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Response to Consultation on "Detailed Proposals and Draft Regulations for the Introduction of the Community Infrastructure Levy"

Introduction

The City of London Law Society (CLLS) represents over 13,000 City lawyers, through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response to CLG's July 2009 Consultation on "Detailed Proposals and Draft Regulations for the Introduction of the Community Infrastructure Levy" has been prepared by the CLLS Planning and Environmental Law Committee.

General comments

The Ministerial Foreword states that the proposals for the Community Infrastructure Levy (CIL) are:

> " … a fairer, clearer, more legitimate and more predictable way of seeking contributions from developers towards the costs of local infrastructure compared with the existing system … [The] priority in this first set of regulations is to ensure the right balance between the objectives of simplicity, flexibility and fairness".

The current system of infrastructure delivery is based upon an assessment of the impact of developments on existing infrastructure followed by a dialogue between regulators and developers set within the parameters of established planning policy. Although the process can be slow and does not always produce uniform outcomes it is fair, democratic and reasonably clear to those involved.

We believe that the CIL proposals can achieve the Government's aims provided that flexibility and fairness are not sacrificed for over-simplicity and administrative convenience.

In particular, we recommend that further consideration is given to:

- The continued use by LPAs of Grampian style conditions for infrastructure which may be funded by CIL.
- EIA consequences from funding infrastructure through CIL.
- The "broad brush" approach proposed for infrastructure planning and CIL rate setting. In particular, the failure to include any mechanism for charging authorities to identify in any detail the items of infrastructure to funded by CIL, how these will be delivered and in what timeframe.
- The lack of flexibility from the Government's unwillingness to introduce an exceptions policy to mitigate the unforeseen, particularly where viability issues are paramount. An exceptions policy will enable authorities to set a sensible CIL rate having a longer shelf life before review becomes necessary.
- The potential for double charging from the proposals to scale back the use of planning obligations.
- The removal of the option to introduce CIL as a result of the transitional arrangements for the scaling back of planning obligations.
- CIL being levied on net increase in development and not on the gross amount of development.
- CIL being tax deductable.

Consultation questions

We set out below our response to those of the consultation questions which fall within the expertise of the Committee.

1. Do you agree with the proposal that the draft CIL Regulations do not define "infrastructure" further?

No.

We agree that "infrastructure" should be defined by the individual charging authorities and we acknowledge the goal of maintaining flexibility but believe that it would be sensible to introduce the CIL in stages, at first only in relation to those categories of "infrastructure" which are most needed for social, economic and/or environmental reasons. Also, there needs to be a clear understanding of what will constitute infrastructure to be funded by CIL and infrastructure to be funded by Section 106 Obligations to avoid double charging.

To prevent development from being discouraged and to maximise the most needed infrastructure, we suggest that it would be sensible for the CIL Regulations to operate initially only in relation to transportation facilities and flood defences.

If the "charging schedules will enjoy the same level of rigorous testing as development plan documents", we believe that a staged introduction will be of benefit to Government, developers and charging authorities as it should encourage a greater number of developments to come forward at an early date without raising issues of viability and without placing too great a burden on charging authorities in the preparation of their charging schedules.

We note in this context that 5 years after the 2004 Act came into force, less than 15% of Core Strategies are currently in place. This suggests to us that the CIL will take considerable time to implement.

2. Is any further reporting required for CIL?

Yes.

We appreciate the additional administrative burden but consider that it is not sufficient for charging authorities to report that monies have been passed to another body for the provision of infrastructure. A condition of receiving such monies should be the obligation for the receiving body to report back to the local authority in good time for them to detail in their annual report how much money has been applied to specific infrastructure projects during the course of that year. Without this safeguard, there is the possibility that monies are accumulated without the infrastructure for which they are collected ever coming forward. We note that s106 agreements generally contain repayment mechanisms whereby monies collected but not applied to the identified project within a specified period of time must be returned to the developer.

We suggest that the Government should also consider a reporting duty on the anticipated timing of the provision of infrastructure so that developers can plan the timing of their developments accordingly. Unlike the current s106 process, CIL removes certainty about the timing of delivery of infrastructure which can be of key commercial importance to developers.

Uncertainty over the timing of infrastructure delivery raises issues about compliance with environmental impact requirements if the infrastructure is part of the mitigation for the impact of the proposed development. Do developers carry out their assessment on the basis that the infrastructure needed to mitigate the impact of their development will certainly be provided as monies are being collected for it through CIL or must it be ignored until the infrastructure project has actually been completed?

3. Format of reports:

a. Is the 1 October deadline for reporting on the previous year's activities sufficient for LPAs?

No. It should be relatively straightforward and inexpensive for planning/charging authorities to maintain a page on their websites which is updated on a monthly basis to show:

- The items of infrastructure to which CIL has been applied in the preceding month;
- The amount of CIL expenditure on each such item; and
- The amount of funding available from other sources for items of infrastructure which the LPA hopes or proposes to deliver in the current financial year.

There is no good reason why developers or the community should have to wait up to 18 months before being advised about these matters. Prompt dissemination of this information is democratic and

permits developers and other stakeholders to forward plan with greater certainty.

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

See our reply to Q3a above.

4. Do you have any other comments on Chapter 2?

Delivery of infrastructure

The Consultation states that "As a source of additional finance for infrastructure, [CIL] can help to fill funding gaps that can hold up the delivery of key schemes" (paragraph 2.37). However, the proposals lack important detail about the timing and delivery of the infrastructure for which CIL is collected, see our comments above.

Draft regulation 39 permits charging authorities to apply CIL to fund infrastructure but it gives little indication of exactly how the CIL should be applied. Should for example infrastructure be funded on a first come, first served basis? Should authorities be under a legal duty to use CIL monies within a specified period of receipt?

Positive duties should be imposed on charging authorities to liaise and engage with infrastructure providers and ensure that the infrastructure required to facilitate development is delivered.

Grampian conditions

Importantly, what - if any - role remains for Grampian style planning conditions where the subject of the Grampian condition is infrastructure to be delivered through the CIL?

We note that the Consultation is silent on the use of Grampian conditions. We suggest that CLG makes it clear that Grampian conditions have very limited if any application in the context of CIL funded infrastructure. In our experience, when the delivery of infrastructure is the reason for delays to the delivery of a scheme, it is most often because the delivery of the infrastructure is outside of the control of the developer.

In the case of CIL funded infrastructure caught by a Grampian condition, a situation could for example arise when Developer A and Developer B commence their developments and pay their CIL at the same time but the charging authority considers that Development A is more important to deliver early than Development B and therefore uses the CIL from both developments to fund infrastructure needed to permit the occupation of Development A only. Is it fair then that Developer A has made use of Developer B's CIL payment to "leapfrog" over Developer B who then has to wait until more CIL funds arrive before it can bring Development B into use?

Is it fair that any developer ought to be subject to a Grampian condition when responsibility for discharging the condition lies outside of its control and is, for example, the responsibility of the charging authority?

If a Grampian condition is imposed in such circumstances, this will make it difficult for developers to secure development funding for their projects. Banks will not take on the risk of a development not proceeding due to matters outside of a developer's control.

Environmental Impact Assessment

We note above that it may be difficult for developers to satisfy the requirements of the EIA Regulations and for LPAs and the Secretary of State to assess properly the likely environmental effects of a proposal if the timing and means of delivery of infrastructure is not more exactly defined than in the outline manner prescribed by the draft Regulations, especially given the potential 18 months delay proposed in the reporting requirements.

5. Are there any circumstances where a CIL charging authority would not be able to fulfil its charging authority functions effectively?

It is not clear how disputes will be resolved between local authorities who are meant to secure delivery of sub-regional infrastructure if there are disagreements about priorities, delivery mechanisms, timing etc.

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

No. This limitation might work in a perfect CIL world where accurate assessments of economic viability supported by a robust evidence base are continually updated for all proposals coming forward or likely to come before an LPA.

It might work if "charging schedules enjoy the same level of rigorous testing as development plan documents", as promised at the beginning of the Consultation.

However, the Consultation states in this section that:

- "The charging authority is entitled to take a broad brush approach which allows for significant uncertainty over likely levels and sources of infrastructure funding; in essence the test will be whether infrastructure planning is "good enough" rather than "good" (paragraph 3.34); and

- "Consultees on the [CIL charging] schedule will need to accept that the rates proposed are based on broadly acceptable approximations derived against a background of some uncertainty rather than a precise calculation" (paragraph 3.40).

Given that charging schedules are unlikely to be reviewed more frequently than once every 2/3 years, it is unlikely that they will achieve the flexibility hoped for by Government if rates differentiation is limited to "broad brush" guesstimates about economic viability.

The CIL system must also take account of the generic "impact" generated by each use class, geographic location and the infrastructure required to support new development.

Statements of the sort above indicate that the CIL will be an inflexible, blunt-edged tool at best. We disagree that administrative convenience is sufficient justification for imposing a levy with such failings.

11. Do you agree that CIL should be levied on the gross development rather than the net additional increase in development?

No.

We disagree that administrative convenience is a good enough reason to promote a gross development approach, particularly when this is likely to discourage the sustainable re-use or improvement of previously developed land contrary to Government policy. An immediate consequence might be the effect of the increased levy on existing jobs.

In our view, CIL should be levied on the net increase in development. Again, impact is an issue here. If a development is virtually the same size as the original building(s) on site, there may be little impact so how can it be argued that there is a deficiency in infrastructure when CIL is not meant to remedy existing deficiencies?

12. Should authorities be required to index CIL charges?

No. If the aim is to promote a flexible and responsive process, it would seem sensible to leave indexation to the individual authorities. However, if a requirement is introduced we suggest that it permits downwards as well as upwards indexation.

15. Are you content with indexation taking place to the point of the grant of planning permission or would you prefer indexation to when development commences?

No.

We appreciate the benefit of providing developers with certainty if the CIL is fixed at the date of issue of the planning permission but consider on balance that to be economically responsive, indexation should occur when the CIL liability crystallises ie at the point when development commences.

This is consistent with the principle that planning permission need not be commenced before the period set under Sections 91 or 92 of the 1990 Act. It accords with current s106 practice. It is particularly relevant in the context of phased developments where the later phases may be some years in the future.

Although this is really a question for economists, we can envisage situations in a changing market where both developers and infrastructure providers end up losers eg if CIL monies fall short of what is needed to deliver necessary infrastructure or, assuming downwards indexation in a falling market, depress development incentive further.

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

No. Administrative convenience should not override fairness to individual developers. It should not be a great burden for authorities to purchase the necessary software to index on a monthly basis.

17. Indexation from 1 January each year?

No. See reply to Q16.

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

No. Re-consultation would be essential in such circumstances.

21. Other comments on Chapter 3?

a. We consider that 6 weeks is too short a period for charging authorities to consult the public on draft charging schedules. We suggest a minimum period of 3 months.

b. We consider that charging authorities should be obliged under regulation 28 to put all evidence supporting a draft charging schedule on their websites. Those making electronic representations should be automatically advised of any supplements or variations to this evidence base. This should involve identifying and listing the infrastructure projects that are to be funded in whole or in part by CIL so that an infrastructure plan can be developed.

c. We note the difficulty for those involved in the development sector to accurately cost or predict the cost of measures required to comply with the Government's stepped commitment to climate change adaptation and mitigation. We believe that this will be a significant factor for charging authorities when formulating an evidence base which does not depress the market incentive to develop land. A similar point applies in respect of the cost of planning obligations including affordable housing requirements.

d. We are concerned about the suggested "broad brush" approach recommended to charging authorities for infrastructure planning if charging schedules are to be rigorously tested in the same way as DPDs against a robust evidence base. We fail to see how, for example, funding gaps can be assessed taking such an approach.

e. We note that for charging authorities to identify potential gaps in funding infrastructure from non-CIL sources, central Government will have to offer firm, long-term commitments to individual authorities on monies available from the Treasury.

f. We believe that charging authorities should be under an express duty to review their charging schedules not later than every 2 years if they are to remain up to date and relevant to the development sector at all.

g. Importantly, we consider that further provision needs to be made for exemptions from the CIL, for example in relation to previously used sites which are heavily contaminated.

22. Do you agree with the chosen definitions of building, planning permission and first permits?

No.

Building

The 2008 Act confusingly defines development to which CIL potentially applies by reference to "buildings" but disapplies (by Section 235) the normal definition of "building" which is contained in Section 336 of the 1990 Act. Draft regulation 5 excludes from the 2008 Act definition of development operational works to certain types of "building" and changes of use for certain sizes of "building". There is however no indication of how liability might be calculated where parts of a building fall within and parts outside of the new definitions. We suggest that a neater and more consistent approach would be to start from the well tested definition of building which is contained in the 1990 Act so far as possible.

First permits

We note how this term is defined in draft regulation 7(5) for detailed permissions – the date when final approval is given before "development can commence".

This phrase is ambiguous and, given recent High Court cases which treat the subject differently, may lead to considerable uncertainty between developers and LPAs in the context of which planning pre-conditions need to be discharged before a development "can commence" – or can "lawfully" commence? - and therefore the time at which the CIL liability should be calculated.

We suggest that regulation 7(5) is clarified given the ability of authorities to surcharge and otherwise enforce CIL liability.

On a related point, we note that "commencement of development" is defined in regulation 6 to mean the date on which any material operation is begun in accordance with Section 56(4) of the 1990 Act. There is no exception, as is commonly found in s106 agreements, for site preparatory and similar works which are often carried out by developers in the knowledge that they involve little cost but can be sufficient to prevent a planning permission from lapsing without triggering expensive s106 obligations.

Since default liability for the CIL arises when "development is commenced", the definition in regulation 6 has the potential to remove an important element of flexibility for many developers which could have the unwanted effect of increasing planning application numbers.

23. Do you agree with our approach to when CIL is chargeable on outline and reserved planning permissions?

Yes. We agree that CIL should not be charged on outline permissions until all relevant reserved matters are discharged (for the relevant phase if in phases). However, see our reply to Q22 concerning the uncertainty about when CIL should be calculated arising from the definition of "first permits" for full planning permissions and the removal of flexibility for developers to prevent planning permissions from lapsing caused by the definition of "commencement of development".

30. Do you agree that it is best not to have a special procedure for developments that have difficulty paying the advertised rate of CIL?

No. Unforeseen circumstances – on a micro or macro level – are bound to occur especially under a system which permits charging authorities to adopt CIL rates "based on broadly acceptable approximations derived against a background of some uncertainty" and which fails to require authorities to review their schedules within any period of time.

An exceptions policy permits flexibility and will enable authorities to set a sensible CIL rate with a longer shelf life before review becomes necessary.

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

Yes, except that further consideration should be given to sites in multiple ownership given that planning permission may be applied for by anyone regardless of ownership so that a default CIL Liability may arise through no fault of the landowner.

Responses to requests for information to assist with the apportionment of CIL liability where a party has defaulted are required within 14 days. This timeframe is too short and should be extended to 28 days.

We also question whether the proposals will be a concern for lenders.

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

Yes. This is a sensible measure allowing greater flexibility for developers and LPAs, thus de-risking cost-efficient and timely infrastructure delivery.

35. Should payment by instalments be provided for in the final CIL regulations in addition to phase by phase payments?

Yes. This is sensible, particularly for developments on the cusp of viability. Instalments will in any event assist developer cash flow which is particularly strained in the current economic conditions.

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

Yes. This should be so whenever the full amount of CIL liability is settled so that property can be disposed of, refinanced etc without prejudice.

38. Should collecting authorities have to issue a warning before being able to impose a late payment surcharge?

Yes. A warning system should be simple to adopt in the case of late payments and where liability has been assumed is a proportionate response consistent with the discretion to enforce.

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

Yes. Inappropriate enforcement could have significant consequences and result in substantial loss in a number of circumstances. In such cases, the Ombudsman remedies provide an inadequate remedy. Owners and developers should be fully compensated in proportion with their loss.

42. Any other comments on Chapter 4?

Yes. We consider it strange and inappropriate for CIL payments to be tax deductable for traders but not deductable by investors against CGT liability.

The proposals in paragraph 4.49 penalise developers and other payers of CIL whose interest in a project are long term. We consider that it makes more sense to have parity of treatment with relief against direct tax liability for payers of CIL, regardless of whether their involvement is trading or investment in nature.

43. What do you think about the Government's proposal in regulation 94 to scale back the use of planning obligations?

If the CIL is introduced, it follows that the scope of planning obligations must be scaled back to avoid a double payment for infrastructure – through planning obligations and the CIL.

We agree that in such circumstances, it is appropriate for planning obligations to be limited to mitigating the direct impact of the proposed development without overlapping CIL or duplicating expense for developers.

Key to achieving this objective will be thoroughly tested charging schedules which identify to a reasonable level of detail the items of infrastructure in respect of which CIL is to be imposed and the timeframe for its delivery.

If the charging schedules are not sufficiently clear, developments may be prejudiced in any event if for example there is a physical link between infrastructure delivered through a planning obligation (such as highway improvements in the immediate vicinity of a site) and

infrastructure delivered through the CIL (such as highway improvements joining to those to be carried out by the developer some distance further from the site). This will be particularly so if LPAs are not discouraged from the use of Grampian style conditions.

We note that many LPAs already apply the Circular 05/05 tests as if they were law, although many do not. Flexibility in scheme delivery suggests that it may in some cases be of benefit both to LPAs and developers to permit planning obligations to continue to be used for wider purposes than those expressed in the Circular.

We suggest that if planning obligations are scaled back, developers should nevertheless be able to offer and LPAs accept planning obligations based on the current legal tests although LPAs should be prohibited from requiring the same if not agreed by the developer. This ought to maximise flexibility. Ideally, developers should receive a discount against their CIL Liability in such circumstances.

44. Do you think the wording of the five tests set out in draft regulation 94 is appropriate

No. If the purpose of scaling back Section 106 is to prevent overlap with CIL infrastructure, this should be expressly stated. There are many examples of Secretary of State decisions, applying his own policy, where planning obligations have been required which cannot easily be described as "scaled back" to address the direct impact from the development in question. The tests in regulation 94 will not necessarily achieve this objective meaning that developers will be faced with a double payment or making an appeal to the Secretary of State.

45. Do you think a transitional period beyond commencement of the CIL Regulations would be required to restrict the use of planning obligations to the Circular 05/05 tests?

Yes. The question assumes that CIL will be operative for all LPAs immediately after 6 April 2010, however evidence indicates that many LPAs have no intention of adopting the new regime.

Draft regulation 94 applies to applications leading to "CIL development", a term which is defined by reference to Section 209 of the 2008 Act and draft regulation 5. Since the CIL is optional, regulation 94 should only apply for CIL development where a valid charging schedule is in force at the date of the determination otherwise there will be the same confusion and disruption as is mentioned in paragraph 5.34.

We note the statement at paragraph 5.35 that the Government wishes the CIL to apply regardless of whether it is taken up by an LPA. This is inconsistent with earlier statements in the Consultation and the Government's policy commitment to date that the CIL will be an optional tax.

In any event, as noted previously less than 15% of Core Strategies are currently in place over 5 years after the 2004 Act came into force.

Since charging schedules are to be prepared and tested on a similar basis to other LDF documents, it is likely that the CIL will take considerable time to implement, certainly longer than the two years mooted in the consultation.

46. Do you agree that a scale back of planning obligations should apply regardless of whether a local authority has a CIL or not?

No. See reply to Q45.

47. Should a scale back of planning obligations prevent further use of them for pooled contributions and tariffs?

No. Considerable work has been carried out and expertise built up by developers and LPAs over the formulation of tariff and pooling arrangements. LPAs and developers should remain entitled to deliver necessary infrastructure in such manner as they consider appropriate bearing in mind local circumstances. This is consistent with the statements earlier in the Consultation and to date that the CIL is to be an optional measure for LPAs.

48. Do you think an additional criterion to restrict planning obligations to address impacts solely caused by a CIL development is workable in practice?

No. Not based upon the proposals contained in the Consultation. In any event, such a criterion implicitly moves away from the use of CIL to fund "infrastructure", which is the Government's rationale for the new tax.

49. What transitional period beyond April 2010 would be required to restrict the use of planning obligations to mitigate impacts solely caused by CIL chargeable developments?

See reply to Q48 and preceding.

50. Do you agree that a restriction of planning obligations to prevent their use for pooled contributions or tariffs should apply universally regardless of whether a local authority has a CIL or not?

No. See reply to Q49 and preceding.

51. What transitional period in London is required before planning obligations are scaled back to prevent the use of pooled contributions and tariffs?

The Crossrail levy will apply until all LPAs introduce CIL charging schedules. If the CIL is optional, there is no certainty that this will happen in all cases.

53. Do you think any additional guidance is required to support the use of planning obligations or CIL?

Yes. We believe that LPAs will benefit from "best practice" guidance.

Conclusion

As indicated above, we believe that the CIL can achieve the Government's aims provided that flexibility and fairness are not sacrificed for over-simplicity and administrative convenience.

Developers and investors have to have confidence in the system if it is to succeed, particularly at a time when development incentive is already depressed. A successful CIL will achieve the Government's social and environmental aims as well as its economic aims.

We are therefore keen to remain involved as the detailed proposals to implement the CIL evolve. We hope that CLG will keep us informed of progress and seek our assistance where this would be helpful.

In the meantime, if there are any particular aspects of the above that you would like to discuss further, please do not hesitate to contact Robert Leeder (Policy & Committees Coordinator, CLLS) at mail@citysolicitors.org.uk or 020 7329 2173.

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