


Articles

The Community Infrastructure Levy: How it will Operate in Practice

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 Development; Infrastructure; Land tax; Levies; Planning policy

“Families across the country need more affordable homes. We want to give more support to communities and councils who are doing their bit to deliver the extra homes we need with money for vital infrastructure. It isn’t enough to build more homes. They need to be in high quality neighbourhoods with proper infrastructure and local facilities too. I want this new community levy to give councils and communities the extra support they need to do their bit to improve their area for families and for the future.”

Housing Minister, Yvette Cooper, January 28, 2008

Introduction

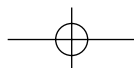
This article aims to provide an overview of how the Community Infrastructure Levy (CIL), provided for in Pt 11 of the Planning Act 2008 (ss.205–225), will operate in practice. The detail of CIL is left by the 2008 Act to be provided by Regulations made by the Secretary of State with the consent of the Treasury (s.205(1)). It seemed that these Regulations would not come into force before October 2009.¹ In addition, the Act makes provision for the Secretary of State to provide guidance on the operation of CIL, which the charging authorities must have regard to (s.221). Such guidance may accompany or succeed the publication of the Regulations. The Department for Communities and Local Government policy document, *The Community Infrastructure Levy*,² coupled with the Explanatory Notes to the Planning Act 2008, provide additional detail of the nature of CIL and how it will operate.³

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¹ It has now been suggested that the levy will not come into force until April 2010 (See C. Hereward, *Planning*, Issue 1830, August 7, 2009). After the first draft of this article was prepared, the draft regulations were published (July 30, 2009). Entitled “Community Infrastructure Levy: Detailed proposals and draft regulations for the introduction of the Community Infrastructure Levy Consultation”, the period for consultation will close on October 23, 2009. A detailed discussion of the draft regulations within this article has not been feasible but where possible, reference to the draft regulations has been included.

² *The Community Infrastructure Levy* (August 2008); note that publication was before the coming into force of the Planning Act 2008 on November 26, 2008.

³ For a comprehensive examination of the historical background to CIL and discussion of current tariff schemes in practice, see Stephen Ashworth and Joanne Demetrius, “The Path to the Community Infrastructure Levy—Past, Present, Future” [2008] J.P.L. 13. This article



CIL is defined as a “charge” whose purpose “is to ensure that costs incurred in providing infrastructure to support the development of an area can be funded (wholly or partly) by owners or developers of land” (s.205(1) and (2)).

It is a tariff which will apply to most types of new development, by virtue of specified descriptions or purposes. It is not a tax on a percentage of the increase in value that results from planning permission being granted (unlike the originally proposed Planning Gain Supplement, which was widely criticised and replaced by CIL in November 2007). CIL “charging authorities” will be empowered, but not required, to charge CIL, and the rate will be calculated by each individual authority, thus varying from charging area to area. Further, the money raised from CIL will be spent only on local and sub-regional infrastructure to support the development of the area, rather than being allocated nationwide. Thus CIL could be said to be a halfway house between a national development tax and the individually negotiated s.106 agreement where contributions go directly to infrastructure linked to the development granted planning permission.

In essence, there are four stages in the CIL process:

- identifying infrastructure need and cost;
- setting rates;
- administering charges and collection;
- distributing revenue.

This article will consider each in turn. References to section numbers refer to the Planning Act 2008.

Throughout a consideration of the operation of CIL, it is worth having in mind the following broad themes:

- *Viability*: if CIL is set at too high a level, there will be impact on viability, particularly as CIL will affect most types of new development. Developers, especially in the current economic climate, will simply not implement planning permissions, thus defeating the Government’s objective of encouraging new development, in particular house-building. On the other hand, if CIL is set at too low a rate it will be ineffective in providing additional resources to fund infrastructure. Although the Government is keen to stress that CIL is a flexible instrument capable of adapting to challenging economic times, there is speculation that many charging authorities will not consider it worthwhile implementing CIL for the foreseeable future.⁴ If a charging authority does implement CIL, setting rates that strike the right balance will be one of the greatest challenges.
- *Autonomy*: CIL is intended to devolve more power to the local level.⁵ Charging authorities will not only be given complete discretion as to whether to implement CIL, but may also be given a good deal of autonomy in setting rates. Although the Act provides some guidance as to how CIL may be allocated (for example, setting out what constitutes “infrastructure”), there is a risk that there will be a lack of consistency between local areas, which must be avoided if CIL is to operate fairly.

addresses the third section of Ashworth and Demetrius’s article in light of the coming into force of the Planning Act 2008. For a concise overview of the historical background to the CIL and insightful prediction of what the regulations might contain see Tim Smith of BLP: Community Infrastructure Levy paper delivered to the RTPF’s 10th Annual Planning Law Update, June 12, 2009.

⁴ See, for example, Written Answer given by Mr Ian Wright, *Hansard*, Vol.481, col.1131W (October 29, 2008). A recent survey carried out by Drivers Jonas has indicated that more than half of local authorities have no current plans to introduce CIL (see below).

⁵ See comments of Hazel Blears introducing the second reading of the Bill in the House of Commons: *Hansard*, Vol.467, cols 32 and 33 (December 10, 2007), describing the levy as a “devolutionary measure”.

- *Cross-authority working*: in allocating contributions, it is intended that funds will not only be spent on local infrastructure but also on sub-regional infrastructure. What sub-regional infrastructure is funded and how much each charging authority will allocate to sub-regional projects from their CIL resources will need to be agreed between individual charging authorities (and problems could arise if, for example, a particular authority chooses not to implement CIL whereas its neighbours do). Some authorities are already experienced in working in partnership (e.g. in Joint Planning Committees), but others may not be so well prepared for this way of working. It is imperative that neighbouring charging authorities work well together in order for CIL to be effective and realise its objectives.

Who will calculate CIL?

CIL will be set by “charging authorities”. A local planning authority is the charging authority for its area (s.206(2)). In the case of London, the Mayor of London is a charging authority for Greater London in addition to the local planning authorities (s.206(3)),⁶ which appears to leave open the possibility of development in London being subject to two tiers of CIL.⁷ The CIL Regulations may further provide for a county council, a county borough council, a district council, a metropolitan council, or a London borough council to be the charging authority for an area, *in place of* the local authority (s.206(4)).⁸

Demonstrating infrastructure need

As the concept of CIL is a tariff that feeds directly back into a charging area’s infrastructure, in setting the level of CIL the first stage is to identify a charging area’s infrastructure need.

According to s.216(2), “infrastructure” *includes*:

- roads and other transport facilities;
- flood defences;
- schools and other educational facilities;
- medical facilities;
- sporting and recreational facilities;
- open spaces; and
- affordable housing.⁹

CIL regulations may add, remove or vary the above list, and specifically exclude matters from the meaning of infrastructure (s.216(3)). This provision rather suggests that, although the list in the Act

⁶ Further, the Broads Authority is the only charging authority for the Broads, and the Council of the Isles of Scilly is the only charging authority for the Isles of Scilly.

⁷ Although note that the DCLG August 2008 policy document states that “the Government will be ideally seeking to design a collection system that ensures that developers only pay one rate of CIL to one collection authority, which is likely to mean that London Boroughs collect CIL on his behalf rather than the Mayor collecting CIL in each case” (para.4.48). See also draft reg.24(3).

⁸ Or in the case of Greater London, one of the charging authorities.

⁹ Being social housing within the meaning of Pt 2 of the Housing and Regeneration Act 2008 and such other housing as CIL regulations may specify. It may be considered surprising that affordable housing is included within the list, given that the main reason for the continuing operation of s.106 agreements alongside CIL is that the Government feels that negotiated planning obligations are better suited to enable affordable housing to be delivered on site (see DCLG January 2008 policy document, para.38). However, the idea is that the Government “does not *initially* intend to include affordable housing within the scope of what may be funded from CIL. However, affordable housing is included within the definition of infrastructure . . . so that affordable housing *could* receive CIL funding if evidence shows that this is necessary” (DCLG August 2008 policy document, para.2.26, emphasis added). So, if it transpires that insufficient affordable housing provision is made through s.106 agreements, CIL can be used to top up developer contributions towards affordable housing (DCLG August 2008 policy document, para.5.24).

is deliberately non-exhaustive, the Regulations may end up defining what is and is not infrastructure for CIL purposes, and it may in fact not be open to a charging authority to consider infrastructure outside the types permitted in the Act and Regulations when identifying infrastructure need. This is despite the Government's intention, as set out in the DCLG's August 2008 policy document, to favour "a wide definition of infrastructure to give local communities flexibility to choose what infrastructure they need to deliver their development plan".¹⁰

Identifying infrastructure need: a plan-led process

Against the background of what infrastructure includes, the Government intends that the process of demonstrating infrastructure need should begin with an examination of an area's development strategy: the Regional Spatial Strategy, the Spatial Development Strategy (in London) and the Development Plan Documents in the Local Development Framework (particularly the Core Strategy and saved policies in Local Plans and UDPs).¹¹ It is from the development plan that an authority should be able to ascertain the broad quantum, type and location of development in the area¹² and ascertain what infrastructure is needed to enable the amount of development proposed for the area to come forward.¹³ The DCLG recommends that, as a minimum, there should be (either in the development plan, or as a background document that was available to the inquiry or examination into the development plan) clear statements of:

- named items or classes of infrastructure related to delivery of the development strategy;
- a broad idea of the quantum of infrastructure need of each type; and
- an assessment of the other sources of funding available to deliver the infrastructure and the shortfall in funding.¹⁴

The CIL process is therefore plan-led. The intention is that CIL should be used only to fund the infrastructure needs of development contemplated by the development plan for the area, and not to remedy existing deficiencies, except to the extent that they will be aggravated by new development.¹⁵ However, this does not mean that only new infrastructure can be funded by CIL. Facilitating better use of existing infrastructure to increase capacity can also be considered in demonstrating infrastructure need, however only if refurbishment, repair or addition to existing infrastructure is important for the success of new development.¹⁶

Infrastructure needed to support the development strategy for the area may be broken down into two categories:

¹⁰ DCLG August 2008 policy document, para.221. The draft Regulations do not in fact substantially alter the list. Minor changes are made in relation to affordable housing (to "such housing as CIL regulations may specify") and in relation to infrastructure funded by the Mayor of London (roads and other transport facilities only): see draft reg.41.

¹¹ DCLG August 2008 policy document, para.3.13.

¹² It should be noted that the Government is minded to propose that a prerequisite for being able to levy CIL will be that there must be an up-to-date adopted development strategy for the area. It will be the responsibility of the authority to decide if the development plan is up to date (based on Government criteria), and, if it is not, the authority will need to prepare a new development plan before taking advantage of CIL (see paras 3.28–3.30 of the DCLG August 2008 policy document).

¹³ See PPS12: Local Spatial Planning, para.4.8.

¹⁴ DCLG August 2008 policy document, para.3.32. Again the Government is minded to propose that CIL cannot be charged until infrastructure planning is sufficient, an assessment to be made by the authority (para.3.33).

¹⁵ DCLG August 2008 policy document, para.2.4

¹⁶ DCLG August 2008 policy document, para.2.5. Examples given are: "where development necessitates the provision of additional sports facilities, CIL could be used to pay for the refurbishment of an existing community centre to provide such facilities. And CIL could be used to repair failing existing infrastructure where this is important for the success and sustainability of new development. But it would not be acceptable to spend CIL on repair or refurbishment where the development circumstances of the local area did not justify this".

1. specific identified items of infrastructure needed to support major strands of the development strategy (e.g. transport links to a major planning urban extension);
2. infrastructure not specifically identified but known to be needed (e.g. the number of primary schools needed to support anticipated population growth but without specific locations).¹⁷

The Government considers that it would be appropriate for charging authorities to use CIL to fund infrastructure in both categories.¹⁸ It may well be, however, that identifying infrastructure need from the second category will provide charging authorities with more flexibility to cater for change and for developments that cannot be identified in advance (e.g. windfall developments).

It is intended that authorities should only select items of infrastructure for CIL funding that have a reasonable prospect of happening within the period covered by the development plan, and prioritise those pieces of infrastructure likely to make the biggest contribution to enabling development to take place in a sustainable way.¹⁹

Sub-regional infrastructure need

As stated above, the CIL is designed to fund not only local but also sub-regional infrastructure. An example given during House of Commons debate by the Rt Hon. Dr Phyllis Starkey (Milton Keynes, South-West) (Lab) is Junction 13 of the M1, which is hugely important for supporting infrastructure and growth of housing in Milton Keynes, but is not in Milton Keynes, nor even in Buckinghamshire.²⁰ It is this type of sub-regional infrastructure that CIL is intended to fund, which presently cannot easily be provided for by way of s.106 contributions.²¹

The Act does not, however, oblige authorities to consider sub-regional infrastructure need in setting CIL (and, with that, fund sub-regional infrastructure). The Government's preferred approach is rather to provide a framework enabling authorities to "agree voluntarily" to fund sub-regional infrastructure and to,

"... work together and think strategically in deciding infrastructure priorities, including infrastructure needs at a sub-regional level which increase the sustainability of their area overall, as well as bringing benefits to the development of their local area and to their local people".²²

Therefore it will be necessary for charging authorities to work together to identify sub-regional infrastructure need from Regional Spatial Strategies, Regional Economic Strategies and Multi-Area Agreements.

Allowing charging authorities the flexibility to work together to identify sub-regional infrastructure may well have many advantages in terms of tailoring CIL funds to where they are needed most, but difficulties in negotiations between authorities could arise in practice where:

¹⁷ Examples given in DCLG August 2008 policy document, para.3.16.

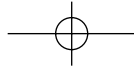
¹⁸ DCLG August 2008 policy document, para.3.19.

¹⁹ DCLG January 2008 policy document, para.31.

²⁰ See second reading of the Planning Bill in the House of Commons, *Hansard*, Vol.469 col.34 (December 10, 2007).

²¹ Because showing the necessary "link" for the purposes of s.106 between a development and infrastructure that serves a wide geographical area is often difficult.

²² DCLG August 2008 policy document, paras 2.31 and 2.32 Guidance. In London, the idea is that sub-regional infrastructure requirements could be addressed by a number of boroughs acting jointly, or by the Mayor, in the context of the London Plan (para.2.35). The draft Regulations preserve a discretion on applying CIL to infrastructure outside a charging authority's area (draft reg.29(2)).



- a piece of sub-regional infrastructure is needed by several authorities but some are planning to implement CIL and others not;
- one charging authority has significantly more funds available for infrastructure than a neighbouring authority;
- one charging authority has a much greater local need for infrastructure than a neighbouring authority, yet still has a need for shared sub-regional infrastructure.

Care must also be taken to ensure that sub-regional need is not doubly or even triply accounted for—for example, if more than one charging authority identifies the same piece of sub-regional infrastructure as needed—to avoid accusations that the CIL rate has been set too high.

The success of identifying sub-regional need and using CIL to fund sub-regional infrastructure will very much depend on the working relationship between neighbouring charging authorities. Those who already have joint working committees and agreements will no doubt find the addition of CIL matters integrates smoothly into their existing cross-boundary working to deliver shared priorities. However, one can nevertheless envisage the potential for disagreement in identifying sub-regional need.

Demonstrating infrastructure need

The Act provides that the Regulations may require charging authorities to prepare and publish a list of projects that are to be, or may be, wholly or partly funded by CIL (s.216(5)(a)).²³ Such a list would serve as a definitive statement of infrastructure need for the purposes of calculating the levy, as well as allocating contributions, ensuring a transparent and accountable process. This list must, however, have its roots in the charging area's infrastructure planning process and should not simply be a new and separate list for CIL purposes,²⁴ reinforcing the fact that identifying infrastructure need is a plan-led process.

The charging schedule: how the levy will be calculated

Once an authority has identified its area's local and sub-regional infrastructure need, it must reflect this in a draft charging schedule, which is provided for in some detail in s.211 of the Act. It is this document that will turn the cost of infrastructure needed into rates, or other criteria, by reference to which the amount of CIL chargeable in respect of development in the authority's area is calculated.²⁵

Section 211(2) of the Act provides that a charging authority *must* have regard to the following in setting CIL rates (to the extent and manner specified by CIL regulations):

- actual and expected costs of infrastructure (whether by reference to lists or otherwise)²⁶;

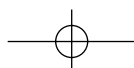
²³ The Regulations may also include provision about the procedure to be followed in preparing such a list (s.216(5)(b)). The draft Regulations propose no such provision.

²⁴ DCLG August 2008 policy document, para.3.14. Further, the Government does not consider that the requirements of infrastructure planning underpinning CIL spending will require different or additional consultees (e.g. public and private sector agencies responsible for delivering infrastructure) from those needed for the development strategy as a whole—see para.3.20.

²⁵ Planning Act 2008 s.211(1).

²⁶ i.e. a figure for infrastructure need.

²⁷ i.e. viability. These factors are reiterated in draft reg.24.



- matters specified by CIL regulations relating to economic development (which may include, in particular, actual or potential economic effects of planning permission or the imposition of CIL)²⁷;
- other actual or expected sources of funding for the infrastructure.

It will not be acceptable for an authority that already has standard charging arrangements in place for planning obligations to convert these automatically into CIL charging schedules.²⁸ CIL is a new tariff and authorities must all go through the process set out by the Act and forthcoming Regulations should they wish to charge CIL.

Although the precise system for calculating the rate of CIL will be set out in the Regulations,²⁹ a relatively clear series of stages emerges from the Act and the DCLG August 2008 policy document as follows:

Stage 1: identification of a total figure for infrastructure need

The first stage, following an examination of the development plan and existing infrastructure planning (and the possible preparation of a CIL infrastructure list), is for an authority to identify the likely cost of that infrastructure coming forward. This corresponds to the requirement in s.211(2)(a) of the Act.³⁰ In relation to identifying the cost, the DCLG heeds the following warning:

“... [T]here will need to be an element of pragmatism about the calculation of costs to be attributed to CIL. Attempts to identify costs accurately too far in advance may lead to spurious decisions and actually result in a worse allocation of resources than if planning maintains a reasonable degree of uncertainty. The Government recognises that the key issue is to ensure that any uncertainty does not lead to a CIL charge that is set too high.”³¹

The advice appears to be: err on the side of caution and there is nothing wrong in identifying a broad estimate for the expected cost of infrastructure.

Stage 2: deduct funding from other sources

In accordance with s.211(2)(c) of the Act, in deciding how much to seek to raise from CIL, authorities must have regard to how much will be available from other sources, such as funding commitments from other infrastructure providers and from Central Government, in order to identify gaps in funding to arrive at a proposed amount for CIL.

Stage 3: consider viability

The amount arrived at must be subject to an assessment of local development viability (s.211(2)(b)). The DCLG August 2008 policy document states that an objective of CIL is to help to “unlock

²⁸ DCLG August 2008 policy document, para.3.35. The Act provides that Regulations may permit or require charging schedules to operate by reference to “values used or documents produced for other statutory purposes” (s.211(6)(e)). Draft reg.10 sets out a charging formula which must be applied by the local authority by reference inter alia to the local authority’s charging schedule. Draft regs 26–38 deal with the charging schedules.

²⁹ Planning Act 2008 s.220.

³⁰ See above.

³¹ DCLG August 2008 policy document, para.3.25.

development”.³² If CIL is set at unaffordable levels, development will not be delivered, which would counter this objective.

In assessing the viability of CIL rates, it appears that the Government is reluctant to produce national guidance to assist charging authorities, who instead should rely on the several methodologies that already exist to help inform decision-making on the level of developer contributions where viability is an issue.³³ Nevertheless, the desired method appears to be an assessment of the proportion CIL represents of the increase in value arising from development.³⁴ In addition, the charging authority will need to take into account the wider range of development costs placed on developers, for example, the level of affordable housing contributions that the authority will require from developments through s.106 obligations.³⁵

However, on the other hand, if the CIL rate is set low, so that viability is unaffected, the levy may be ineffective in funding infrastructure. It is worth remembering that the Act sets out that the purpose of CIL is to enable owners or developers to fund the cost of providing infrastructure to support the development of an area “wholly or partly”.³⁶ The Act’s Explanatory Note goes further in stating that the aim of CIL is that infrastructure costs are funded “wholly or mainly” by owners or developers of land.³⁷ The extent to which it will be possible for authorities to achieve this purpose and either wholly, mainly, or even partly, fund infrastructure needed in light of viability is, however, uncertain. In the current economic climate, it may well transpire that the impact of CIL on infrastructure funding (assuming it is implemented by charging authorities) will be much less than originally anticipated.

Stage 4: apportionment to future development

Once an overall figure of infrastructure need is reached, taking into account viability, it appears likely that the Regulations will provide for the authority to apportion CIL to different classes of development—s.211(6)(a) of the Act states that CIL Regulations may permit or require charging schedules to operate by reference to “descriptions or purposes of development”. This is provided for in draft reg.25 (different rates for zones and intended use of development).

It is anticipated that rates will be set to reflect: (1) the broad relative impacts of different types of development; and (2) different levels of viability between different classes. Thus types of development that typically have a higher intensity of use will attract a higher CIL rate, as will types of development that are considered more viable.³⁸ It appears that the decision on how to apportion CIL will be left to individual charging authorities rather than being set down expressly in the Regulations.³⁹

The DCLG’s August 2008 policy document notes that it might be appropriate to allow different CIL rates not only between different types of development but also within a local authority area, for

³² DCLG August 2008 policy document, para.3.50.

³³ DCLG August 2008 policy document, para.3.54.

³⁴ See DCLG August 2008 policy document, para.3.52 and the words of Planning Act 2008 s.211(1)(b)—“actual or potential economic effects of planning permission”.

³⁵ So as to ensure that CIL liability does not reduce the amount of affordable housing delivered through s.106 planning obligations (DCLG August 2008 policy document, para.3.55).

³⁶ Planning Act 2008 s.205(2).

³⁷ Planning Act 2008 Explanatory Note, para.329 but note that the draft Regulations state the aim of the CIL is to fund infrastructure “wholly or partly” (draft reg.24).

³⁸ DCLG August 2008 policy document, paras 3.58–3.60.

³⁹ DCLG August 2008 policy document, para.3.58. The draft Regulations confirm this approach.

example to reflect that one portion of a local authority has particular needs for new flood defence and transport infrastructure, while another portion is a brownfield regeneration area with particularly difficult economic conditions.⁴⁰ There are references to this idea in the Act in s.211(6)(c), which provides that CIL regulations may permit or require charging schedules to operate by reference to the “nature or existing use of the place where development is undertaken” and in s.211(6)(f) which states that Regulations may provide, or permit or require, provision “for differential rates, which may include provision for supplementary charges, a nil rate, increased rates or reductions”. (See draft reg.25).

If this could be made to work in practice, it seems a sensible proposal that would cut through the arbitrary nature of an authority boundary for the purpose of calculating CIL rates. It would have the twofold effect that: (1) development situated in an area of great infrastructure need contributes more towards infrastructure; and/or (2) higher value areas help fund infrastructure to a greater extent than lower value areas.⁴¹

Stage 5: application of a standard unit metric

The Act leaves it open for the Regulations to permit or require CIL to operate by reference to any measurement of the amount or nature of development.⁴² A number of metrics are discussed in the DCLG Guidance, including floor and site area, number of dwellings, number of bedrooms and number of habitable rooms.⁴³ It appears that the Government considers that calculating CIL rates per square metre of floor space of development is “sensible” for industrial and commercial development.⁴⁴ However, the most appropriate unit for residential development is yet to be decided.⁴⁵

Whatever is decided, the proposal is that it will be set out in the Regulations and applied nationwide, rather than being left to individual charging authorities to determine.⁴⁶ This will provide some national consistency to CIL, which is otherwise very much a flexible local tariff. Striking a careful balance between national consistency and local flexibility is important as, if CIL operates at vastly differing levels between charging authorities and in different ways, it will be open to criticism on the ground of unfairness. It could also provide an artificial incentive or deterrent for developers to choose to locate new developments in certain areas to the disadvantage of all charging authorities.

Further, the Act provides that Regulations may permit or require charging schedules to operate by reference to an index used for determining a rate of inflation.⁴⁷ The Government is minded to prescribe which indices will be appropriate.⁴⁸ This will enable charging authorities to update the charges set out in the charging schedule.

⁴⁰ DCLG August 2008 policy document, para.3.62.

⁴¹ DCLG August 2008 policy document, para.3.63. The Government intends to allow charging authorities to set different rates of CIL (see draft reg.25 and paras 3.42–3.53 of the consultation document).

⁴² Planning Act 2008 s.211(6)(b).

⁴³ DCLG August 2008 policy document, paras 3.64–3.68.

⁴⁴ DCLG August 2008 policy document, para.3.63.

⁴⁵ DCLG August 2008 policy document, para.3.66. A uniform standard of gross internal area is the preferred option for all types of development both commercial and residential (see draft reg.10).

⁴⁶ “To aid transparency and comparability”—DCLG August 2008 policy document, para.3.64. The formula is set out at draft reg.10 and is based on gross internal area.

⁴⁷ Planning Act 2008 s.211(6)(d). Indices are included in the formula for calculating the chargeable amount.

⁴⁸ DCLG August 2008 policy document, para.3.68. The appropriate index proposed in draft reg.10 is the construction costs.

Potential stage 6: consultation

Once an authority makes a preliminary decision on the relevant rates, the Act provides that they “*may* consult, or take other steps, in connection with the preparation of a charging schedule (subject to CIL regulations)”.⁴⁹ It would seem surprising that a levy of this potential significance and impact should avoid public consultation and the DCLG August 2008 policy document makes reference to the charging schedule being “consulted upon for a minimum of six weeks”.⁵⁰ It is hoped that this stage will make its way into the CIL Regulations. Consultation does feature in draft reg.27 but no timescale is provided. Consultation bodies include adjoining LPAs, county councils, parish councils, the Mayor in London, and representations must be invited from residents and businesses in the area, voluntary bodies and bodies representing the interests of businesses in the area.

Stage 7: independent examination

A requirement of independent examination of the draft charging schedule is clearly provided for by s.212 of the Act. The authority, before approving a charging schedule, must appoint an examiner who, in the opinion of the authority, is independent of the charging authority and has appropriate qualifications and experience, to examine the draft charging schedule.⁵¹ The Government’s preferred option is that the Planning Inspectorate should lead the examination of charging schedules,⁵² but the charging authority may, with the agreement of the examiner, appoint persons to assist the examiner (e.g. the Valuation Office Agency).⁵³

It is proposed that examinations will follow the same rules as examinations into development plan documents. The Act provides that CIL regulations *must* require a charging authority to allow anyone who makes representations about a draft charging schedule to be heard by the examiner.⁵⁴ This mandatory requirement made of the Regulations is unusual in the sections in the 2008 Act on CIL, and could be taken to be an indication of the Government’s desire to ensure full public participation in the planning process. However, there is no guarantee that a person who makes representations will be heard at a formal inquiry, as the means by which the right to be heard is exercised is likely to be at the discretion of the independent person.⁵⁵ Thus it may transpire that representations by members of the public on CIL rates will be given less prominence than the Act at first sight appears to suggest.

The examiner must recommend that the draft charging schedule be approved, rejected or approved with specified modifications, and give reasons for the recommendations.⁵⁶ The report of the examiner is binding on the charging authority so they may approve the schedule only if the examiner has recommended approval and subject to any modifications recommended by the examiner.⁵⁷

⁴⁹ Planning Act 2008 s.211(7) (emphasis added).

⁵⁰ DCLG August 2008 policy document, para.3.41.

⁵¹ Planning Act 2008 s.212(1) and (2). The requirement appears in draft regs 29 and 33(1). See also Hansard Written Answers for June 2, 2009 [277116].

⁵² DCLG August 2008 policy document, para.3.43.

⁵³ Planning Act 2008 s.212(3).

⁵⁴ Planning Act 2008 s.212(9).

⁵⁵ DCLG August 2008 policy document, para.3.41—the means could be rather a round table discussion or informal hearing.

⁵⁶ Planning Act 2008 s.212(7).

⁵⁷ Planning Act 2008 s.213(1).

Stage 8: formal adoption of the charging schedule

Given the key role of the charging schedule, the Act sets out that it should be brought into force formally. In the case of a charging authority other than the Mayor of London, it must approve the charging schedule (1) at a meeting of the authority, and (2) by a majority of votes of members present.⁵⁸ The Mayor of London must approve a charging schedule personally.⁵⁹ Once approved, a charging schedule will not take effect until the charging authority publishes it.⁶⁰

The charging schedule will not only be a legal document created through the CIL regulations but will also be part of the folder of documents that make up the Local Development Framework defined through PPS12.⁶¹ This is an important point for local authorities to note, many of which may already be at an advanced stage in their LDF process and currently getting to grips with the recently revised PPS12. Paragraph 4.12 of PPS12 makes reference to the Community Infrastructure Levy and advises authorities to continue to advance their infrastructure planning which will serve as a basis for charging CIL; however, no reference is made to how the charging schedule may be incorporated into the LDF. It does not appear, however, that the charging schedule will be a development plan document, although authorities should be aware that the Government has stated in its August 2008 policy statement that “the formal legal status of the charging schedule is a matter of ongoing discussion with stakeholders”,⁶² so it is possible that the Regulations will provide otherwise. The draft Regulations do not include provision for the charging schedule to be a development plan document.

Post-adoption, CIL regulations may make provision for the correction of errors in the charging schedule,⁶³ and, further, a charging authority may determine that a charging schedule is to cease to have effect in circumstances specified by the Regulations.⁶⁴

Administering charges and collection

Liability to pay CIL arises where development is commenced in reliance on planning permission (s.208). The Act provides a new definition of development for CIL purposes as meaning “anything done by way of or for the purpose of the creation of a new building, or anything done to or in respect of an existing building” (s.209(1)).⁶⁵ The emphasis is therefore on operational development concerning buildings only. The Regulations must include provision for determining when development is treated as commencing (s.209(3)), which may include when a specified activity or event is undertaken or occurs, when that activity or event is not development for CIL purposes but has a specified kind of connection with a CIL development (s.209(4)).⁶⁶

⁵⁸ Planning Act 2008 s.213(2).

⁵⁹ Planning Act 2008 s.213(3).

⁶⁰ Planning Act 2008 s.214(1).

⁶¹ DCLG August 2008 policy document, para.3.38. PPS12: *Local Spatial Planning* (June 2008).

⁶² DCLG August 2008 policy document, para.3.38.

⁶³ Planning Act 2008 s.213(2).

⁶⁴ Planning Act 2008 s.214(3) and (4).

⁶⁵ There is no definition of “building”, so presumably this will continue to be judged in accordance with s.336(1) of the 1990 Act and associated case law. These provisions are proposed to be supplemented by draft reg.5 which provides limitations on what are considered “buildings” (excluded are buildings into which people do not normally go and buildings used only intermittently for inspecting or maintaining plant or machinery) and size limitations as well as limitations on works to existing dwellinghouses.

⁶⁶ This appears to be an attempt to mesh the existing definition of commencement of development in s.56 of the 1990 Act with the narrower definition of development for CIL purposes. The DCLG August 2008 policy document confirms that in determining at what point a development has started, the Government is minded to use the definition of when development is begun set out in s.56 of the 1990 Act because it “provides a relatively tried and tested definition understood by planners and developers alike” (para.4.21). See also draft reg.6 (commencement of development).

Further, the CIL regulations must define planning permission (which may include planning permission within the meaning of the 1990 Act and any other kind of permission or consent (s.209(5)). It seems that the definition of planning permission may not be limited to cases where an application for permission is necessary. According to the DCLG August 2008 policy document, “*Most* GPDO development is likely to be excluded from CIL” (emphasis added), which suggests that there may be some permitted development that will attract CIL.⁶⁷ CIL may also be charged in respect of development that has been commenced without the benefit of planning permission (s.208(7)).

The calculation of the CIL amount will be made by reference to the time when planning permission first permits the development (s.200(6)) and, again, the Regulations will need to include provision for determining that time, particularly in the case of outline planning permission (s.209(6)) (as to which, see draft reg.7). Where a development is granted OPP, the planning permission for CIL purposes is most likely to be the grant of approval for the final reserved matters for a site, or part of a site. This ensures that where outline planning permission is used to enable phased developments, CIL liability would be calculated and paid separately for each of the phases.⁶⁸

The Regulations must provide for a right of appeal against the calculation of CIL on a question of fact to a person appointed by the Commissioners of Her Majesty’s Revenue and Customs (who must either be a valuation officer appointed under s.61 of the Local Government Finance Act 1988 or a district valuer) (ss.215(1) and (2)). (See Pt II of the draft Regulations: “Appeals on Chargeable Amount”).

The person responsible for paying CIL is either a person who has assumed liability to pay CIL before the commencement of development⁶⁹ or, if nobody has assumed liability or other circumstances have arisen (such as the insolvency or withdrawal of a person who has assumed liability), the Regulations *must* make provision for the owner or developer to be liable.⁷⁰ “Owner” means a person who owns an interest in the land and “developer” means a person who is wholly or partly responsible for carrying out a development.⁷¹ It appears that it will be up to the parties to agree between them who will pay CIL, rather than being determined by the charging authority.

The Regulations may provide for registration or notification of actual or potential liability to pay CIL,⁷² which, it is considered, will be of particular importance if CIL is to be charged for certain types of permitted development or unauthorised development. There is also the potential to register a CIL liability as a local land charge, which should enable subsequent purchasers of developed land or property to be aware of the existence of an outstanding liability.⁷³

Local land charges may also be used as one method of enforcement against a failure to pay CIL, in particular in the case of enforcement against successive owners and by way of sale or other disposal with consent of a court (s.218(5)(c)). In addition, the presence of a charge on the Land Register would act as a practical deterrent against failure to pay as those trying to evade their CIL liabilities

⁶⁷ But note that householder development by homeowners will not be liable to pay CIL (DCLG August 2008 policy document, para.4.13).

⁶⁸ DCLG August 2008 policy document, para.4.7. This is confirmed by draft reg.7(3) and (4).

⁶⁹ Planning Act 2008 s.208(2). The assumption must be made in accordance with any provision of CIL regulations about the procedure for assuming liability.

⁷⁰ Planning Act 2008 s.208(4). Draft reg.13 (Default liability) makes provision only in relation to owners of a material interest (and not developers) being liable to pay CIL in an amount apportioned to their interest.

⁷¹ Planning Act 2008 s.209(7).

⁷² Planning Act 2008 s.218(5). See draft regs 43 and 44.

⁷³ Planning Act 2008 s.218(5). See draft reg.75.

would be unlikely to sell their properties unless they pay the charge (or be forced to reduce their selling price).

As well as the ability to register CIL as a land charge, the Regulations will contain wide-reaching and very comprehensive enforcement provisions (see s.218). These may, in particular, include provision for the payment of interest, the imposition of a penalty or surcharge, the suspension or cancellation of a decision relating to planning permission (akin to a stop notice), enforcement of sums owed (action on a debt, distraint against goods, etc.), jurisdiction on a court to grant injunctive relief (s.218(4)). Furthermore, there will be new criminal offences created (including, in particular, offences relating to evasion or attempted evasion or to the provision of false information or failure to provide information, and offences relating to the prevention or investigation of other offences) (s.218(4)(g) and (h)). A very large proportion of the draft Regulations deals with enforcement (see draft regs 53–80).

Payment is likely to be either on account or by instalments (s.217(2)). According to the DCLG, the Government is also exploring whether online payment of CIL might be facilitated, including through existing services such as the Planning Portal.⁷⁴

Of interest is the fact that the Regulations may make provision about payment in forms other than money (such as making land available, carrying out works, or providing services) (s.217(4)). The DCLG recognises that payment of CIL in kind “raises some significant challenges”.⁷⁵ First, it is not clear how the value of an in kind offer would be calculated: would it be the cost actually incurred by the developer to provide the in kind offer, or the cost that would fall to the charging authority if they were to provide the infrastructure?⁷⁶ Secondly, in kind payments may not be compatible with EU procurement rules.⁷⁷ Finally, there may need to be specific consideration as to how to enforce in kind payment, for example if the charging authority considers that the in kind payment is not delivered to the quality expected. It is perhaps because of these challenges that there is no provision for in kind payment in the draft Regulations.

Allocation of contributions

Once a charging authority has received funds from developers or owners in accordance with the rates set out in its charging schedule, it has to decide what to allocate those funds to. In theory, the allocation of CIL should closely (if not exactly) tally with the infrastructure need identified at the outset of the process. However, in practice, it is unlikely to do so as the infrastructure need assessment will have been made some time in advance of the collection of the levy and need circumstances may have changed. Further, the moneys levied are unlikely in any event to account for the total figure for infrastructure need owing to issues of viability.

⁷⁴ DCLG August 2008 policy document, para.4.38.

⁷⁵ DCLG August 2008 policy document, para.4.40.

⁷⁶ It seems likely that the costs to the developer of providing the in kind provision could be significantly lower than paying the CIL charge for the same infrastructure (if they use their own workforce and/or land to construct the infrastructure). This raises issues of fairness between CIL payers, and also could lead to pressure being placed on charging authorities by developers to accept in kind contributions.

⁷⁷ The potential difficulty is that the agreement between the charging authority and the owner/developer could amount to a public works contract (if the threshold is met) requiring advertisement and competition. See, in particular, *Ordine Degli Architetti delle Province di Milano e Lodi v Comune di Milano* (C-399/98) [2001] E.C.R. I-5409: the ECJ held that the execution of infrastructure works directly by a developer in lieu of an “infrastructure contribution” required by Italian law on granting of permission for urban developments amounted to a public works contract because, inter alia, the works were fully capable of constituting public works, a contract did exist (notwithstanding that the arrangement came about pursuant to legislation), and the contract was for a pecuniary interest as it involved the developer settling a debt that would otherwise have existed. See also *Auroux v Commune de Roanne* (C-220/05) [2007] E.C.R. I-385.

The strict requirement in the Act that CIL must only be spent on infrastructure, which informed the assessment of infrastructure need, will remain.⁷⁸ Also, if a charging authority is required to prepare and publish a list of projects that are to be, or may be, wholly or partly funded by CIL, this may further serve to constrain the allocation of contributions.⁷⁹ Such a constraint is reinforced in the Act, which states that the Regulations may provide for circumstances in which the charging authority may and may not apply CIL to projects not included on the list (s.216(5)). Confining the allocation of CIL to infrastructure identified at the outset of the CIL process contributes to the idea of CIL as an open and transparent plan-led tariff that enables developers to see where their money is going (unlike the Planning Gain Supplement); however, this could lead to a degree of inflexibility for charging authorities if they are unable to respond to changing circumstances in delivering infrastructure need.

Perhaps to counter any inflexibility in a projects list, the Regulations may provide for using CIL for “forward” and “backward” funding. The Regulations may specify “what is to be, or not to be, treated as funding” (s.216(4)(c)) and, in particular, s.216(6) sets out that the Regulations may:

- permit CIL to be used to reimburse expenditure already incurred;
- permit CIL to be reserved for expenditure that may be incurred on future projects;
- permit CIL to be applied (either generally or subject to limits set by or determined in accordance with the regulations) to administrative expenses in connection with infrastructure or in connection with CIL;
- include provision to the giving of loans, guarantees or indemnities;
- make provision about the application of CIL where the projects to which it was to be applied no longer require funding.

These provisions should mean that CIL is directed in practice where it is needed most, and the money will not be tied into certain projects that no longer require funding, despite their being on the “list” or otherwise identified as infrastructure need. This corresponds to the Government’s intention that CIL cannot and should not work in isolation from other revenue streams and authorities ought to have flexibility in determining how to utilise CIL, so that CIL can help to fill funding gaps that can hold up the delivery of key schemes.⁸⁰ These are the provisions that give charging authorities flexibility, in light of the restrictions on which actual projects CIL can go towards. However, Pt 8 of the draft Regulations (Application and Reporting) appears to provide only for reimbursement of expenditure incurred (in addition to standard application infrastructure). It would appear that the flexibility in allocating CIL funds suggested in the Act is not fully reflected in the draft Regulations.

It is intended that, when necessary, authorities should use front-funding mechanisms to enable them to deliver infrastructure before other receipts come on stream, such as injections of cash from public sector “bankers” (e.g. English Partnerships) and Regional Infrastructure Funds.⁸¹ “Front-funding” can then be recouped from CIL. The Government anticipates that CIL receipts will be more predictable and less “lumpy” than planning obligations because CIL will capture contributions from smaller developments of which there is a steady stream in most local authorities, thus making it easier to predict the pay-back of “front-funding”.⁸² However, in these uncertain financial times,

⁷⁸ See Planning Act 2008 s.216(2).

⁷⁹ Planning Act 2008 s.216(5)(a). The “infrastructure list” concept is not in the draft Regulations.

⁸⁰ DCLG August 2008 policy document, para.2.38.

⁸¹ DCLG August 2008 policy document, para.2.39.

⁸² DCLG August 2008 policy document, para.2.39.

authorities will need to act with some trepidation in utilising “front-funding”, for fear of not being able to recoup the money from CIL.

In the case of sub-regional infrastructure, the Act provides that Regulations may permit a charging authority to pass money to another body (s.216(7)(f)) and to cause money to be applied in respect of things done outside its area (s.216(7)(d)). Depending on the sub-regional infrastructure concerned, CIL receipts would be passed to the infrastructure provider by the charging authority.⁸³ These infrastructure providers should already be identified in the Implementation Plan that accompanies the Regional Spatial Strategy. They could be the county council in the case of, say, waste management, or the Highways Agency or Network Rail.

Accountability

As developers will not be able to know exactly which projects their money is going towards (as they do in the case of s.106 agreements), the Government considers it particularly important to have clear information about the income received from CIL and the infrastructure delivered, although it is considered impractical and burdensome for authorities to attempt to make links between a single CIL receipt and a specific item of infrastructure.⁸⁴

Both the charging authority and any body which has received CIL should monitor the use which either has been or will be made of it, and report on actual or expected charging, collection and application of CIL.⁸⁵

The Government is considering the following reporting options:

- utilising the annual outturn reports that authorities complete to show annual income and expenditure, because these currently capture the amount of money spent on each capital expenditure category and within that, the different finance streams supporting that spending;
- using the Annual Monitoring Report system to capture data on infrastructure milestones, and using the Multi-Area Agreement and Local Area Agreement processes to monitor delivery;
- the Government may assemble this information into an annual report, or simply make public the data held.⁸⁶

The Regulations are highly likely to require a charging authority to account separately, and in accordance with the Regulations, for CIL received or due,⁸⁷ so authorities will need to manage their accounts in such a way that CIL moneys are readily distinguishable in order to demonstrate that they are acting lawfully in how they spend and distribute it. Auditing will need to verify that CIL funds are being spent on infrastructure.⁸⁸

⁸³ DCLG August 2008 policy document, para.2.34. This is provided for in draft reg.39.

⁸⁴ DCLG August 2008 policy document, para.2.41.

⁸⁵ Planning Act 2008 s.216(7)(b) and (c) and (f) in the case of other bodies.

⁸⁶ DCLG August 2008 policy document, para.2.43. None of the reporting options appear in the draft Regulations: instead a charging authority must prepare a separate CIL report for each financial year in which it collects CIL and publish it on its website no later than October 1 following the end of the financial year to which the report relates (draft reg.42).

⁸⁷ Planning Act 2008 s.216(7)(a). Confirmed by draft reg.42.

⁸⁸ DCLG August 2008 policy document para.2.44.

Conclusion

A recent survey of all local authorities in England conducted by Drivers Jonas found that over half of authorities said they had no current plans to introduce CIL and only 22 per cent suggested that they would be implementing CIL either now or in the future.⁸⁹

This reluctance to embrace CIL may in part be due to uncertainty as to how CIL will operate in practice, particularly in view of the fact that the Regulations are not as yet forthcoming. In the prevailing economic climate, local authorities are doubtless also concerned that the cost of implementing CIL (involving a detailed study of infrastructure need and preparation and formal adoption of a charging schedule) will not reap sufficient benefits in terms of the amount of money raised to be worthwhile.

However, in the long term the operation of CIL should provide charging authorities with much greater flexibility than the current s.106 obligations. The range of developments asked to contribute will be broader, infrastructure that is not directly linked to the development can be funded (including sub-regional infrastructure), and the authority's discretion as to how the money is allocated, including "forward" and "backward" funding, should ensure that more efficient use is made of developer contributions.

From the developer's point of view, the publication of CIL rates in the charging schedule will improve predictability and certainty as to what they will be asked to contribute, and the (possible) publication of a list of infrastructure projects to be funded, coupled with transparent monitoring and reporting, should enable developers to see where their money is going.

If the potential hurdles of viability, national consistency and effective cross-authority working can be overcome, CIL has the potential to be a flexible and effective tool which can help provide for much-needed infrastructure to support new development. However, whether this will prove to be the case or whether CIL will sit on the statute book as a legislative "white elephant" will depend significantly upon the clarity and coherence of the forthcoming Regulations.

⁸⁹ See Drivers Jonas press release February 2009 at <http://www.driversjonas.com/uk.aspx?doc=30588> [Accessed July 3, 2009]. The draft Regulations propose restricting the use of s.106 agreements after two years. According to Claire Dutch of Lovells; "The government is trying to force councils to adopt CIL", Lawyers warn rules could compel levies, Planning, Issue 1830, August 7, 2009.