

Public / Planning

It's a jungle out there

The Community Infrastructure Levy & other animals, by **Romola Parish**

IN BRIEF

- The unanswered questions surrounding the government's new methods of raising funding for the infrastructure needed to support development.

A recurrent theme in planning law is the thorny issue of how best to “tax” development. This is highly topical at present when planning contributions are estimated to have fallen from £9bn last year to £3bn this year, and are expected to fall further. The Community Infrastructure Levy (CIL), enacted by the Planning Act 2008 (PA 2008), is the latest in a long history of short-lived “development taxes”, “planning gain supplements”, and similar mechanisms that extend the reach of the existing s 106 agreements.

The CIL is one of the most controversial aspects of PA 2008 because of the way in which it restructures the basis of planning contributions to raise funds for specific regional infrastructure projects. Infrastructure is defined in PA 2008 to include roads, flood defences, educational, medical and sporting facilities, open space and housing.

As originally drafted, the rate of CIL was to be based on the increase in land value accompanying the grant of planning consent. After much adverse comment, this has now been replaced by a system whereby the rate of CIL is to be based on a calculation of the local infrastructure needs and economic viability of development in the area. This is a welcome amendment, particularly in the current economic climate where punitive taxes on land value could significantly affect the potential for bringing forward development. However, a value-driven rate criterion may still reappear in the CIL Regulations.

Implementation

It is not mandatory for a local authority to implement the CIL. Where it is implemented, it will apply to all

development (including construction and refurbishment), residential and commercial, above a *de minimis* threshold (development by householders is excluded). The levy will be charged to the owner or developer at the time that development consent is granted, but not payable until the commencement of development. There is likely to be a 28-day payment period. It is envisaged that the CIL may be paid in instalments, or in phases where development is phased. It may be possible to pay “in kind” (as permitted under s 106 agreements) but the

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government's concern is that this would reintroduce uncertainty and raise technical and fairness issues. It may also raise issues of procurement (which an obligation to make payments to the charging authority would not) particularly if the link between the proposed development and the infrastructure to be funded is tenuous or distant.

The charging authority (the relevant local planning council, National Park or Broads Authority or the Greater London Authority) must produce a charging schedule setting out their proposed infrastructure needs and costs, the potential for development in the area and the rate of CIL per unit of development, eg per dwelling or per square metre of development. The charging schedule will not formally be part of the development plan, but is likely to evolve with the development plan. Prior to

adoption the schedule will be subject to the same degree of scrutiny (including a public inquiry and testing) as development plans, but developers will have no right of appeal.

The government is intending to maintain both certainty and flexibility by setting some aspects (the unit of development, exemptions and inflation indices) at a national level, but facilitating differential rates for different regions and other flexibilities to reflect local circumstances. However, it will be interesting to see which local authorities decide to implement the CIL and how projected development rates and the perceived need for infrastructure and its proposed cost will balance out. Fears remain that imposing large CIL levies will deter development, particularly in the current economic climate.

A survey undertaken by Drivers Jonas in February 2009 indicated that less than 50%



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existence. Charging authorities will be able to add interest and surcharges to late payments and will have the power to stop development in the event of non-payment. The CIL Regulations may even impose criminal sanctions for non-payment. So far, so clear. But there are wider questions about the way the CIL will work in practice, including:

- What happens to the proposed infrastructure works if planning consent is not implemented within the three years during which it is valid?
- How will the issue of “implementation” or “commencement” of development be assessed for the purposes of charging the levy?
- Will the infrastructure contributions by a developer influence the extent to which a project gains consent?
- If a local authority does not use the money for the infrastructure initially proposed, can the developer reclaim any of the levy or take legal action to oblige the authority to carry out those works?

The “other animals”

The most commonly used mechanism prior to the coming into force of PA 2008 was the s 106 agreement governed by the terms of the Town and Country Planning Act 1990. These agreements are entered into between a local authority and a developer and contain a planning obligation to enable the local authority to impose restrictions on the use of the land or the operation of the development and/or to claim contributions towards the local infrastructure and facilities.

Their function is limited to obligations and contributions that are “intended to make acceptable development which would otherwise be unacceptable in planning terms” (Circular 05/2005 Planning Obligations, para B3) and therefore must be linked to the proposed development in a tangible way. The idea is to compensate for and/or mitigate the effects of the development, rather than as a means

by which planning permission is bought and sold. The s 106 mechanism allows contributions to be closely tailored to the proposed development on the site.

The CIL will replace some of the contributions that are currently collected under the s

106 agreement regime. However, that regime will stay in place and will address matters that are required to mitigate the site-specific impact of proposed developments, many of which could fall outside the scope of the published infrastructure requirements of the local authority. The government is considering restrictions on the use of the s 106 obligations mechanism, once the CIL is implemented. This would effectively force authorities to implement the CIL (or encourage use of the potentially forthcoming Business Rates Supplement (BRS)) to prevent a hiatus developing in the funding for infrastructure that is not set out in a development plan and charging schedule.

The most obvious matter that will continue to be governed by s 106 agreements is the delivery of affordable housing, notwithstanding that it is also listed as a suitable CIL project. It is government policy for this to be delivered in kind and on site as part of the permitted development, which is arguably a fairer and more appropriate way of dealing with the issue than the formulaic CIL approach. However, it seems that both options will be available to a charging authority which will have to decide how to charge for this provision without risking “double charging” developers. For example, if the CIL goes into a general pot of funds and is used for affordable housing, but a developer is also required to provide housing under the terms of a s 106 agreement, the double charge might be considered unreasonable.

BRS levy

The BRS is intended to be a fundamental mechanism for raising funds for the Crossrail project but is not limited to this and, if passed as currently drafted, it would give local authorities the power to raise funds from occupiers for infrastructure, employment or skills which will promote economic development of an area by way of a levy capped at 2p on business rates. The BRS cannot be used for housing, social, education or health services which the local authority already has a duty to provide, and must be additional expenditure which the local authority would not have otherwise incurred. However, transport is clearly a permitted use of BRS funds, and it would seem that major physical infrastructure attached to the excluded uses mentioned above would fall within the scope of the BRS.

There is the potential for some authorities to fund appropriate projects which were omitted from the CIL charging schedule

using the BRS. Alternatively, funds may not be clearly allocated towards specific projects and could be diverted to other needs. This could have implications for occupiers who may want a degree of certainty as to which project their funds will contribute to, and who would be concerned that smaller, lower profile infrastructure projects closest to their development needs may be sidelined in favour of bigger, higher profile projects with less immediate benefits.

While the BRS is to be offset against any contributions paid under Business Innovation District payments there is no indication that the CIL will be offset against any BRS, s 106 or other levy or contribution paid by a developer, which raises the question of whether developers who are also occupiers will be able to take legal action to claim a repayment if they are double-charged for the same or similar infrastructure projects.

Crossrail levy

The mayor of London is hoping to raise funds for Crossrail not just via BRS, but also by a £213/m² development levy for office space above a 500m² threshold, payable under s 106 agreements (proposed as an alteration to the London Plan) and also a further £300m via the CIL (when implemented) to be charged on all London boroughs regardless of the benefit they will derive from the project. There are already concerns that funding for this project will be diverted from important local projects and that the cost-benefit implications between boroughs will be unfair.

While harvesting funding from a range of sources is admirable, even necessary, there is an element of “double whammy” for developers who are also occupiers, and potential unfairness on the part of those boroughs that are likely to benefit least from the project, particularly as counties outside London that will benefit from a Crossrail link are outside the reach of the Mayor’s funding schemes. If the Crossrail funding package sets a precedent, these themes are likely to recur frequently particularly in these more straitened times. The government will need to meet the shortfall from fewer housing schemes being constructed, and lower contributions negotiated on the back of reduced viability of such schemes. The CIL and BRS may not be able to provide the answer. NLJ

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