

	<p style="text-align: center;"><b>Planning Committee</b> 21<sup>st</sup> October 2009</p> <p style="text-align: center;"><b>Report from the Chief Planner</b></p>
For action	Wards Affected: ALL
<p style="text-align: center;"><b>DETAILED PROPOSALS AND DRAFT REGULATIONS FOR THE INTRODUCTION OF THE COMMUNITY INFRASTRUCTURE LEVY: CONSULTATION</b></p>	

## 1.0 Summary

- 1.1 From April 2010, the Community Infrastructure Levy (CIL) will be a new charge which local authorities in England and Wales will be empowered, but not required, to charge on most types of new development in their area. CIL charges will be based on set formulae which relate the size of the charge to the size and type of the development. The proceeds of the levy will be spent on local and sub-regional infrastructure to support the development of the area.
- 1.2 Central Government believe CIL will improve predictability and certainty for developers as to what they will be asked to contribute; will increase fairness by broadening the range of developments asked to contribute; will allow the cumulative impact of small developments to be better addressed; and will enable important sub-regional infrastructure to be funded. Central Government are seeking comments on the details of the CIL, regulations and implications until the 23rd October 2009. Brent will make both its own representations as detailed in this report and where appropriate support those of London Councils.

## 2.0 Recommendations

- 2.1 That the Planning Committee agrees to the comments on CIL as set out in paragraph 3.13 to be sent to Communities and Local Government Mayor and London Councils as part of their consultation process, on the proposals for implementing the CIL.

## 3.0 Detail

### Introduction

- 3.1 Over the last few years the Government has introduced legislation to enable local and regional governments to introduce a new

infrastructure charging regime. The principle aim of this new charge is help provide the infrastructure that is required for growth and development. While there had been previous attempts to reform the S106 planning obligations system, most notably with a revised circular 1/97(becoming 05/05) enabling standard charges and procedures to the long discussed but never realised Planning Gain Supplement (PGS), there remained concern over the lack of significant pieces of infrastructure that could derail the provision of new homes and new jobs.

- 3.2 The new charge is known as the Community Infrastructure Level (CIL) and works as a set charge to be applied to all non-householder developments in an area. The legislation is in place, in the form of Part 11 of the Planning Act 2008, for it to be used from April 2010 subject to the approval of a Charging Schedule, which sets out the level and justification for the charge. The Charging Schedule must be linked to an approved Core Strategy and have been approved by an inspector at a hearing itself.
- 3.3 The goal from central government is to replace much of the S106 system with a clearer set charge that all sides know how much to expect and when. The idea that all sides will be in better positions in a more simplified and clarified system. Knowing the set charge developers will be able to purchase land with this in mind and reduce the ad hoc nature of S106 negotiations. Local authorities will be better able to make long term infrastructure plans, knowing there is a set amount of funds coming in, in a more consistent and regulated way. The element of negotiation will be removed.

### **Issues**

- 3.4 This sounds very similar to Brent Council's own S106 Planning Obligations SPD. This is a reflection of the Council's forward thinking approach to S106 and the fact that much of the impetus for CIL came at a time when local councils were struggling with S106. However CIL makes a break between the actual impact of the development, as S106 was bound to, and providing infrastructure for wider growth.
- 3.5 The other key points of the proposed CIL are:
1. Uniform charge across the borough
  2. Rate per square metre
  3. Non negotiable
  4. Widening of remit, including sustainability measures
  5. Paring back of S106 to Affordable Housing and direct mitigation (i.e. footways, landscaping etc)
  6. 2 years to implement before S106 is scaled back
  7. Reporting information back on CIL to central government and administration efficiencies and regulation.
  8. Mayor CIL, Crossrail and more
  9. Viability testing

- 3.6 A uniform rate across the borough would follow our existing S106 SPD and is broadly accepted. A rate per square metre (sqm) is one way of trying to assess the impact of each development in a fair and consistent way. There are concerns that this will lead to developers reducing the size of their buildings, not the number of units, to try and avoid paying more CIL. As the Council has set minimum standards for units sizes in SPG17 which is carried over into the proposed Development Plan Document, this should not be of concern.
- 3.7 Removing the negotiation element should improve predictability in securing the charge, but will also remove the flexibility S106 has enjoyed, particularly in securing other benefits and supporting development in turbulent economic times. This is likely to result in other areas, particularly affordable housing coming under more pressure as they remain open to negotiation. Furthermore, when the economy picks up there is less opportunity to increase CIL or vice-versa.
- 3.8 Widening the remit of CIL contributions, allowing for large scale sustainability projects to be funded is a positive and proactive way of dealing with our responsibilities in tackling climate change impact of new developments.
- 3.9 The area of most concern is the proposed requirement to pare back S106 if and when CIL is established in an area. CLG requiring such a move within 2010-2012 could have a damaging effect on setting CIL at an appropriate level. A 2010-12 establishment would require data from 2008-2010, which will be an extraordinarily turbulent period. This would result in any CIL either being set at a low level due to historically low growth and land values or at a normal level prohibiting growth in the first few years. The Council proposes a longer 5-7 year window to allow CIL to be proven prior to the removal of the requirement for S106 contributions.
- 3.10 Under the proposed new structure, payments will be at set times, possible through the planning portal and more efficiently collected and collated. This is supported and would improve efficiency. Central government wants to more closely monitor the receipt and expenditure of CIL.
- 3.11 It is likely that the level of CIL will need to be viability tested prior to it being adopted. This, particularly in the current economic environment causes concern, for the reasons listed in 3.9. Further to these reasons the Council in it's Infrastructure and Investment Framework has identified a short fall (including allowing for the current S106 contributions) of approximately £2,400 per new residential unit. This and the current S106 charge would need to be viability tested, if it proves it would make the majority of schemes unviable it could in theory be reduced to a level most are viable, even if this is below the current S106 standard charge rate. The Council's response to this is in

the comments relating to not removing the S106 system until CIL is ready and to take over in (3.9).

- 3.12 Regional planning authorities, i.e the Mayor of London will be able to apply CIL for regional infrastructure such as Crossrail. The Mayor has already indicated there will be Crossrail CIL and there could be other Mayoral CILs. Boroughs will need to collect this on behalf of the Mayor and our own, if introduced after any Mayoral CIL will need to consider the Mayors in viability terms. Should boroughs be required to collect CIL on behalf of third parties, the boroughs should be allowed an administration fee. Brent will need to consider carefully if / when we propose a CIL baring in mind the Mayors ambitions.

### **Proposed responses**

- 3.13 The consultation document proposes set questions it would like responses to. The Council's proposed responses and comments are listed below, covering the issues raised in the first part of this report:

1. *Do you agree with the proposal that the draft CIL regulations do not define 'infrastructure' further?*

The Act contains a list of infrastructure which now includes Affordable Housing .This gives the option of including affordable housing if CIL has a negative impact upon securing affordable housing. The Mayor's list only covers Transportation. The Council supports the current list and the option of further changes to consider changes in technology to be incorporated.

2. *Is any further reporting required for CIL?*

Charging authorities have to report information back to central government on CIL. No further reporting is supported.

3. *Is the 1<sup>st</sup> October deadline for reporting on the previous year's activity sufficient for local authorities?*

The Council would propose a 31<sup>st</sup> December deadline as this marries with the Annual Monitoring Report and falls within a historically quieter part of the year.

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

NONE

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

If during the viability setting of the charge, the level shown is so low that it does not prove sufficient funds for providing sufficient infrastructure.

6. Not relevant to Brent.
7. *Do you agree that differential rates should be based only upon economic viability of development?*

It is proposed to have a uniform level of CIL across the area, without any direct links between a development and a set piece of infrastructure, which is supported. In Brent a uniform level is supported, while the option of different levels of Crossrail CIL across London should be considered.

8. *Do you agree that CIL charges should be based on metric of pounds per square metre?*
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?*

The Council supports the per square metre approach on commercial and retail schemes, but not on residential units. The Council believes a per bedroom charge on residential units is more fair and easier to work out. It is also more aligned with the value of the property and therefore viability of the charge. This is the approach Brent has successfully used for the last 3 years in this S106 SPD.

10. *Do you agree with the Government's proposal to apply the charging metric to the gross internal area of the development or do you think there are advantages to levying CIL on the gross external area?*

CIL guidance needs to be clear about what is covered by internal and external areas, which walls / storage, plant etc. As long as not much more than external walls are excluded there is little difference and either is supported. The longer the list of excluded items the stronger the objection to using internal. Internal is supported with limited exclusion of space.

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

The Council supports CIL on any increase in development and is concerned it could undermine whole scale redevelopment and encourage piecemeal development to avoid paying more CIL.

12. *Should authorities be required to index CIL charges?*
13. *Should indexation be based on a national index to provide simplicity, consistency and a readily understood index or, alternatively should charging be allowed to choose different indices in different places?*
14. *Do you agree with Government's proposed choice of an index of construction costs?*

Charging authorities should be required to index link CIL to keep it fair and accurate in terms of what it can provide for. Indexing it to a national

construction costs index is correct and a supported index. Support indexation to national construction index.

15. *Are you content with indexation taking place to the point of granting of planning permission or would you prefer charges to be indexed to the point when development commences?*

Indexation must occur through to the implementation of the planning permission, otherwise only half the indexation benefit will be realised and the value of the charge reduced. Furthermore it will encourage developers to wait until the end of their permission to reduce the costs of the charge, rather than bring development forward to reduce the indexation amount. The Council supports the indexation until the point of implementation as a separate indexation to the pre planning permission indexation.

16. *Do you think it is right to apply the index on an annual basis or do you see advantages in apply it monthly?*
17. *Do you agree that charging authorities should be able to index their charges from 1 January each year (taking November index)?*

Indexation should be applied yearly to the charge, so that the base amount is clear. Indexation from the granting to the implementation of the permission should be applied monthly and will depend upon the when the permission is implemented.

18. *Do you agree with the Government's proposal to allow a joint charging schedule / development plan examination?*
19. *Do regulations or guidance need to cover any additional matters relating to the joint examination*

Joint charging schedules examinations are supported, especially for those with other boroughs. Consideration should be given for the trigger of an examination and the cost of it. Charging authorities can be held to ransom for the cost of the examination. It is hard to justify an examination if just one objector seeks it.

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

The examiner should be able to increase the CIL rate only where the charging schedule and viability aspects have been address. This would stop areas from decreasing their CIL to give them a competitive advantage over other areas.

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

As the level of CIL will need to be viability tested there is concern, particularly in the current economic environment, that any CIL would either be established at a low level due to historically low growth and land values or at a normal level prohibiting growth in the first few years. The Council in it's Infrastructure and Investment Framework has

identified a short fall (including allowing for S106 at its current rate) of approximately £2,400 per new residential unit. This in addition to the current standard charge would need to be tested, if it proves it would make the majority of schemes unviable it could in theory be reduced to a level most are viable, even if this is below the current S106 standard charge rate.

Regional planning authorities, i.e the Mayor of London will be able to apply CIL for regional infrastructure such as Crossrail. The Mayor has already indicated there will be Crossrail CIL and there could be other Mayoral Transport CILs. Boroughs will need to collect this on behalf of the Mayor and our own CIL, if introduced after any Mayoral CIL will need to consider the Mayors in viability terms. If the Mayor is introduced after the boroughs, they should have to take consideration of ours into account. Also should boroughs be required to collect CIL on behalf of third parties, the boroughs should be allowed an administration fee.

22. *Do you agree with the chosen definitions of building, planning permission and 'first permits'? If not what changes would you wish to see that strike the right balance between simplicity, fairness and minimising distortions?*
23. *Do you agree with our approach to when CIL is chargeable on outline and reserve planning permissions? If not what changes would you wish to see that strike the right balance between simplicity, fairness and minimising distortions?*

Yes, no comments.

24. *What are your views on the principle of providing a reduced rate of CIL for all affordable housing development? What do you think the likely consequences of providing such a discount might be?*

We support a discount for affordable housing units, as affordable housing is likely to come under significant pressure from CIL and reductions in grant. Allowing say a 20% reduction would encourage affordable housing delivery while acknowledging the benefit and cost of affordable housing.

25. *If the government were to provide a reduced rate of CIL for affordable housing development, do you think the proposed definition of affordable housing is workable in practice?*

Yes, supported.

26. *If the proposed definition provides a workable basis for any reduced rate of CIL for affordable, 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?*

If they are building affordable housing not under their charitable purposes it should have the charge at the reduced rate. If it is under their charitable purposes it should not have CIL applied.

27. *Should LCHO properties where receipts from staircasing are recycled for additional affordable housing, not be subject to any clawback?....*

No clawback is support as the funds are being reused to provide more affordable housing.

28. *Is 7 years an acceptable time period for clawback to operate over?*

No objection.

29. *Is it reasonable to ask a claimant to submit an apportionment of liability in this way?*

No objection

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?*

It is important to recognise that there will be times when developers can not pay the charge in the timeframe set due to market conditions or to company specific factors. A special procedure needs to be set and clear for what will happen and when. The S106 system has worked well through the downturn in being able to stage payments to aid developer cash flow. The Council proposes a system where financial constrains have been demonstrated to the Council's satisfaction, 50% of the charge may be proposed from implementation of the planning permission to practical completion. The same should apply to all other charging authorities.

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

No objection

32. *Are these timescales for the transfer of CIL revenue from the collecting authority to the charging authority the right ones?*

In London this would be monthly to the Mayor for transportation. There will be heavy administrative burdens on both the collecting authority and the Mayor in processing this every month. The council proposes requiring charging authorities to be required to transfer the funds not less than every quarter. This allows them to transfer more frequently if required but does not requirement to do so.

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

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



Final regulations need to provide for CIL in-kind payments. In-kind CIL payments should be considered as the provision of public infrastructure either as shown or similar to the charging schedule, with the costs identified in it plus 10%. The provision of this infrastructure usually at the end of construction reflects a 10% surcharge equivalent of 5 per annum, over the average 2 years of construction.

35. *Should payment by instalments be provided for in the final CIL regulations in addition to the ability to pay CIL by phases of development? How should the instalments be structured?*

Regulations for the instalment of payments should be provided for as most large complex developments will be phased. Set timescale instalments such as on implementation at the start of each phase, with the proportional amount of CIL. This should allow for cash-flow and phasing issues to be addressed, while giving clarity and encouraging all of the development to come forward.

36. *Do you agree that payment on account should not be provided for in the final CIL regulations?*

Strongly agree.

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

Strongly agree.

38. *Should the draft regulations be amended to require collecting authorities to have to issue a warning to liable parties(..) before being able to impose a late payment surcharge?*

Charging authorities should only have to issue a warning prior to the six month surcharge. It is the responsibility of the developer to pay the charge not the authority to request it.

39. *Are the means of recovering CIL debts sufficient or would further methods such as the ability to impose attachment of earning orders be helpful?*

They are sufficient.

40. *Should the Government provide for specific enforcement measures in regulation to allow collecting authorities to penalise and deter breaches of condition for relief?*

Yes.

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

A bespoke compensation regime is required to clearly identify when inappropriate taken action has occurred and the professional recourse available for both sides.

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

No.

43. *What do you think about the Government's proposals as set out in draft regulation 94 to scale back the use of planning obligations?*

44. *Do you think the wording of each of the five tests as set out in draft regulation 94 is appropriate? Is each of the five test meaningful and workable in practice or could any be expressed in a better way?*

This approach is flawed. The reason case law only recognises it as a consideration is that it is virtually impossible to accurately define what is 'reasonable' and what is 'required' when considering the mitigation required for new developments. How many people in a new development will require a new drop kerb to be installed, can you say definitely 27 residents but not 26? The regulations need to either be totally revisited or left as they are with the caveat that it is 'unreasonable' for them to apply where it is covered by CIL.

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 05.05, and if so what should it be and why is such a period required?*

The proposal to require planning obligations to be pared back if and when CIL is established within 2010-2012 is not supported. The evidence base for this time would either establish a low level due to historically low growth and land values or at a normal level prohibiting growth in the first few years. The Council proposes a longer 5 year window to allow CIL to be adequately established with sufficient policy and evidence from a more stable economic time, prior to removing the vital planning obligations tool.

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 CIL or not?*

No, we do not agree. Local authorities should be given the choice, otherwise CIL is mandatory. As long as it is clear you can not have old style planning obligations and CIL, the choice is best left to the local authority.

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.*

If local authorities are given the choice of CIL or old style planning obligations, yes.

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? If not please state why not. Can you think of an alternative which would have the same affect?*

Circular 1/97 and 05/05 have shown that it is not workable in terms of restricting the use of planning obligations. 05/05 would need to be updated and specify the level of unreasonableness in planning terms, unfairness etc. For example it would have to state something along the lines of: Where there is sufficient impact from the proposed development that on it's own it has a negative impact on the social, environmental or physical infrastructure that would not provide a sustainable development and for which a level of mitigation is available and reasonable to seek in planning terms.

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 development.*

Until the charging authority has adopted CIL charges in place, to a maximum of 5 years

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.*

No, it is unfair and would prohibit the authority in seeking required mitigation. There will be a direct loss of infrastructure income.

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 of the need to use planning obligations form Crossrail purposes.*

Given much of our work will be closely linked to what and when the Mayor introduces CIL, a longer period is certainly required of at least 5 years.

52. *In revising Circular 05/05 in the light of CIL. What further policy or areas of clarification do you think might be required with regards to the use of planning obligations?*
53. *Do you think any further guidance (additional to a revised Circular 05/05) is required to support the use of planning obligations or CIL, and if so who would be best to provide it.*

Further clarification from CLG is required for using planning obligations, with more examples and a best practice guide. A similar best practice guide from CLG or PAS would be good for CIL. If CLG is not explicitly

clear as to how it will work in practice then chagrining authorities will struggle.

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

None.

## **Conclusions**

3.14 In conclusion, the Council welcomes the proposed details of CIL and its regulations. There are a number of concerns around the Mayor of London's role and the future of planning obligations that need to be resolved first. This causes further concern given the April 2010 deadline for introducing CIL. This report highlights the amendments and clarification sought by the Council. Much will depend upon the amendments achieved after this consultation.

## **4.0 Financial Implications**

4.1 The council's Core Strategy and Infrastructure and Investment Framework has considered the amount of new development proposed and its impacts. The existing S106 system brings in £3-4million a year for infrastructure in the borough to address some of the impact of new development. If this were to stop there would be a clear short fall in income which would need to be addressed. Equally should CIL increase or decrease from the current level of income there will also be direct impacts upon the service provision and Council resources that rely upon this income.

## **5.0 Legal Implications**

5.1 Under the current proposals, the existing S106 system will be come obsolete after 2012, leaving CIL and a pared back S106 as the only options for securing infrastructure from planning applications. While there is no legal requirement upon a LPA to introduce CIL, post 2012, the existing S106 planning policies guidance will require updating if it is to carry any legal weight in securing infrastructure. The current details of CIL are out to consultation and this report covers the matters the Council will highlight in it's response.

## **6.0 Diversity Implications**

6.1 None

## **Background Papers**

- Detailed proposals and draft regulations for the introduction of the Community Infrastructure Levy: Consultation - Partial Impact Assessment
- Detailed proposals and draft regulations for the introduction of the Community Infrastructure Levy: Consultation - Draft Regulations and Reference documents
- Detailed proposals and draft regulations for the introduction of the Community Infrastructure Levy: Consultation

### **Contact Officers**

Any person wishing to inspect the above papers should contact Zayd Al-Jawad at Brent's Planning Service , [Zayd.AL-Jawad@brent.gov.uk](mailto:Zayd.AL-Jawad@brent.gov.uk), 020 8937 5018

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