



## **Community Infrastructure Levy Consultation July 2009**

### **Response of the Planning Officers Society**

This response is made on behalf of the Planning Officers Society (POS). The Planning Officers Society represents the most senior professionals and managers of planning functions in the English Local Authorities. We set out to:

- Act as an advocate and promoter of public sector planning
- Assist and advise the Government and the Local Government Association on planning matters and related issues
- Act as a centre of excellence, undertake research and promote best practice in planning matters
- Promote all aspects of the built and green environment by working closely with other organisations and profession

The Society's aim is to ensure that planning makes a major contribution to achieving sustainable developments, from national to local level, in ways, which are fair and equitable and achieve the social economic and environmental aspirations of all sectors of the community.

#### **1. Introduction**

1.1 POS has been actively involved in the development of the CIL proposals, recognising their significance to our members and the potential implications they will have when implemented. We have been represented on groups engaged with CLG on the developing proposals and, through POS Enterprises we have been working with 3 groups of local authorities (over 50 in total) from all parts of the Country for the past 12 months on developing Infrastructure Planning and preparing for the introduction of CIL. Our members will also have the responsibility for implementing and administering the Levy. This gives us a unique understanding of the implications for LPAs and their views. The comments in this response have been prepared with the knowledge coming from this work as well as contributions from individual authorities and members. This paper sets out the Society's major concerns and suggestions for improvement. Other detailed points are dealt with in response to the consultation questions.

- 1.2 POS is also a signatory, with the LGA, BPF, HBF, CBI and other public and private sector bodies to a joint letter setting out the necessary pre-conditions for CIL and this response should be read with that letter.

## **2. General Comments**

- 2.1 POS supports the principles behind the CIL, in particular the need to spread the burden of contributions to Infrastructure to a wider range of developments and create a more predictable income stream for infrastructure provision. However, the desire for certainty, in terms of fixed published charges, brings with it a lack of flexibility which can have adverse effects in making desirable developments which serve the needs and objectives of local communities more difficult to achieve. In this respect POS would want to see more flexibility to reflect particular circumstances, without further layers of complexity on top of what is already a complex and onerous process.
- 2.2 POS welcomes the opportunity for the creation of income streams for infrastructure provision. This will take some time to be realised and cannot be seen as the one solution to funding infrastructure. Forward funding arrangements will be essential to avoid any delay waiting for funds to build up, and the mainstream funding must continue but in a more systematic and coordinated way.

## **3. Set Up and Administration Costs**

- 3.1 To provide a national CIL regime which meets legal tests and demonstrates openness, transparency and accountability the proposals have produced (some might say inevitably) a complex system which will have significant costs and prolonged timescales for introduction. At a time of intense pressure on public finances and constantly increasing expectations of planning authorities, additional costs in preparing for and administering CIL will be very difficult to find from existing diminishing budgets. This will be a disincentive to CIL introduction. Provision to use CIL income for its development and administration is essential and would assist considerably in its take up and success. The 2008 Act specifically mentions that regulations may permit CIL to be applied to administrative expenses in S216 (6) (c). We would strongly urge this provision to be taken up.

## **4. Transitional Period**

- 4.1 The 2 year timescale for the transitional period suggested in the consultation, with S106 agreements scaled back from April 2012 is clearly insufficient. Even the most enthusiastic local authorities will struggle to achieve an adopted charging schedule within this timescale and there is considerable evidence that most LPAs are adopting a 'wait and see' approach in the light of economic and political uncertainties. Making an adopted or draft Core Strategy a prerequisite for CIL is clearly desirable, but will lead to significant delays in its widespread introduction. Scaling

back S106 agreements in April 2012 would lead to a large reduction in funding for infrastructure rather than an increase. Availability of the skills, resources and information necessary to construct charging schedules will be another key factor determining timescales. A 5 year transition period would be much more realistic.

## **5. Use of CIL for Revenue Spending**

- 5.1 Currently S106 agreements are used regularly to fund revenue contributions to a wide range of valuable initiatives and services which come within a broad definition of infrastructure. These include, for example, contributions to employment and training initiatives, support for public transport such as provision of bus services, funding for countryside management and for culture and leisure projects. The scaling back of S106 would probably exclude that source of funding for many of these, but they would also fall outside CIL expenditure if this is restricted to capital. The definition of infrastructure in the regulations should be clarified to enable expenditure on revenue where it clearly contributes to social infrastructure in support of planning and community objectives.

## **6. Operation in Two Tier Areas**

- 6.1 The operation of CIL in two tier areas and where there are sub-regional infrastructure needs will inevitably take some time to develop and establish. There will be problems where individual authorities are reluctant to take up CIL and the encouragement of 'non-joiners' will be necessary to avoid problems of either 'freeloaders' or partial implementation. POS does not support Central Government prescription to deal with this, but has identified the need for early guidance and support to encourage joint and partnership working. The likely timescales for partnerships to get CIL in place, particularly where progress on Core Strategies is inconsistent or where there is reluctance for some LAs to join up, is another strong reason for a longer transition period.
- 6.2 In London, where both the mayor and the Boroughs are CIL authorities, POS can see potential issues to be resolved. Firstly the Boroughs have a duty to have regard to the Mayors charging schedule when preparing their own but not vice versa. This will give priority to the Mayors requirements over the Boroughs squeezing out local investment. Secondly the requirement on the Boroughs to collect CIL on behalf of the Mayor where they do not have their own CIL in place (or may have decided not to implement CIL) seems likely to cause tensions and confusion.
- 6.3 Where two or more CIL authorities work together to produce a joint charging schedule, it would be also be more efficient for them to jointly collect, hold and spend CIL, either through a joint committee or agreement that one authority would administer the funds on behalf of the group. We would wish to see regulations specifically provide for such arrangements.

## **7. Double Counting**

- 7.1 There are potential problems around 'double counting' of CIL and S106 contributions. This is most likely to occur on large sites where, for example, there is a requirement for a school which could be included as a S106 obligation but which would also be an item on the infrastructure schedule supporting the CIL charge. Our understanding is that supporting evidence for the charging schedule may be on a more general area wide basis rather than site specific, particularly for the 5 year plus items, and this will increase the likelihood of possible 'double counting'. The evidence base for both the CIL and for Core Strategies should include all known infrastructure requirements albeit at a general level for later years, but should also flag up those which may be delivered through S106 agreements for key sites. This will need to be kept under review.

## **8. In Kind Benefits**

- 8.1 It is common practice for many S106 obligations to be delivered in kind by developers and there are compelling financial and timescale benefits in this approach. It can also minimise the risk to the public purse of price increases, construction delays and cost claims if responsibility for delivery rests with the developer. Sites for infrastructure can also be delivered in this way. POS would wish to see the option for 'in kind' benefits in the CIL regulations. It would be for the CIL authority to decide whether this would be appropriate in the particular circumstances, and to have the value independently verified. The potential saving to the public purse and speed of delivery can be very significant and would enable CIL income to be used more effectively.

## **9. Flexibility to Deal with Low Value Sites - Exceptions**

- 9.1 It has been acknowledged that setting CIL rates on a generalised area wide basis of viability will impact on the viability of individual sites and marginal sites may not be developed. This will be of particular concern where low value sites are of strategic importance in delivering planning and community objectives. The 2 options available to deal with this situation are differential rates and exceptional cases. In setting differential rates there is no definition of 'geographical zones or sub-areas' and it is possible to see situations where it would be beneficial to set a differential rate for a specific site (e.g. where there are expensive mitigation measures for contamination). Alternatively and a more immediate and pragmatic solution would be accepting much higher numbers of exceptions on a case by case basis.
- 9.2 LPAs may wish to indicate at an early stage (perhaps at examination) that it would consider specific sites as exceptional cases subject to the necessary evidence being produced. Striking the right balance between certainty and flexibility is likely to be problematic, particularly in the early stages of operation, and POS would want greater flexibility where development is clearly in line with the adopted plan and issues of viability

prevent development. We would not however favour a CIL appeal process as this would open the way to further delays, have significant resource implications and be open to abuse. Exceptions should be agreed between the LPA and developer and if no agreement is possible the default position would be the set CIL rate.

## **10. Definition of Development and CIL liability**

- 10.1 POS is in general agreement with the principle of levying the charge on buildings, but has concerns that the objective '*to ensure that all development which has a significant impact on infrastructure contributes towards the cost of that infrastructure*' (para 4.5) will not be realised in some cases. For example minerals and waste developments and large scale leisure complexes can have a significant impact on infrastructure requirements yet have very limited buildings as defined. They can also result in substantial uplift in land values. The scaling back of S106 provisions may make the provision of offsite infrastructure in these cases difficult if not impossible to achieve. A mechanism is required to ensure that these developments make a contribution to infrastructure requirements in the future.

## **11. Affordable Housing**

- 11.1 The decision to leave affordable housing to S106 obligations is logical in that it would continue to deliver sites and meet the objectives of mixed and balanced communities. However there will be tensions between payment of CIL and the success of affordable housing delivery. With CIL as an upfront non-negotiable payment it is inevitable that there will be an increased focus on S106 negotiations and affordable housing will be a key factor. Where there are issues of viability S106 costs and therefore affordable housing provision will be squeezed.
- 11.2 Is there a workable option of the inclusion of affordable housing as an infrastructure cost for the purposes of creating the charging schedule, but the liability to be discharged through either in kind on site provision or through off site funding? The alternative of including Affordable Housing within the CIL regime and delivering it totally through CIL funding will add unnecessary stages and bureaucracy to the process and do nothing to help the problem of finding sites.
- 11.3 There are strong in principle arguments that affordable housing development should be liable for CIL, particularly in e.g. urban extensions or major sites where it may well have a greater impact on infrastructure requirements than other residential development. The shortfall through exemption will need to be made up by charging others more. However, as most affordable housing providers will benefit from charitable exemption there is probably little to be gained in practice from their inclusion.

## **12. Working with Infrastructure Providers**

- 12.1 Two impediments to the potential success of CIL are the reluctance of some infrastructure providers to become involved in the infrastructure planning process and to release financial information, and the temptation for providers to substitute CIL for mainstream funding, particularly with pressures on public spending for the indefinite future. Government must work with the infrastructure providers to overcome these problems.

## **13. Calculation of CIL Rates**

- 13.1 There is little in the consultation about the calculation of CIL rates and how this applies to different classes of development. Is it the case that the starting point should be that the same rate per sq m will apply to all classes of development? This seems implied but not clearly stated. Differential rates can be justified on the basis of viability, but how would this apply for example to public buildings such as schools, hospitals, police stations and theatres some of which could also be the recipients of CIL funds? Can private and public sector development within the same use class be charged at different rates? How can the viability of public sector development be calculated? The consultation is very thin on this aspect of charge setting and whether it needs to be regulation or guidance there is an urgent need for more information to assist those authorities wishing to make early progress.

Graham Jones  
Vice President Emeritus, Planning Officers Society  
Email: [GJ@jandjplanning.demon.co.uk](mailto:GJ@jandjplanning.demon.co.uk)

## COMMUNITY INFRASTRUCTURE LEVY POS RESPONSE TO CONSULTATION QUESTIONS

- 1: Do you agree with the proposal that the draft CIL regulations do not define 'infrastructure' further? **Yes subject to clarification below**

**The definition should be as flexible as possible and allow revenue expenditure on delivery of wide range of social infrastructure**

- 2: Is any further reporting required for CIL? **For infrastructure providers**

Comments

See comments in question 4 on administration costs. **A mechanism is needed to require providers to report on delivery, to supplement the duty of CIL authorities to report transfer of funds.**

### FORMAT OF REPORTS

- 3: (a) Is the 1 October deadline for reporting on the previous year's activity sufficient for local planning authorities? **Yes**

(b) Will this timescale enable developers and local communities to understand how CIL revenue has been applied? **Yes**

### GENERAL

- 4: Do you have any comments on any other matters raised in chapter 2 which are not covered by the questions above?

**No provision has been made in the regulations for meeting the costs of administering the new system. Also the partial impact assessment recognises the set up costs as between £90k and £193k. Provision should be made for top slicing CIL to meet these costs with annual reporting to ensure transparency.**

**Guidance will be needed on the methodology to be applied for the apportionment of sub regional infrastructure costs where some authorities are applying CIL and others are not.**

### CHARGING AUTHORITIES

- 5: Are there any circumstances where a CIL charging authority would not be able to fulfil its charging authority functions effectively? **No**

- 6: (a) In deciding whether to use the power at section 207 of the Act, should the Government apply different criteria? **No**

(b) Which functions should a joint committee perform? **Joint Committees should have the option of joint collection and expenditure where there is an adopted joint charging schedule. Joint committees should consist only of representatives of the CIL authorities.**

#### DIFFERENTIAL RATES

7: Do you agree that differential rates should be based only upon the economic viability of development? **Yes**

Comments:

#### METRICS

8: Do you agree that CIL charges should be based on a metric of pounds per square metre? **Yes**

9: Would prefer to have a choice of charging metrics, and if so, can you suggest what and how the system could accommodate this choice without undue complexity and unfair distortions? **No**

10: Do you agree with the Government's proposal to apply the charging metric to the gross internal area of development or do you think there are advantages to levying CIL on the gross external area? **Gross external**

**Planning applications are measured on gross EXTERNAL floor area and this is by far the simplest and most straightforward measurement. Gross internal is not known at application stage as it is dependent on construction and design detail not required or available. The CIL authority would therefore have to make an assessment based on assumptions which could be contested.**

See response to question 22

11: Do you agree that CIL should be levied on the gross development, rather than the net additional increase in development? **Levying on the gross development will have an impact on the comparative costs of redevelopment versus conversion/renovation, which could distort the market. Has any modelling been undertaken on the impact, and how this could affect the level of CIL charging?**

Comments

#### INDEXATION

12: Should authorities be required to index CIL charges? **Yes**

13: (a) Should indexation be based on a national index to provide simplicity, consistency and a readily understood index. **Yes**

(b) Alternatively, should charging authorities be allowed to choose different indices in different places? **No**

14: Do you agree with the Government's proposed choice of an index of construction costs? **Yes**

15: Are you content with indexation taking place to the point of the grant of planning permission or would you prefer charges to be indexed to the point when development commences? **YES to the point when development commences**

Comments **If commencement is delayed for a prolonged period (up to 5 years) the CIL payable would significantly undervalue the cost of the Infrastructure which would be costed at the time permission was granted.**

16: Do you think it is right to apply the index on an annual basis or do you see advantages in applying it monthly? **Annual basis**

17: Do you agree that charging authorities should be able to index their charges from 1 January each year (taking the November index)? **Yes**

#### CHARGING SCHEDULE PROCEDURES

18: Do you agree with the Government's proposal to allow joint charging schedule/development plan examinations? **Yes, but there needs to be some thought given to how this would work in practice with different 'examiners' working under different legal powers, with different tests and different 3<sup>rd</sup> party rights.**

19: Do regulations or guidance need to cover any additional matters relating to joint examinations? **See above**

20: Should the CIL examiner be able to modify a draft charging schedule to increase the proposed CIL rate? **Yes**

Comments **It is important that as much flexibility as possible is built into the system. If there were representations e.g. from Infrastructure Providers, that the CIL charging schedule underestimated the costs the examiner should have the opportunity to increase the rate. The Examiner would have to have viability evidence to justify an increase. This would avoid the need for a further examination with the time delay and cost. The provision that allows LPAs to withdraw their scheme if unhappy with the Inspector's report is a further check**

#### GENERAL

21: Do you have comments on any other matters raised in chapter 3 which are not covered by the questions above?

**The collection of CIL should be solely a Charging Authority responsibility. County Councils should not have any responsibility as this will add unnecessarily to LA set and administration costs. County Councils should have a duty to inform their districts of necessary information to enable charges to be set and collected.**

22: (a) Do you agree with the chosen definitions of building, planning permission and 'first permits'? **No**

(b) If not, what changes would you wish to see that strike the right balance between simplicity, fairness and minimising distortions?

Comments **The definitions will lead to considerable anomalies. For example they would exclude wind turbines extensive minerals and waste developments and even large parts of major industrial developments including nuclear power plants. All of these can have significant impacts on the need for infrastructure but would make no contribution towards it. A mechanism is needed to capture contributions from these developments.**

23: (a) Do you agree with our approach to when CIL is chargeable on outline and reserved planning permissions? **Yes**

(b) If not, what changes would you wish to see that deal fairly with these types of permissions?

#### EXEMPTIONS AND DISCOUNTS

24: (a) What are your views on the principle of providing a reduced rate of CIL for affordable housing development? **See comments in covering letter**

(b) What do you think the likely consequences of providing such a discount might be?

**See comments in covering letter**

25: If the Government were to provide a reduced rate of CIL for affordable housing development, do you think that the proposed definition of affordable housing is workable in practice? POS supports the principle of using the HRA definition, but questions the additional criterion of public funding. Many authorities have in the past secured affordable housing without the benefit of grant through S106 agreements, using e.g. accumulated Housing Association funds or deferred equity for low cost housing for sale.

Comments **HCA definition should be adopted for consistency**

26: If the proposed definition provides a workable basis for any reduced rate of CIL for affordable housing, should CIL relief for charities building affordable

housing be applied according to this definition or according to whether it fulfils the charity's charitable purposes?

Comments **Relief should be available on either basis, whichever is the greater.**

Local discretion based on HCA definition

27: Should LCHO properties where receipts from staircasing are recycled for additional affordable housing, not be subject to any clawback? **There should be provision for clawback; otherwise relief for affordable housing could be abused.**

(b) If LCHO properties where receipts are not recycled are subject to clawback of the CIL discount, should there be a time limit up till when staircasing to full ownership would invoke clawback? **Yes**

(c) How should such a clawback operate? **No Comment**

28: Is 7 years an acceptable time period for clawback to operate over? **Yes**

29: Is it reasonable to ask a claimant to submit an apportionment of liability in this way? **Yes**

30: Do you agree that it is best not to have a special procedure for developments that have difficulty in paying the advertised rate of CIL? If not, how could it be done in a way that is fair, non-distortionary and not open to abuse? **An appeals procedure would involve yet another administrative process with the accompanying bureaucracy and costs. There will be cases where it will be in the interests of the community and the developer to reduce the CIL charge to enable beneficial development to proceed. It should be for the developer and the planning authority to agree on these cases; where there is no agreement CIL should be liable. Local Authorities are subject to normal fiduciary duties and auditing which are sufficient controls.**

THE LIABLE PARTY

31: Do you agree with the Government's proposals for liable parties and assumption of liability? **Yes**

COLLECTING CIL

32: Are these timescales for the transfer of CIL revenue from the collecting authority to the charging authority the right ones? **Yes**

#### PAYMENT OF CIL IN KIND

- 33: Do you think that the final regulations should provide for the payment of CIL in-kind? **Yes**

Comments **See covering letter**

**The regulations should allow flexibility for payments in kind. This will often have advantages for the provision of infrastructure more efficiently and cheaply which ultimately is the purpose of the charge**

- 34: If you think they should, can you suggest how CIL could be paid in-kind without incurring the difficulties outlined above?

**The ability of LPAs to reject offers of payment in kind is critical. Other issues of valuation to ensure value for money would not be difficult to apply together with discounting to allow for differing payment windows.**

#### PAYMENT BY INSTALMENTS

- 35: (a) Should payment by instalments be provided for in the final CIL regulations in addition to the ability to pay CIL by phases of development? **Yes**

(b) How should the instalments be structured?

**Around a pre-agreed phasing plan with CIL payable on commencement of each phase.**

**Instalments are often important to viability. The ability to allow payments to follow development receipts avoids the developer having to borrow thus increasing costs. Indexation would still be applied.**

- 36: Do you agree that payment on account should not be provided for in the final CIL regulations? **Yes**

#### DUTY ON THE AUTHORITY TO REMOVE THE LOCAL LAND CHARGE UPON REQUEST

- 37: Should the collecting authority be under a duty to remove the charge automatically on payment of the full CIL liability? **Yes**

#### ENFORCEMENT OF CIL LIABILITIES

- 38: Should the draft regulations be amended to require collecting authorities to have to issue a warning to liable parties (in writing and possibly by posting a warning on the site in question) before being able to impose a late payment surcharge? **No**

Comments **Unnecessary burden that will add to the costs of administering the scheme**

- 39: Are the means of recovering CIL debts sufficient or would further methods, such as the ability to impose attachment of earnings orders, be helpful?  
**Yes**

Comments **Attachment to earnings would be an administrative burden that would rarely be cost effective.**

- 40: Should the Government provide for specific enforcement measures in regulations to allow collecting authorities to penalise and deter breaches of the conditions for relief? **Yes**

Comments **Such powers are considered very important to ensure the system operates fairly and effectively**

## COMPENSATION

- 41: Is a bespoke compensation regime required for CIL where enforcement action is inappropriately taken or would the Ombudsman route suffice?  
**Yes**

Comments **Ombudsman route would be effective**

## GENERAL

- 42: Do you have any comments on any other matters raised in chapter 4 which are not covered by the questions above?

**The requirement to have to regularise unauthorised development before charging CIL will lead to the removal of the test of expediency by default. An alternative would be to charge unauthorised developments a penalty surcharge sufficient to encourage regularization**

**Relief for charities should be restricted to their charitable purposes and discretionary relief should not apply to their investment activities**

- 43: What do you think about the Government's proposal as set out in draft regulation 94 to scale back the use of planning obligations?

**Agree in principle**

- 44: Do you think the wording of the five tests as set out in draft regulation 94 is appropriate? Is each of the five tests meaningful and workable in practice, or could any be expressed in a better way? **There is overlap and duplication, but they are well understood and have stood the test of time**

- 45: Do you think that a transitional period, beyond the commencement of CIL regulations in April 2010, would be required to restrict use of planning obligations to the Circular 5/05 tests? **Yes** And if so what should it be and why is such a period required?

**A 2 year transition period is not long enough. 3-5 years will be needed. This reflects both past experience of bringing in new measures and the present reluctance to move too quickly until CIL becomes a certainty and the market improves. Scaling back S106 powers from April 2012 would result in a considerable loss of benefits from existing tariff arrangements which would not be the interests of the community or developers.**

46: Do you agree that a scale back of planning obligations as set out in draft regulation 94 should apply universally across England and Wales regardless of whether a local authority has a CIL or not? **Yes**

47: Should a scale back of the use of planning obligations go further and prevent the future use of planning obligations for pooled contributions and tariffs? **Yes**

Comments

48: Do you think the Government's proposal to provide an additional legal criterion to restrict the use of planning obligations to address planning impacts 'solely' caused by a CIL chargeable development is workable in practice? **Yes**

If not, please state why not. Can you think of an alternative which would have the same or similar effect?

49: What transitional period, beyond the commencement of CIL regulations in April 2010, would be required to restrict use of planning obligations to mitigate impacts 'solely' caused by CIL chargeable developments?

**See question 45**

50: Do you agree that a restriction of planning obligations to prevent their use for pooled contributions or tariffs should apply universally across England and Wales regardless of whether a local authority has a CIL or not? **Yes providing there is a reasonable transition period**

51: What transitional period in London do you think would be required before a scale back of the use of planning obligations which prevented the use of pooled contributions and tariffs could take effect, to ensure a smooth transition from the existing to the new planning obligations regime, taking account for the need to use planning obligations for Crossrail purposes? **5 years should be sufficient, in line with a national 5 year period**

52: In revising Circular 5/05 in light of the introduction of CIL what further policy or areas of clarification do you think might be required with regards to the use of planning obligations? **None**

- 53: Do you think any additional further guidance (additional to a revised Circular 5/05) is required to support the use of planning obligations or CIL, and if so who would be best to provide it? **Yes**  
Comments **See previous comments**

#### GENERAL

- 54: Do you have comments on any other matters raised in chapter 5 which are not covered by the questions above?