Developer Contributions – Which Way Next?

Ahead of the Community Infrastructure Levy and s106 Masterclass, taking place on the 4th July in London, Roy Pinnock, Partner at Dentons takes a look at the future of developer contributions.

The October 2016 CIL Review proposes a radical reform of the Community Infrastructure Levy regime. The Housing White Paper and the Conservative Manifesto now promise a new approach to developer contributions, with a commitment to capture the increase in land value created by housebuilders.

Ahead of the Autumn Budget, there is a need for real debate about how to create a clear pathway for reform so that planning can focus on place-making not value capture.

CIL Intentions

The planning system has since 1947 been set up both to change the value of land, and to capture some of that (directly and indirectly). Its success has varied. The Barker Review[1] reflected the general consensus by 2004 that a more systematic approach was needed. The Planning Gain Supplement (proposed as a charge on the increase in value of land associated with the grant of planning permission) reflected in part increasing ad hoc, site-by-site requests by the private and public sectors for infrastructure funding. A growing number of tariffs (supported, with varying robustness, by supplementary planning guidance) were beginning to confront developers with variable survival rates on appeal.

CIL was put forward - by the property industry - as a response to the variability and uncertainty of tariffs (and to try to prevent the imposition of PGS). A charge that sat within the planning system, was local and discretionary and which effectively legitimised the tariff approach as long as that there was appropriate public examination. The regime implemented under the Community Infrastructure Levy Regulations 2010 has proved effective but at times painfully complex.

Imperfect CIL

The CIL regime has proved to be highly effective in some respects – rebasing land value expectations as intended and securing significant funding for the longer-running charges (such as the Mayor of London's Crossrail CIL). It has provide horribly complex in others. The simplicity of the original roof tax approach did not make it through the legislative process. The rigidity, inflexibility and complexity of the CIL Regulations and the lack of freedom to deal sensibly with strategic sites reflects to some extent distrust of local decision making. The offsets, exceptions, reliefs and strange confection of pooling and double dipping controls requested by the property industry at the time have contributed to undermining the original goal of simplicity.

The CIL Regulations themselves are deeply flawed and navigating the mire of amendments, logical mantraps and buried transitional measures have left them functional but fraught with complexity (**Box 1**). The offsets for demolished and retained floorspace (different rules apply) create headaches for the unwary or ill-advised. The charge-setting process is relatively quick and simple but uneven engagement has done little to hold it to account and lax assumptions have consequences for delivery. Some authorities have also been too eager to trade affordable yield for CIL revenue when setting CIL (and compound problems by applying high residential charges in ways that were often not modelled). These practices have eroded affordable delivery and, in places, slowed down major applications as the consequences of CIL choices are realised.

At the same time, restrictions in the Regulations on borrowing against CIL have limited forward funding against large allocated schemes. The 'works in kind' regime preserves the additionality of CIL (by requiring offset works to be unnecessary in planning terms). In doing so, it also undermines the real world scope for developers to deliver critical infrastructure. On

[1]Review of Housing Supply: Delivering Stability: Securing our Future Housing Needs (Kate Barker, March 2004)

CIL Review Proposals

The CIL Review (completed in October 2016) is a high-level report recommending replacement of CIL with a series of tariffs (Boxes 2 and 3). The limited data shows a broadly positive trend - collecting almost as much CIL in the last year (£140m) as in the first five combined (£170m). The relative contributions by CIL and S106 for different types of sites would seem a natural starting point, but this is not included.

The concerns about the CIL Examination process noted in the Review cancel each other out to some extent. Authorities complain of the burden of testing viability. Developers complain the test is not detailed enough. There are few reported complaints that the end result is either wrong or unfair.

Two key findings on delivery would benefit from proper debate: firstly, that CIL has "increased uncertainty over delivery of infrastructure (by transferring funding and construction risk from developers to local authorities)" and "only" meets 5-20% of infrastructure funding; secondly, that "5% -20% of […] new infrastructure funding is from CIL, leaving the balance to be found elsewhere". Both findings mistakes the original purpose of CIL, which was to contribute to, not wholly fund, infrastructure needed for growth. Suggestions that CIL would replace scheme-specific mitigation have been surprisingly persistent and persistently unhelpful. Nonetheless, for the schemes where critical infrastructure is genuinely reliant on CIL, change is needed (not least in recognising that strategic infrastructure requires strategic solutions and central government support).

While the 'pooling' and 'double-dipping' restrictions in regulation 123 are not clear, the passing of the April 2015 pooling deadline has pushed authorities with generalised infrastructure tariffs into becoming far more specific. The restrictions are also not as drastic as often suggested and rarely present a real barrier to sensible decisions.

The ongoing role for Section 106 is still causing challenges, though. The lack of up to date allocations means there is still too much room for debate on the mitigation genuinely required to deliver major schemes.

Tweak It - 6 ways to fix CIL

CIL is the only land value or contribution capture mechanism to survive a change of government. The efforts now needed to justify planning contribution costs above CIL are a step forward. While the technical shortcomings have - in places - slowed down applications, truly insoluble problems are rare, even with the current 'crazing paving' set of Regulations. Abolishing, rather than reforming, CIL seems wasteful in that light. A reduced-level CIL-LITe approach will not close the infrastructure funding gap. There is a risk that recover a lower fixed rates will lead to a return to the search for planning gain, with the familiar uncertainties and delays.

The Review helpfully raises a number of issues that could be tackled by reform, leaving in place the system whereby local authorities decide locally, in public, what level of charge developments can bear. Engaging with the issues thrown up by the Review is essential for the sector to ensure there is a long-term solution.

Firstly, considering the transitional arrangements for abolition (on which the Review says little). The lesson of CIL is that the transition is hard. Dealing with existing consents, changes to consents and variations have caused real problems. And what should local authorities do now in the lead up to the proposed 2020 abolition date - should CIL charging schedules be advanced or not? Should existing schedules be reviewed? The limbo is now eating into charging schedule reviews that were needed but have been paused.

Secondly, testing the assumption that the local charge will be simple to set, being based on the value of a standard residential or other property. The business rates revaluation exercise suggests that debate about the value used for LIT could be worse than CIL testing.

Thirdly, the Review acknowledges that there will need to be waivers and exemptions – albeit kept to a minimum. Exceptions for viability and self build and undermine the purported benefit of simplicity. The system begins to look a bit like CIL.

Bigger Picture

It is worth taking a step back and looking afresh at CIL, using the work done in the Review. The system is imperfect. The fact that the cost of infrastructure has to be paid for by development - but that it will rarely fund all needs – is widely accepted. The real question is how best to do achieve a sensible contribution. A few amendments (Box 4) would address the problems identified far more quickly and far more easily the abolition, transition and re-animation. Tailoring, not abolishing, CIL in this way avoids the risk of breathing life back into unaccountable tariffs.

Box 1 – CIL Oddities

- Early payment – careful phasing is needed to avoid large initial payments triggered by basic works
- Deemed zero – floorspace offsets require significant evidence to establish and can be easily lost due to timing of demolition or new consents
- Abatement risks – crediting CIL already paid is complex and on multi-phase sites can be a risk
- Social Housing Relief can be lost easily (including by badly timed land deals)
- Accountability gap - only 28 days to challenge a Liability Notice and development starts void review/ appeal applications.
- Basement and plant room areas may be chargeable and high-level residential charges, despite having no residential

Box 2 – CIL Review Key Findings

- 60% uptake
- Not providing a 'faster, fairer, simpler, more certain and more transparent' way of ensuring that all development contributes something towards cumulative infrastructure need.
- Disrupting and complicating Section 106 arrangements which "worked reasonably well"
- Industry confusion about what CIL is intended to be/ achieves.
- Divorced from the Local Plan process
- Commercial rate problems
- Large site CIL is inflexible (although low-rate Mayoral CIL is not a problem).
- Too many exemptions and reliefs

(Continued overleaf)

- Greater yield overall, but reduced for some larger sites
- Not funding enough of the gap
- Shifting delivery from developers to inadequately resourced authorities
- Inconclusive findings on affordable housing
- S106: "Mixed evidence" on whether fewer Section 106 agreements are now being required and whether they are now less complex and therefore taking less time to negotiate.

Box 3 – CIL Review Recommendations

- Replace CIL with 'a hybrid system of a broad and low level Local Infrastructure Tariff (LIT)
- Mandatory adoption, subject to a cost of collection cut-off
- Section 106 for larger developments'
- Floorspace charge at 1.75% of on "local market value"
- "No (or very few)" exemptions
- "Low or zero rated" bands for agricultural buildings
- Separate charge for 'commercial development'
- Mayoral-type Strategic Infrastructure Tariff (SIT) for Combined Authorities
- Expenditure restricted to "a small number of major projects that will benefit the wider area"
- Simplified adoption/ examination and monitoring
- No S106 for '10 units or less', unless exceptional circumstances
- Additional S106 arrangements for large strategic sites
- No pooling restrictions

Box 4 – 6 Ways to Simplify CIL

- Limit CIL spending to new, not existing, infrastructure
- Cut the need to demonstrate infrastructure is required and needs to be paid for by CIL. The examination should concentrate on viability issues
- Make CIL payable on all gross floorspace, with a 3 year transition
- Abolish all exemptions/exceptions, including affordable housing – it will balance out in the amounts paid for land
- Limit S106 agreements – allow quick expert determination on whether conditions should be used instead and whether departure from standard forms is justified.
- Allow local authorities a discretion to tailor CIL on strategic developments in exceptional circumstances. Trust them.

Hear from Roy…

As well as Liz Peace, Chair of the **Community Infrastructure Levy Review, Hyas Associates**, **Turley, Surrey County Council, Broadland District Council and many more at the Community Infrastructure Levy and s106**
Masterclass taking place in **London** at Dentons on **Tuesday 4th July**.

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