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22nd October 2009

Paul Martin
Communities and Local Government
CIL Team
Zone 1/E2
Eland House
Bressenden Place
London SW1E 5DU

Dear Paul,

**DETAILED PROPOSALS AND DRAFT REGULATIONS FOR THE
INTRODUCTION OF THE COMMUNITY INFRASTRUCTURE LEVY:
CONSULTATION**

I am writing to submit this joint response to the Community Infrastructure Levy consultation. It has been prepared by Cambridgeshire Horizons, the Local Delivery Vehicle for the Cambridgeshire growth agenda, discussed with a number of stakeholders, and agreed by all six Local Authorities within Cambridgeshire.

Cambridgeshire Horizons has been working with the Local Authorities for over a year on the potential for a county-wide tariff, or Section 106-based standard charging system, which would allow a proportion of revenue to be pooled towards sub-regional infrastructure projects. The Community Infrastructure Levy represents an opportunity to deliver the benefits of a tariff within a much stronger legal framework, and to broaden the base of developments contributing to infrastructure funding. We therefore welcome its introduction, and the draft regulations.

However, the detailed design of the levy as suggested by the draft regulations raises a number of concerns for us. We appreciate the opportunity to share these concerns and thus contribute to making the Community Infrastructure Levy (CIL) a successful mechanism for increasing infrastructure investment.

Our comments are set out in detail in the attached questionnaire, with the most significant points summarised below.

Transition to CIL

The transition to the Community Infrastructure Levy is not addressed sufficiently clearly in the consultation document. Implementation of CIL will require a step change for both Local Authorities and developers, in addition to the prerequisites of an adopted Core Strategy and PPS12-compliant infrastructure planning. In order to ensure that this change goes smoothly, we suggest a transition period of at least three years. During this period there should be greater scope for exceptions to be made to CIL, in order to take account of decisions made prior to its introduction.

The transition period would also allow existing standard charging and tariff systems to migrate into CIL. Moreover, developments with existing outline planning permissions attached to a Section 106 should not then incur a CIL liability during reserved matters, as this would lead to an unreasonable double requirement for contributions.

Without adequate transition arrangements there is a real danger that amounts being secured for infrastructure under the present arrangements will be prejudiced, leading to a temporary if not longer term reduction in resources secured.

Relationship between CIL & residual Section 106

It is important that the boundary between the use of CIL and Section 106 is clearly understood. The two instruments have different purposes, Section 106 to mitigate onsite impacts and CIL to deal with cumulative offsite impacts, and in the interests of fairness these must not overlap. Clarity about this would also assist the transition period.

Where large strategic housing sites are concerned, this point is especially critical. Local Authorities in Cambridgeshire are currently having considerable success in negotiating Section 106 packages for larger developments. It must be ensured that widening the base of contribution through CIL does not result in lower contributions, or less clear arrangements, for major sites.

We therefore suggest that sites of more than approximately 1000 housing units are dealt with under a bespoke levy approach, rather than the standard CIL. The exact threshold should be chosen with reference to the provision of key infrastructure onsite, for example a new primary school, as opposed to a contribution to offsite provision.

This approach would be similar to Cambridge City Council setting aside their adopted Planning Obligations Supplementary Planning Document when negotiating Section 106 agreements for the major urban extensions to the city.

The level of this bespoke charge, and the site-critical infrastructure it would pay for, would be identified at the earliest possible planning stage. This could be in the relevant Area Action Plan, although the CIL Charging Schedule should specify development areas of sufficient scale to require a bespoke levy.

Developers of larger sites and Local Authorities should both benefit from the additional clarity that a bespoke levy could bring to the complex planning process for these sites. However, it would not seem necessary to adopt the full EIP process for such bespoke levies (not least because the relevant Area Action Plan would already have been through a public scrutiny process).

Such an approach would retain the simplicity of having as much as possible dealt with by one system (i.e. CIL), but allowing for a tailored solution to very large sites. Failure to establish a mechanism for large sites as proposed above is likely to lead to protracted negotiations as to what is covered by CIL, and what is 'on site mitigation', thus reducing the overall benefits of the policy change.

Setting CIL Rates

We note that whilst setting variable rates of CIL requires a greater level of viability analysis, and that it will be important to avoid deterring development by setting too high a rate, a measure of pragmatism is needed. It would be impossible to set the rates perfectly, and the complexity of multiple differential rates would undermine the clarity and predictability that CIL could offer.

Rather than setting levels based on the lowest value developments, a mean should be sought. A certain degree of flexibility remains through affordable housing policies, although these will of course be taken into account when establishing what is viable during the rate-setting exercise.

If CIL is set by reference to the lowest value sites, there is a danger that widening the base of contributing developments would not offset the reduction in level of funds each contributes. The result could be a less favourable infrastructure funding situation than currently exists under negotiated Section 106.

The spatial make-up of areas such as Cambridgeshire, with more small and medium-sized settlements, poses particular problems in this regard. It is not unusual to have sites requiring regeneration (generally lower value sites) in close proximity to 'green field' sites (with little constraint and therefore much higher value). In such circumstances it will be difficult to set different 'geographic' CIL rates based on viability, unless it is done at the site level, which clearly would lead to excessive complexity in the charging schedule, and in the evidence base.

Clarity would also be welcome as to whether a nil rate of CIL would need to be set for buildings that themselves constitute infrastructure, and into which people normally go, or whether these could better be exempted through the regulations. Examples of these would be schools and libraries. It seems counterintuitive and needlessly complex that such developments could in theory be required to pay the levy which funds them.

Additionality of CIL

We welcome the confirmation in Section 2.14 of the Consultation Document that CIL will be additional to existing sources of infrastructure investment, rather than a substitute. Given that there is potential for CIL to be transferred to the

Environment Agency and other national organisations, we would emphasise that this should not be instead of central government infrastructure funding.

Regarding Section 2.19, we draw to your attention to the 43% cut in Cambridgeshire's Housing Growth Fund allocation for 2010-11, which appears to undermine the assertion that, 'other sources of funding for infrastructure that are ring-fenced for supporting new growth will of course continue to be spent on new growth.'

Other important points covered in our response include the ability to use CIL for revenue purposes, as under the present 106 arrangements (e.g. subsidised public transport); the ability to cover set up and management costs, and charging for minerals and waste development generally (not just buildings).

We trust that these comments, and the more detailed response attached, will assist with the development of the Community Infrastructure Levy.

We look forward to working further with you as we move towards implementation of the levy in Cambridgeshire in due course and would be willing to share our learning from this process at any point.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'A Plant', written in a cursive style.

Alex Plant
Chief Executive
Cambridgeshire Horizons

Community Infrastructure Levy Consultation

Cambridgeshire welcomes the introduction of draft regulations for the Community Infrastructure Levy (CIL). CIL provides the opportunity to improve the way local and sub-regional infrastructure projects are funded. However we do have concerns regarding several elements of the levy's design, particularly regarding its operation in a two-tier Local Authority area.

Questionnaire

About You

i) Your details:

Name: Alex Plant

Position: Chief Executive

Name of organisation (if applicable): Cambridgeshire Horizons

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ii) Are the views expressed on this consultation an official response from the organisation you represent or your own personal views?

Organisational response

Please tick the box which best describes you or iii) your organisation:

Other - Local Delivery Vehicle

iv) What is your main area of expertise or interest in this work (please tick one box)?

Chief Executive

v) Do your views/experiences mainly relate to one or more specific regions within England and Wales, to one or both countries?

Specific local area - Cambridgeshire

Would you be happy for us to contact you again in relation to this questionnaire?

Yes

Chapter 2. Delivering infrastructure with CIL

1. Do you agree with the proposal that the draft CIL regulations do not define 'infrastructure' further? Yes No

Yes. If the overall purpose of CIL is to fund the infrastructure needed to support growth in an area, the definition in the regulations should not be limited. Innovative solutions to the mitigation of and adaptation to climate change should not be constrained. How CIL is spent thus becomes a local decision, based on the Local Infrastructure Framework, Integrated Development Programme and charging schedule. The definition should also be framed so as not to exclude revenue contributions, as noted in more detail under question 21.

2. Is any further reporting required for CIL? Yes No

No. The transparency provided by the two duties will improve the position significantly when compared to the current system. It is important that spending authorities have to account for where the money is spent. However, further regulatory burdens should be avoided, as should excessive centralization of procedures (for example, on handling exceptional cases).

3. (a) Is the 1 October deadline for reporting on the previous year's activity sufficient for local planning authorities? Yes No

It would be more appropriate for timescales for CIL reporting matched up with the end of the financial year, as this would allow the Annual Monitoring Reports produced by each Local Planning Authority to include CIL data.

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

If presented clearly and accessibly, it should do. The level of accountability will certainly be much higher than under Section 106, when a Freedom of Information request would most likely be required to secure data of this sort.

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

It is vital that CIL is an instrument for additional infrastructure investment, rather than an excuse for central government funding cuts. CIL revenue should only be channeled to the HCA, EA, etc if this is ensured.

The reference to the low carbon economy on page 36 is welcomed. Box 2.2 regarding 'allowable solutions' requires further consideration and clarification.

References to forward-funding are welcomed as this is a key problem, especially in growth areas. CIL will potentially provide a stronger and more predictable revenue stream for local authorities. However to fully utilise this forward-funding potential to front-fund enabling infrastructure, more local financial flexibilities should accompany CIL.

There is no mention of the need for new capacities and a different skills base within Local Planning Authorities, as well as stronger monitoring procedures. This is a significant omission.

The lack of detail regarding how CIL will be spent is surprising. There is no reference to the need for prioritisation and justification of infrastructure plans; no requirement to set out criteria, publicly consult, etc. This could prove contentious.

A balance needs to be struck between clarity for developers and the public, and flexibility for Local Authorities. We suggest that an indicative but not definitive list of infrastructure priorities should be included with the CIL charging schedule. Likewise, developers will want confidence that enabling infrastructure (for example flood defences) will be delivered to allow their developments to go ahead in a timely fashion, and some sort of undertaking from Local Authorities might assist this.

Chapter 3. Setting the CIL Charge

5. **Are there any circumstances where a CIL charging authority would not be able to fulfill its charging authority functions effectively? Yes No**

No

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

The criteria appear broad and easy to meet, which would facilitate joint working in growth areas like Cambridgeshire that already have such procedures in place.

(b) Which functions should a joint committee perform?

A joint committee could inform sub-regional priorities for CIL spend, and potentially consider the use of CIL as leverage to open up further funding sources.

7. **Do you agree that differential rates should be based only upon the economic viability of development? Yes No**

This is a difficult issue, as 'viability' is a nebulous concept, often subject to intense debate. Some steer, for example on what level of developer returns LPAs should consider reasonable, would be helpful. To set CIL rates, 'a broad assessment of the potential impact of CIL on the viability of development within a charging area' is required. This is very broad, although the regulations note that further guidance will be issued. However it is made clear that the setting of CIL is a balancing act, and that the final decision rests with the LPA (with independent examination carrying the presumption of agreement), which is the right approach.

We note that whilst setting variable rates of CIL requires a greater level of viability analysis, a measure of pragmatism is needed. It would be impossible to set the rates perfectly, and the complexity of multifarious differential rates would undermine the clarity and predictability that CIL offers. An assessment of land values will be needed, and this data is very difficult to secure. Sampling will be necessary, according to the regulations, with more fine-grained assessment required to set differential rates.

Rather than setting levels based on the lowest value developments, a mean should be sought. A certain degree of flexibility remains through affordable housing policies, although these will of course be taken into account when establishing what is reasonable during the rate-setting exercise. If CIL is set by reference to the lowest value sites, there is a danger that widening the base of contributing developments would not offset the reduction in level of funds each contributes. The result could be a less favourable infrastructure funding situation than currently exists under negotiated Section 106.

Some steer on a reasonable level of developer profit margin to assume when setting CIL would be extremely helpful, as this has a significant impact on viability calculations.

Economic circumstances may dictate a different approach to commercial and residential development, as would regeneration sites. For example, an area in need of an economic boost might set a nil-rate of CIL for commercial development.

Major strategic sites would also benefit from a slightly different approach. Local Authorities in Cambridgeshire are currently having considerable success in negotiating Section 106 packages for larger developments. It must be ensured that widening the base of contribution through CIL does not result in lower contributions from major sites.

We therefore suggest that sites of more than approximately 1000 housing units are dealt with under a bespoke levy approach, rather than the standard CIL. The exact threshold should be chosen with reference to the provision of infrastructure onsite, for example a primary school, as opposed to a contribution to offsite provision.

This approach would be similar to Cambridge City Council setting aside their adopted Planning Obligations Supplementary Planning Document when negotiating Section 106 agreements for the major urban extensions to the city.

The level of this bespoke charge, and the site-critical infrastructure it would pay for, would be identified at the earliest possible planning stage. This could be in the relevant Area Action Plan, although the CIL Charging Schedule should specify development areas of sufficient scale to require a bespoke levy. Developers of larger sites and Local Authorities should both benefit from the additional clarity that a bespoke levy could bring to the complex planning process for these sites, but it would not seem necessary to adopt the full EIP process for such bespoke levies.

8. Do you agree that CIL charges should be based on a metric of pounds per square metre? Yes No

Yes, albeit with reservations. This could provide incentive to further contraction in new housing sizes. Already the UK builds the smallest new housing in the Western world, as inadequate legal controls exist to prevent this. But given that CIL will apply across all 'buildings', the floorspace metric is the only realistic one. Per housing unit could not apply to commercial, industrial and other development. A per room metric would be difficult to apply and enforce.

If this metric is used, building regulations should be strengthened to prevent housing unit sizes becoming any smaller.

- 9. Would you 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? Yes No**

No, there is no obvious benefit in a choice of metrics. This would cause confusion. Floorspace is easy to understand, and the unintended consequences of it can be offset with better building regulations. A choice of metrics would remove some of the clarity benefit of CIL.

- 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? Yes No**

Internal area is a better proxy for overall impact, including on infrastructure. Use of external area would also penalise better-insulated properties with thicker walls, hindering increases in energy efficiency.

- 11. Do you agree that CIL should be levied on the gross development, rather than the net additional increase in development? Yes No**

This could provide a perverse incentive against developing brownfield land, which would be difficult to overcome. However, net would be more difficult to calculate and more open to dispute and/or abuse. On balance, gross seems the least-worst option, but will probably alter the balance of development that comes forward. This will need to be controlled in policy elsewhere.

- 12. Should authorities be required to index CIL charges? Yes No**

Yes. Section 106 agreements are routinely indexed. Not indexing, coupled with a lack of provision for phasing, would cause a disincentive to the progress of applications.

- 13. (a) Should indexation be based on a national index to provide simplicity, consistency and a readily understood index? Yes No**

Yes, that makes sense. Varying indices between places would cause confusion and offers no clear advantage.

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

No, there's no clear benefit and it would cause confusion. The argument could be made that the drivers of the housing market vary geographically, but not to a significant extent.

- 14. Do you agree with the Government's proposed choice of an index of construction costs? Yes No**

This is the index routinely used to index Section 106 contributions, and is therefore the most obvious choice. However it also implies that increases in construction costs will impact doubly upon developers, who are very likely to pass this on when selling homes. There are potential affordability implications to this.

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 No

Indexing to commencement would offer developers more of an incentive to build, and this is currently the practise with Section 106 agreements. As years can pass between grant of planning permission and commencement, there would be a risk to Local Authorities if indexing ended at grant of permission.

16. Do you think it is right to apply the index on an annual basis or do you see advantages in applying it monthly? Yes No

As the construction costs index is relatively volatile, quarterly or monthly indexation would more accurately reflect the construction market.

17. Do you agree that charging authorities should be able to index their charges from 1 January each year (taking the November index)? Yes No

See response above.

18. Do you agree with the Government's proposal to allow joint charging schedule/ development plan examinations? Yes No

We welcome opportunities for joint working, in principle this proposal could save duplication of Local Authority effort. Further information on this would assist, we assume that a joint core strategy would not be a prerequisite.

19. Do regulations or guidance need to cover any additional matters relating to joint examinations? Yes No

According to the guidance, the charging authority needs to appoint an examiner rather than being done by the Secretary of State. This is a different approach from that taken for DPD examinations and the reality of how this will work in practice should be considered in more detail especially if it's the Government's preference to be a Planning Inspector and joint examinations can be held. The cost implications of this approach will also need to be factored in by Local Authorities.

20. Should the CIL examiner be able to modify a draft charging schedule to increase the proposed CIL rate? Yes No

Yes. If the charge proposed by the charging authority is not sufficient, the examiner should be given discretion to increase it. This would avoid situations such as a County Councils being unable to provide essential infrastructure, or neighbouring authorities skewing local markets by setting disproportionately

low rates. However this power would only need to be exercised in exceptional cases.

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

This is a proposed levy by the Local Planning Authority – the examiner should therefore be predominantly testing its soundness, rather than taking a broader role of decision maker on levels of charge.

The shift from individual site viability to overall plan viability testing is an important one. How will this transition be handled with developers?

Some flexibility in phasing of payments will be needed, at least as a transitional arrangement. Otherwise there will be a considerable impact on scheme design and submission of reserved matters.

The consultation document does not fully recognise the step change for Local Authorities that will be required to implement CIL, both for charging authorities and County Councils. This will involve significant investment in new skills. For instance, once CIL is in place Local Authorities will require greater financial, administrative, procurement and project management capacity. Conversely, less negotiation and site-specific viability testing expertise will be required. Development Control teams will need to acquaint themselves with many new notices and procedures. Closer working between development control and infrastructure planning will be essential from the outset. These changes will be challenging at a time of decreasing public sector spending.

As establishing CIL is likely to impose significant costs on Local Authorities, the ability to recoup these would be very useful. Likewise, the position of CIL with regard to revenue contributions should be made explicit. Revenue forms a significant proportion of current Section 106 requirements, and it would be very difficult for Local Authorities if these contributions were imperilled. The consultation document does not make mention of revenue.

The sections on review are unclear. Is a wholesale re-examination of the Charging Schedule necessary? Could just the viability work (an agreed model?) be rerun? There is a lack of clarity on the difference between review and revision of the Charging Schedule. Some guidance on how often would be appropriate for review would also be welcome.

Section 3.8 makes mention of how CIL will operate in a two-tier local authority system. It must be ensured that the upper-tier council has sufficient input to infrastructure planning, and the opportunity to sign it off. An agreement would then be required as to the split of CIL that the County authority will receive. Guidance on this would be helpful. Cambridgeshire's experience of designing a variable rate tariff to operate within Section 106 suggests that a one-off agreement between each district and the county council is needed. This agreement would set out the percentage of CIL/tariff collected that the county council will receive and when it will be transferred.

It is important that the boundary between the use of CIL and Section 106 is clearly understood. The two instruments have different purposes, Section 106 to mitigate onsite impacts and CIL cumulative offsite impacts, and in the interests of fairness these must not overlap. Moreover, confusion and

potential delays would result from ambiguity on this point, which would negate the benefits CIL could offer in terms of simplicity and avoidance of lengthy negotiations. Clarity about this would also assist the transition period.

Chapter 4. Paying CIL

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

'Building' - There is confusion with definition of 'development', as defined in section 209 of the Planning Act 2008 ('In section 208 "development" means— (a) anything done by way of or for the purpose of the creation of a new building, or (b) anything done to or in respect of an existing building.')

The draft regulations define what is not development, but fail to provide clarity as to what a 'building' is. As CIL will be chargeable on buildings (barring those 'into which people do not normally go' - SI No. 2531 2000), a clear definition of what constitutes a 'building' is clearly needed. The regulations do not provide one, and currently the definition of a building relies on case law (the structure test). This is a potential source of serious uncertainty and ambiguity.

'Planning permission' - The definition of this is wide but relatively clear. The inclusion of some GDPO development is noted.

'First permits' - This concept is relatively clear for the usual planning consents, although how it will apply to GDPO and other forms of CIL-liable development may need greater clarification.

It is not clear how development of a temporary nature be handled by these definitions, as these can have infrastructure impacts. A potential solution would be to allow exemption for a limited time, for example four years, after which any renewal would incur CIL.

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

A clear definition of a 'building' is needed. To be CIL-suitable, this would need to reflect infrastructure impacts, as these are what CIL is intended to mitigate. It would also need to take account of minerals and waste developments, which are site rather than building-based and therefore likely to avoid CIL. They can nonetheless have significant infrastructure impacts.

23. (a) Do you agree with our approach to when CIL is chargeable on outline and reserved planning permissions. Yes No

This needs to be approached carefully, with consideration of the potential impacts on large, medium and small developments. Larger developments may need to break up their reserved matters into small phases in order to avoid incurring an unmanageable CIL liability up-front. This could have wider planning impacts on masterplanning and design.

This issue is strongly linked with the ability (or otherwise) to pay CIL in instalments. In principle the proposed approach is endorsed. However the introduction of Chargeable Development Notices and Commencement

Notices will add a greater administrative burden to both developers and Local Authorities. Transitional measures would assist.

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

The proposals seem sound, but will increase the workload of Local Authorities. This should be acknowledged.

24. (a) What are your views on the principle of providing a reduced rate of CIL for affordable housing development?

We note the procedures for treatment of affordable housing, with exemption from CIL through charitable status and development for charitable purposes. This exemption seems on balance to be suitable, as a blanket exemption for affordable housing could cause perverse incentives for developers to deliver smaller, all-affordable housing schemes, reducing delivery overall.

However, this is a policy choice, and some scope could be left for Local Authority discretion for example the ability to decide the level of discount for affordable housing. To developers, both CIL and affordable housing will be regarded as costs. Affordable housing and infrastructure investment are both policy goals, but there is a tradeoff between them. This will not be the same for every Local Authority.

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

A blanket exemption for affordable housing could cause perverse incentives for developers to deliver smaller, all-affordable housing schemes, which might reduce the overall delivery of affordable housing. However a smaller discount would have a less significant impact.

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? Yes No

The definition proposed is a mixture of HRA 2008 s68 (which defines social housing) and PPS3. This is not completely clear, and could exclude novel affordable housing products. It may prove a disincentive to innovation.

We therefore do not feel that the proposed definition is workable. It is obscure and poorly known. If it were to be used, the transition and full implications would need to be carefully considered.

The additional criterion, regarding the need for public subsidy, is also a cause for concern and could discourage provision.

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? Yes No

CIL relief should take account of nature of the development as well as the nature of the developer; therefore to receive relief the development should fulfil charitable purposes.

It must be ensured that no loophole is created such that private developers contract out works to charities in order to avoid CIL liability. Thus the definition of 'charitable purposes' must be carefully chosen, to also ensure that those in need can still be helped.

27. (a) Should LCHO properties where receipts from staircasing are recycled for additional affordable housing, not be subject to any clawback? Yes No

CIL should not discourage provision of affordable housing products that allow staircasing.

(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 No

No comment

(c) How should such a clawback operate?

No comment

28. Is 7 years an acceptable time period for clawback to operate over? Yes No

Yes, as this accords with the statute of limitation on debts.

29. Is it reasonable to ask a claimant to submit an apportionment of liability in this way? Yes No

This provision shouldn't apply in most cases. It adds complexity but should make it more difficult to dodge liability for CIL. Local Authorities will need the expertise to check these liability apportionment assessments, to avoid dishonesty. How they will do so is not clear.

A clear definition of what constitutes 'a material interest in land' would be helpful (at present, this is a combination of statute and case law).

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?

This is a very difficult question. During the transition between S106 and CIL, before CIL becomes internalised in land values as anticipated, developers may find the change difficult, especially if they were not expecting to incur any Section 106 contribution.

We accept that in the interests of fairness, clarity, predictability, etc there should be as few exceptions to CIL as possible. However it must be acknowledged that this will have consequences for other policies, in particular development of brownfield land and affordable housing delivery. As affordable housing will remain within Section 106 and therefore subject to individual site viability, pressure will be placed upon it by developers arguing that their site viability is marginal.

If no special procedure for exceptions exists for CIL, regeneration projects could become harder to deliver. Once CIL is established as a cost of development, developers will include it in their business models. It is the transition that will prove problematic, especially given the current downturn in development. Whilst ultimately the CIL will prove a more equitable way of securing infrastructure contributions from development, it marks a huge step change from individual site viability to overall plan viability.

It is our view that a narrow exceptions procedure should exist, with some discretion for LPAs. This should be more generous during the first three years of a CIL being in place, and tighten thereafter to recognize transitional issues.

This exceptions procedure should not be based on financial viability but on a public good test, allowing CIL to be discounted by the Local Authority in rare cases of overriding public interest. Examples of this might be regeneration projects and exemplar low carbon developments, like the Mayfield Road site in Huntingdonshire District.

If such a procedure were included, it would be vital that Local Authorities be held strictly accountable for every use of this exceptions power. Criteria should be set out alongside the CIL Charging Schedule, and a duty to set out when and why it had been used on each occasion should be added to the reporting duties for CIL.

31. Do you agree with the Government's proposals for liable parties and assumption of liability? Yes No

Yes, we have no issues to raise with these procedures.

32. Are these timescales for the transfer of CIL revenue from the collecting authority to the charging authority the right ones? Yes No

Yes, the quarterly basis for transfer is acceptable.

33. Do you think that the final regulations should provide for the payment of CIL in-kind? Yes No

No. Payments in kind should continue in residual Section 106, as this will include site-specific infrastructure and affordable housing. It is not appropriate for CIL to be paid in kind, as this recreates the link between the contribution and specific infrastructure projects, contrary to the spirit and intent of the levy. Rouanne ruling considerations reinforce this. However, there will be the option for the Local Authority of contracting works back out to the site developer where appropriate.

It should also be noted that Local Authorities would need to increase their procurement and project management capacity in response to CIL.

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

Not applicable.

35. (a) Should payment by installments be provided for in the final CIL regulations in addition to the ability to pay CIL by phases of development? Yes No

Yes. It is clearly necessary for larger developments to have some way of phasing payments, so as to avoid an unpayable CIL bill at the start of build-out. The question is whether the current reserved matters procedures are sufficient. Large developments often put forward phased reserved matters applications already, as part of Section 106 payment phasing.

The cashflow situation for Local Authorities will need to be taken into account, as a great deal of infrastructure is needed upfront at the start of development.

If a procedure for phasing payments is included, it should not be subject to negotiation between developer and Local Authority, as this would undermine the swiftness and simplicity of CIL.

(b) How should the installments be structured?

A potential structure for payment in instalments could be offered in cases of a CIL liability exceeding, say, £500,000. (This figure would need to be agreed with representatives of the development industry.) This would allow Local Authorities to divide the payment into instalments of reasonable size, each payable during a pre-set window. For example, a deposit-type sum to be paid on grant of permission would allow up-front infrastructure to be provided in advance of start on site. This could be followed by payment in instalments.

36. Do you agree that payment on account should not be provided for in the final CIL regulations? Yes No

Yes. There doesn't appear to be a need for this.

37. Should the collecting authority be under a duty to remove the charge automatically on payment of the full CIL liability? Yes No

Yes, this appears sensible. The charge on land should not remain once the CIL has been paid and the liability discharged. If it remains it could prove problematic should the landowner try to sell the land.

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? Yes No

The question is whether this needs to be a statutory duty. It could place an excessive administrative burden on Local Authorities, or potentially offer a useful method of encouraging payment and avoiding enforcement. During the transition period, when CIL is first introduced, warning notices of this kind would be particularly valuable.

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 No

These are already stronger than the enforcement remedies for Section 106 default. Attachment of earnings does not seem proportionate; the remedies proposed are akin to those for a tax or even a mortgage.

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?

The appropriateness of these measures would depend on whether they would act as a deterrent. The enforcement measures set out may already be sufficient.

41. Is a bespoke compensation regime required for CIL where enforcement action is inappropriately taken or would the Ombudsman route suffice? Yes No

It seems most appropriate to deal with CIL compensation through the ombudsman as it is an element of the planning system; to deal with it otherwise implies that it is something else, for example a tax. However, some other factors should be considered, such as the capacity of the Ombudsman. Is it fair that s/he does not have to investigate complaints, and the Local Authority does not have to accept his/her findings? Additional capacity may initially be needed to cover CIL.

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

The exemptions point is a particularly difficult one, especially during the transition, and will need sensitive handling.

Clarification is needed upon whether buildings which themselves constitute infrastructure, and into which people normally go, will incur CIL. Examples of these are schools and libraries. It seems counterintuitive that such developments pay the levy that funds them.

The introduction of commencement notices will be useful for monitoring purposes, but developers will have to become accustomed to submitting these. A clear definition of 'commencement' will need to be widely known.

The appeal grounds for CIL are notably narrow, with reasonableness and site viability not included. We consider this appropriate but recognise that it will represent a step change, requiring adjustment on the part of the development community.

The additional enforcement measures for CIL will also need to be considered alongside existing measures for controlling breaches of planning law. In the case of multiple breaches, which method should be used? Local authorities will presumably have discretion, but confusion could result.

We have serious concerns regarding the proposal in section 4.63 that in order to qualify for CIL discount affordable housing must meet the additional criterion of benefiting from public funding. This criterion would provide a perverse incentive against affordable housing provision, particularly in the current climate of falling public funding.

Chapter 5. Planning Obligations and Other Powers.

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?

It is clear that the use of Section 106 will need to be scaled back, and a clear line drawn between Section 106 and CIL. Does draft regulation 94 imply that development not incurring CIL cannot be subject to Section 106 either? If so, major developments not liable for CIL, such as grid stations, may be impacted. In addition, Section 106 is used for other purposes, such as regulating selective management of employment. Conditions would not be sufficient for such purposes.

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? Yes No

For clarity, the five tests should be changed as little as possible. Of the tests, (i) relevant to planning, and (v) reasonable in all other respects, may not be necessary as they are implicit in the other three. (ii), (iii) and (iv) are still needed.

It should be borne in mind that these statutory tests will need to be used to justify affordable housing provision.

**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 No
And if so what should it be and why is such a period required?**

Yes. The issue is that if a transitional period is not mandated, there will be a window during which Local Authorities will be able to justify a very limited range of infrastructure contributions. It will not be possible for any to start charging CIL on 1st April 2010, and for some it will take years to introduce it (as an adopted Core Strategy is a prerequisite). Inevitably there would be a period of some chaos, when a rush of planning applications tried to squeeze in before CIL in order to incur a lower/zero contribution.

This situation would be disastrous for Local Authorities and detrimental to infrastructure investment. It would also strongly push Local Authorities towards implementing CIL swiftly, which could prove counterproductive. A well thought-out, carefully considered charging schedule would prove much more durable and effective than one pulled together as quickly as possible. Local Planning Authorities will also require some adjustment to deal with the new CIL system. Structures will need to be changed, skills improved, etc.

The transition period should therefore be at least 3 years, allowing Local Authorities time to decide whether to implement CIL and decide on the level(s) of charge best suited to the area. However, the restriction on use of Section 106 should apply as soon as a CIL Charging Schedule is adopted.

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 No

Yes, subject to the transition period. It is hard to see how it could be otherwise, noting the points raised above.

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 No

No. We do not feel that this is necessary in addition to the stricter application of the Circular 05/2005 tests. Once the five tests are made statutory and interpreted strictly, pooled contributions and tariffs will not be legal through Section 106 means. As CIL provides a much more robust legal framework for collecting pooled contributions from development, Section 106 based tariffs should not be reluctant to make the transition.

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 No If not, please state why not. Can you think of an alternative which would have the same or similar effect?

No, it would be inappropriate to add this legal criterion, as it could severely restrict the delivery of affordable housing. It is also unnecessary, as it is implicit in the other tests. Section 106 will need to be fit for purpose to justify affordable housing provision, and the 'solely caused' test will hinder this.

This test would also hinder the ability to secure sites for schools and other infrastructure through Section 106, as there is no mechanism within the CIL regulations for doing so. This is a significant concern, as facilities cannot be delivered if sites are not available.

In summary, making the 05/05 tests statutory and interpreting them narrowly should be sufficient, an additional legal test is not necessary.

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 comments above. This appears to contradict a prior paragraph setting out a two-tier transition for Section 106 tariff to convert to CIL.

We also question the 'caused by *CIL chargeable* developments' element. This implies that development not liable for CIL (charitable, sub-100 square metres, buildings into which people do not usually go, etc) cannot have a Section 106 agreement. Given that Section 106 is used for purposes beyond securing infrastructure contributions, this could prove restrictive.

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 No

This implies that restricting the use of Section 106 and preventing Section 106-based tariffs are different things; in fact they are the same. Thus the response to question 46 applies.

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?

Not applicable outside London, but as matter of principle we do not consider that London should be treated as a special case merely because of Crossrail. Other areas have critical infrastructure projects also requiring pooled contributions.

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?

A circular or other advisory instrument focusing on CIL would be very helpful, given that it is such a step change and will have wide impacts on Local Authorities, the development community, infrastructure providers, etc.

Circular 5/05 will need to be revised to reflect the restricted use of Section 106, and to draw a clear line between the two methods of capturing planning gain.

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 No

Yes, CLG should issue specific guidance on introducing and managing CIL, drawing on existing best practise. This should be presented so as to be accessible to Local Authorities (beyond planners), developers, infrastructure providers, and the public. This should include guidance on prioritisation of infrastructure projects and public engagement with the CIL process.

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

We strongly agree that CLG should monitor the effect that CIL has on delivery of affordable housing. We also agree that CIL will provide a much stronger base for standard charging than Section 106. However a period of transition and a clear delineation between the use and purposes of the two will be needed for successful implementation.