastructure Levy (Amendment) Regulations 2011

*"Community infrastructure levy – an overview"*, May 2011 DCLG

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*"The Community infrastructure levy summary"*, November 2010 DCLG

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