THE HOME BUILDERS FEDERATION

Natasha Trinidale
Community Infrastructure Team
Communities and Local Government
1/E2
Eland House
Bressenden Place
London
SW1E 5DU

23rd October 2009

Dear Madam

COMMUNITY INFRASTRUCTURE LEVY – CONSULTATION

Thank you for consulting the Home Builders Federation on both the draft regulations and the accompanying guidance note regarding the introduction of Community Infrastructure Levy (CIL).

The Home Builders Federation (HBF) is the principle trade federation for the private sector housebuilding industry. Our members range from large, international companies through regional to small local companies and, together, account for around 80% of dwellings built in any one year. They are, therefore, one of the main groups who will be liable for CIL payments and thus the details of the process are of particular concern.

HBF was, of course, part of the original development industry group that submitted our concept of an alternative to the government proposed planning gain supplement and we have been involved in the discussions over reform of the S106 process since the review of Circular 1/97 way back in 2003. HBF has taken an active role in the discussions of the CLG policy group over the past 2 years and housebuilders have similarly given considerable time to the practitioners group over a similar period.

It is, therefore, with considerable disappointment that we find ourselves in the position of having to disagree and object to so much of what is set down in the draft regulations and guidance note for CIL. Some of the fundamental issues and pre-requisites for a successful approach to CIL that we addressed in our original proposal have not been reflected in the emerging CIL methodology and, as such, we cannot support the current proposals.

That is not to say that we are opposed to the principle of CIL. The original goal of a simple, pre determined, calculable and standard contribution towards local

infrastructure provision in place of the uncertainty and, in many cases, unaffordability of the current negotiated S106 process remains strong throughout the development industry.

We are, therefore, still keen to continue the dialogue with the government over how to address what remain key issues for the industry over the introduction and application of CIL if it is to receive industry support and result in an improved approach to the funding of infrastructure.

We have attempted to make our representations in response to the questions posed in the consultation document but, you will appreciate that some of our concerns are with issues not directly associated with the areas of comment invited by the consultation.

We would also ask you to note that our representations are the result of wide discussion throughout the industry, across both England and Wales, of the principles of a possible CIL and our experience of the current S106 process over not just the past 2 years regarding CIL but over many years as the S106 process has grown and expanded beyond all recognition since 1991 and before. We hope, therefore, that you give them significant weight in your deliberations of how to move forward on this essential, yet difficult and delicate issue.

Yours faithfully

Andrew Whitaker
Planning Director

COMMUNITY INFRASTRUCTURE LEVY
REPRESENTATIONS BY THE HOME BUILDERS FEDERATION

GENERAL COMMENTS

1. We have tried to answer the questions posed in the consultation document as they are presented. However, some of our fundamental concerns over the introduction of CIL are more general in nature and they are addressed here.

Infrastructure providers must provide infrastructure

2. The principle of CIL should be clearly stated as providing a methodology of setting a standard charge for development to contribute towards community infrastructure. It should not be seen as a replacement for capital investment in infrastructure from infrastructure providers.

CIL to apply to net development

3. CIL should be required solely to support infrastructure required as a result of development growth, not development per se or to address existing deficiencies in infrastructure provision. Thus CIL must apply solely to net increases in development.

Establishing the hierarchy of CIL

4. The hierarchy of CIL should be defined against other costs of development whether statutory or policy based. There are, in effect, 4 fundamental costs of development:

    - The costs of meeting new building regulations
    - CIL
    - Site specific requirements
    - Affordable housing

5. It is, therefore, critical when setting CIL that the order of priority of the above is clearly determined since it will have a significant effect on the level of CIL if it is set before or after the policy requirement for affordable housing is assumed to be met. Alternatively, the level of affordable housing sought through planning policy may fall since CIL is a non negotiable levy on the proposed development, thereby determining the site viability and thus any ability to contribute towards affordable housing subsidy.

Consistent assessment of viability

6. HBF proposes that a standard modelling tool is established to ensure a consistent and comparable approach towards the "hierarchy of development costs" in order that the approach towards CIL is both clear and consistent. This should test a wide range of sites within a charging authority area in order that they can show that over 95% of sites will remain viable for development under the authority's CIL proposals. It would be very helpful for guidance to be very detailed regarding what will be considered to be a robust evidence base for establishing the level of CIL.

CIL to replace existing S106 and tariff based practice

7. CIL should replace S106 rather than be additional to existing practice. Infrastructure which is included within a CIL schedule should not be sought as a site specific requirement of planning permission. In effect this passes the liability of mitigation from the development itself onto the charging authority. This must be made very clear within the regulations and guidance.

8. There is a strong relationship between the payment of CIL, the provision of infrastructure and the use of Grampian conditions or other restrictions over the timetable for development proposals that must be more explicitly dealt with through the regulations. Failure to address this inter-dependence will lead to confusion, legal challenge and unnecessary delay.

9. CIL must not be thought of as "voluntary" in the sense that local authorities should not be able to choose between the introduction of CIL or sticking with existing practices. Only where authorities have no requirement for any infrastructure included within the CIL definitions can they choose not to have a CIL schedule. Such infrastructure cannot then be negotiated under S106 provisions on a site by site basis. This is particularly the case with sub regional infrastructure which must only be included within a CIL scheme rather than through site specific negotiations.

10. Those areas where CIL cannot be supported in terms of general site viability have, in effect, a CIL of zero rather than not having CIL at all. This must be made much clearer in the guidance.

Delivery of infrastructure

11. Charging Authorities must be under greater compulsion to undertake their best endeavours to deliver the infrastructure set out in infrastructure plans. The payment of CIL should devolve the responsibility of infrastructure away from the developer onto the charging authority. The CIL legislation needs to specifically address this point which is currently missing from the draft regulations. Delivery should be given as much weight in the regulations as the setting, collection and enforcement procedures.

In kind delivery

12. As stated above, the delivery of infrastructure is essential if CIL is to work. Therefore, it is also essential that a process for offsetting the value of in kind delivery of infrastructure via the development itself is established within the regulations.

The metric for residential development

13. We believe that the metric for residential development should be £/dwelling rather than the proposed £/sqm as proposed. This is due to the greater certainty and transparency that such a metric provides to both developers and local communities.

14. We now seek to address the issues raised within the consultation through the government's specific questions:

CHAPTER 2: SPENDING CIL

Definition of “infrastructure”

1: Do you agree with the proposal that the draft CIL regulations do not define ‘infrastructure’ further?

15. The most important thing is not to define what infrastructure can be included within CIL but what cannot be included within S106. There should be no provision to allow for “double dipping”, that is, paying for the same infrastructure both through CIL and through S106.

16. It is right that local authorities have the ability to develop their own infrastructure plans but it is critical that such plans (and, by implication, the types of infrastructure included within the CIL list) are robustly tested in terms of both their impact on development viability and delivery and their necessity in supporting the levels of development proposed for an area.

17. CIL should not be used or justified to rectify existing deficiencies in infrastructure and therefore must be solely calculated on the infrastructure requirements that are directly related to the additional development growth provided through the development plan process. Contributions should only be based on capital expenditure for infrastructure, not ongoing revenue costs

18. It should also be noted that some infrastructure provision (such as water and sewerage) is dealt with under other legislation and that the development industry already pays contributions towards infrastructure upgrading through these other statutes. Such infrastructure should not, therefore, be included within CIL since this would constitute charging twice for the same infrastructure.

Monitoring and Reporting CIL Spending

2: Is any further reporting required for CIL?

19. It is critical that clear and transparent reporting is undertaken by charging authorities. This should be on both the amount of CIL collected and the amount spent as proposed by the consultation.

20. However, it is also important for local authorities to look forward as well as backwards in such reports, explaining how much CIL they expect to receive in the forthcoming year and to relate the actual income and expenditure to these forecasts from the previous year.

21. The report should be clearly related to the infrastructure delivery plan also produced by the authority to show which infrastructure has been delivered (albeit it is acknowledged that any particular CIL contribution does not contribute directly to the provision of any specific piece of infrastructure). Thus, infrastructure plans should have a clear timetable for delivery against which reporting can be undertaken.

Format of Reports

3: (a) Is the 1 October deadline for reporting on the previous year's activity sufficient for local planning authorities?

22. There seems to be little justification for such a long time lag in the reporting of CIL receipts and expenditure. It is assumed that the "year" referred to in paragraph 2.59 is the financial year ending in March. The passing of a further 6 months before a report is published seems an unnecessary delay and will lead to less transparency and clarity than a report published more rapidly.

23. Since CIL is established with the granting of planning permission it is a simple matter for liabilities to be logged. Indeed, we would expect charging authorities to maintain a public register of all CIL payments and thus be able to publish a report very rapidly at any time. In the light of the above, a proposed 6 month target is considered to be too long. A period of 3 months would seem more than generous.

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

24. As discussed above, a 6 month delay in the reporting of CIL revenue will reduce the transparency of the CIL process since some of the contributions will have been made 18 months previously. Our proposal for reports to include an assessment of expected CIL contributions over the forthcoming year and for infrastructure plans to include clear timetables for delivery of key pieces of infrastructure would also be of greater use if the report was published as quickly as possible after the end of the previous year.

General Comments

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

25. Chapter 2 uses the term "additionality" of CIL yet does not explain against what assessment of current developer contributions CIL income will be more than. Indeed, we

are very concerned that the loose terminology of the concept of “additionality” will be seen by some as meaning “an additional contribution over and above those sums already collected through S106”.

26. This concern is, unfortunately, compounded by the government’s insistence that CIL will be voluntary for local authorities to introduce, further implying that those authorities who choose not to introduce CIL will be able to carry on using the existing S106 process and models to secure developer contributions. This is a fundamental difference in understanding from the development industry’s proposal for a system of standard charging to replace S106 site by site negotiations not merely to add to the regulatory burden and costs of development.

27. CIL must deliver greater certainty, faster decisions and, above all, certainty of delivery of infrastructure. This will only be possible if its adoption is mandatory on all local planning authorities.

CHAPTER 3: SETTING THE CIL CHARGE

Charging Authorities

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

28. We are concerned over the ability of charging authorities to ensure the delivery of the necessary infrastructure, particularly where it is relying on third parties and their capital programmes for investment. The regulations should deal specifically with delivery of infrastructure since to focus (as they do) on setting, charging and collecting CIL is avoiding the critical element of actually ensuring delivery.

6: (a) In deciding whether to use the power at section 207 of the Act, should the Government apply different criteria?

29. We can see the merit in allowing joint committees to be established but would need further clarification on their role and responsibilities in either the setting of CIL or its collection and, most importantly, its contribution towards delivery of planned infrastructure.

30. As set out in paragraph 3.14, the grant of planning permission is the time at which liability for payment of CIL is established and that the grant of such permission is a planning authority decision. Therefore we believe it is unnecessary to pass on the responsibility of a charging authority to any other body.

31. Of course, the charging authority can pass on the receipts of CIL to other infrastructure providers but this is already adequately catered for in the regulations and does not require the recipient of CIL money to be a charging authority in its own right.

(b) Which functions should a joint committee perform?

32. Joint committees could assist local authorities in coordinating their CIL charges within areas wider than individual authority areas and could help determine where, in their wider areas, differential rates of CIL might be appropriate. Such advice would, of course, be a strong part of the evidence base against which the proposed charging schedules would be tested. However, it should remain the responsibility of the charging authority to propose such a schedule.

Setting Differential Rates of CIL

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

33. There is considerable misunderstanding within the development industry of the use of the term “based on economic viability of development”. Clearly the industry is certain that differential rates should reflect the different economic circumstances of different developments in different areas. However, this should not be interpreted as meaning that the differential rates of CIL should be based solely on the ability to pay. Such an approach would be more akin to the previously proposed “planning gain supplement” to which the development industry is still strongly opposed.

34. Thus while we agree that differential rates should be set within CIL schedules and that this will inevitably reflect the economic viability of development within the defined differential rate area, this should be explained in much greater detail so as not to suggest that such rates should be based on perceived or actual ability to pay.

Metrics

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

35. While it appears simple to use a standard metric for all types of development in a charging schedule it is inappropriate since such precision will not allow for accurate appraisal of CIL income (or, indeed, apportionment). Currently the only figure that local authorities use for forward planning of residential development is dwellings. While it would, of course, be possible to use an average floorspace figure for a rough estimate of potential CIL income this is not considered as certain as a metric for residential development of net additional dwellings.

36. Indeed, the use of pounds per square metre would remove any flexibility within the planning system once planning permission had been granted since the liability for CIL would similarly change. The most common post decision change on residential schemes is the change of a house type within a development. While this would have no effect on the CIL liability if the metric of dwelling units was used, the use of £/sqm would involve an unnecessary and complicated recalculation of CIL.

37. The government has recently introduced new provisions for post decision flexibility to be accommodated within the planning system. To remove it so quickly and as an unintended consequence of the introduction of CIL is considered to be unhelpful.

38. There appears to be no provisions within the regulations for the recalculation of CIL following the amendment of a development post commencement. This is, of course, of greatest concern where the CIL liability reduces as a result of the amendment. The regulations must address both the recalculation of CIL (including the repayment of overpaid CIL where the number of units decreases in a subsequent amendment) and the potential situation (for example, following a S73 application to amend the development post commencement and thus post payment of CIL) where CIL liability is established twice for essentially the same development. No development should be obliged to pay CIL twice and this common scenario should be clearly addressed in the regulations.

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?

39. We do not believe that there should be a choice of metrics for charging authorities. Metrics should be set nationally and through the regulations.

40. However, It does not seem too complicated to use different metrics for different types of development such as £/sqm of commercial floorspace and dwelling units for residential development. This would also allow other metrics for other land uses such as site size if, as we suggest elsewhere, CIL is charged on a wider range of development than merely buildings.

41. We do, however, acknowledge that in assessing the effect of CIL on development viability when setting the CIL charge, the use of a viability model will need to be based on assumed floorspace calculations measured in square metres.

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?

42. This issue would not arise for residential developments if the metric of units was used instead of floorspace. We set out below our arguments for the use of net additional development which we believe is a fairer reflection of why CIL is being charged in the first place.

43. Thus we believe that for residential development the metric should be net additional dwelling units. However, if the government persists in using £/sqm for all development types then we agree that this should be measured as net internal residential floorspace.

This measurement is well understood in sales particulars and contracts with purchasers and thus should be capable of being used when establishing liability for CIL.

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

44. We fundamentally disagree with the proposal that CIL should be levied on gross development rather than the net additional increase in development.

45. This is because CIL is supposed to be a contribution towards the additional infrastructure required to support growth. Thus if one house is replaced with another there is no additional need for infrastructure provision since there is no additional impact on the existing infrastructure. While we accept the arguments put forward in paragraph 3.64 as being the problems associated with using net calculations to establish liability it would be easy to establish a set of simple rules and tests for defining "net" development for CIL purposes. This would not necessarily need to be as rigorous as any other use of the term "net development" – it would merely need to reflect the fact that it is only the element of additional development that requires additional infrastructure provision. The standard planning application form includes the entry of the size of any existing development on the application site and this same figure could be used when establishing CIL liability.

46. As recognised in paragraph 3.66, the use of gross development as the metric would seriously disincentivise redevelopment and regeneration schemes thus being contrary to many other government policy initiatives, particularly that of sustainable development.

Indexation

12: Should authorities be required to index CIL charges?

47. HBF agrees that it would be appropriate to allow CIL charges to be indexed from their adoption in a charging schedule to the time when the liability for CIL is set. Indeed, we agree that such indexing should be a "requirement" upon charging authorities.

13: (a) Should indexation be based on a national index to provide simplicity, consistency and a readily understood index.

48. The use of a national index is preferred to the alternative of allowing many different local indexes to be used by different charging authorities.

(b) Alternatively, should charging authorities be allowed to choose different indices in different places?

49. No. This would be confusing and difficult to test/challenge.

14: Do you agree with the Government's proposed choice of an index of construction costs?

50. No. The index of construction costs is relatively limited in its scope and does not reflect changes in the market place quickly enough, using, as it does, a rolling long term average of data. We propose below that indexation should take place more frequently than on an annual basis and thus we suggest that the monthly retail price index is a better indicator of short term changes in the market.

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?

51. The fixing of the liability for CIL occurs at the point of granting planning permission. Thus the indexation of the CIL charge should also be set at this time. The purpose of CIL is to grant certainty to developers of their liability for contributions towards community infrastructure. It is not a process of value capture arising from development. Thus the charge should be defined at the point of granting planning permission not commencement of development.

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

52. The use of annual indexing would mean a peak in applications seeking to be determined before the new indexing if the charge was likely to increase. Similarly, charging authorities might seek to defer such applications until after the indexation period.

53. To avoid this potential perverse consequence we propose that indexation is undertaken monthly using the retail price index.

17: Do you agree that charging authorities should be able to index their charges from 1 January each year (taking the November index)?

54. This proposal appears illogical by proposing indexation to occur on the basis of calendar years, yet previously proposing the reporting of CIL on financial years. If the above

suggestion of an alternative indexing process is not adopted we would expect the indexation of the charge to be aligned with the reporting schedule.

55. However, as stated above, we believe that one of the merits of a rolling index would be to avoid the uneven spread of planning applications required to be determined before the new indexed charges came into force and the temptation for local authorities to defer such applications leading to unnecessary delay.

Charging Schedule Procedures

18: Do you agree with the Government's proposal to allow joint charging schedule/development plan examinations?

56. It is critical that the link between the charging schedule and the wider development plan is maintained. Thus we fundamentally believe that joint inquiries should be a requirement of the CIL proposals not discretionary.

57. This point is best explained through the hierarchy of CIL set out in our opening comments. If CIL is set independently of other policy requirements of development (such as affordable housing) then delivery of these objectives will be severely constrained through the viability of development which has to pay the mandatory CIL payment. Similarly, if CIL is set after assuming the delivery of other policy requirements then the level of CIL will, inevitably, be lower.

19: Do regulations or guidance need to cover any additional matters relating to joint examinations?

58. As suggested above, the regulations should require the charging schedule to be reconciled with the overall policy requirements and costs of development of the wider development plan. It is not necessary to prescribe in minute detail the mechanics of examinations, merely the principle that that CIL schedules cannot be examined in isolation from the rest of the development plan (whether through a joint examination or not).

59. Detailed procedures for the examination of charging schedules would be more appropriately set out in a circular rather than regulations.

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

60. CIL is a contribution towards community infrastructure that is set at a rate that allows development to come forward at the level required by the development plan. It should not be seen as a tool to capture the value from development. The suggestion that an examiner might increase the proposed CIL rate merely reinforces the suspicion that the proposals for CIL are more akin to capturing the maximum value from development rather than seeking a fair and affordable contribution towards community infrastructure. HBF cannot support CIL on the basis of it being a tool for maximising developer contributions on the basis of actual or perceived ability to pay.

61. If the CIL examiner were allowed to increase the proposed CIL rate it would be necessary to include a right of challenge since the charging authority would be able to adopt the increased charge without any further representations being made.

General Comments

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

62. The regulations allow local authorities to be their own judge and jury of whether or not they have an up to date development plan and infrastructure plan. This is unacceptable. The regulations should define what is meant by “up to date” or, at the very least, the assumptions of the authority should be capable of challenge through the CIL examination process.

63. We are not convinced that an informal hearing process will be robust enough to examine the detailed and technical aspects of the CIL charging schedule and the robustness of the evidence base upon which the schedule has been based. While we accept that it is within the power of the examiner to use formal inquiry procedures we believe that this should be the default examination process and that an informal process should only be used where all parties agree to such an examination.

The charging schedule should also be linked to both the development and the infrastructure plans and should demonstrate that there is a realistic implementation schedule attached to both plans.

CHAPTER 4: PAYING CIL

Definition of Development and Planning Permission

22: (a) Do you agree with the chosen definitions of building, planning permission and 'first permits'?

64. The definition of development being limited to buildings is not considered to be wide enough to adequately reflect the impact of other types of development on community infrastructure for which they should make a contribution. The most obvious are those set out in paragraph 4.8, many of which potentially have a huge impact on infrastructure such as transport and policing yet have very little building floorspace associated with them.

65. It is possible to use different metrics for different categories of development. We addressed this in our very first submission to CLG almost 2 years ago wherein we suggested that each category of development should be provided with a metric to ensure that all development contributed towards the infrastructure provision of an area since all development would benefit from such infrastructure. The government appears to have limited the definition of development to buildings merely because it is difficult to define all other such uses. This is not the case. Other standard approaches towards infrastructure provision (such as car parking) use different metrics for each category of development. There is no reason why CIL cannot be calculated for all types of development nor why all development shouldn't contribute towards the provision of infrastructure in an area through CIL.

66. Indeed, the absence of CIL being applied to all types of development calls into question how development which is not associated with buildings (minerals extraction for example) will be required to contribute towards infrastructure. Under CIL the scale back of S106 would limit any such provision to site-specific impacts only, presumably negotiated through a S106 agreement. Such a situation would be unfair to development which is buildings based since they would be paying a disproportionate share of the wider infrastructure in an area.

67. Paragraph 4.25 recognises that changes of use between certain use classes are permitted development and that this is because the uses have similar planning impacts. This therefore accepts the fact that CIL is about additional impact of development in general and adds considerable weight to the HBF contention that CIL should be applicable to net rather than gross development since this too is related to the additional impact of additional development.

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

68. The key to this issue is that CIL should be simple. Thus the proposal to include some types of development that are already granted permission through permitted development rights is confusing. In effect planning permission will not be required but a liability for CIL will be established.

69. The definition of planning permission includes S73 and S73A applications. These could apply to applications that seek to regularise development undertaken not in accordance with a previously approved planning permission. However, CIL would have been paid on implementation of the original permission and thus should not be repayable on the S73 application.

70. This similarly applies to the amendment of permissions as explained in our response to Q8. Since CIL will have already been paid on implementation of the original permission a further consent under S73 should be credited with the original CIL payment and any under or over payment rectified. This situation should be clearly set out in the regulations.

71. HBF agrees that CIL liability should be fixed at the time planning permission is first permitted.

23: (a) Do you agree with our approach to when CIL is chargeable on outline and reserved planning permissions.

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

72. We agree that CIL should be payable in phases in respect of phased development.

73. The regulations are clear on how liability is fixed on full permissions and those for outline and reserved matters. Unfortunately they make no provision for hybrid applications such as those which involve an outline consent and a change of use (for which full permission is granted).

<u>Exemptions and Discounts</u>

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

74. If CIL is truly a tool to ensure that development makes a fair and reasonable contribution towards community infrastructure then there is no logical reason as to why affordable housing development should pay a reduced rate. The impact of development for affordable housing must be similar to any other form of housing and thus a reduced rate would be inappropriate.

75. Presumably there are those who propose that such a reduced rate on the basis that affordable housing reduces land value due to lower development value. Yet that is true of all development. Some residential development has higher gross development values than others yet both will need to pay the standard rate of CIL.

76. In fact the suggestion of a reduced rate is only justifiable on the basis that affordable housing provision is, in itself, community infrastructure and therefore should be a recipient of CIL rather than a contributor to CIL. HBF would agree with this approach and would advocate the inclusion of affordable housing subsidy within CIL.

77. The ability of affordable housing to pay CIL should be assessed in the setting of CIL rather than granting a general discount to such development.

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

78. Government would come under pressure to define affordable housing as a separate use class in order that local authorities could allocate sites specifically for affordable housing. Given the policy desires to create mixed and balanced communities and to allow flexibility of tenure over time such tight restrictions would be both unhelpful and unwise.

79. It would also be extremely difficult to define the term “affordable housing” for the purposes of the exemption. This is being made even more difficult by various government initiatives aimed at addressing housing affordability such as Home Buy Direct and other shared equity products. Similarly the process of mixed and balanced communities allows for flexibility of tenure of individual properties over time and, as recognised by the consultation, the concept of “clawback” is problematic and unjustifiable.

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?

80. As stated above, we do not believe that affordable housing should be afforded a reduced rate of CIL. This is principally due to the problems associated with defining what constitutes affordable housing.

81. We agree that a national definition would be more appropriate than local definitions. However, as we suggest above, such definitions in the light of the desire to allow flexibility of tenure over time, creates far too many problems to make it practicable (of which clawback, discussed below, is but one of the most obvious). New approaches towards addressing housing affordability will, inevitably, cause additional problems in the future if all such housing is granted an exemption from CIL.

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?

82. We agree with Section 210(1) of the 2008 Act which requires the CIL regulations to provide for exemption from liability in the instances stated therein.

83. However, S210(2) is a discretionary clause that we recommend is not included within the exemption.

27: (a) Should LCHO properties where receipts from staircasing are recycled for additional affordable housing, not be subject to any clawback?

(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?

(c) How should such a clawback operate?

84. Paragraph 4.69 again draws attention to the fact that the government sees CIL not as merely a contribution towards community infrastructure provision but as a tool for capturing the value of development. Thus, the proposals for clawback relate to "recouping the CIL discount provided" rather than "seeking a contribution towards the additional infrastructure needs of the development" which should be the basis on which such additional payments ought to be based if CIL were truly about making a fair contribution towards community infrastructure.

85. It would be extremely difficult to calculate what the additional CIL liability would be under any clawback provision. The "lost" CIL would, of course, have to be levied at the rate that was being applied when the development occurred, not at the time staircasing occurred. Similarly it would be difficult to calculate how to apportion the level of payback at any specific time. If the additional CIL liability was only triggered at the 100% staircase level

one would see perverse consequences of 99% staircasing until the time limit for clawback had been reached. Such perverse outcomes show the folly of the whole idea of clawback.

86. Thus it cannot be acceptable for clawback to be agreed as a principle of CIL. This logically leads to the conclusion of our recommendation that there should be no specific CIL discount for affordable housing.

87. We are unclear as to who would continue to be liable for the clawback of CIL, especially where the asset had been transferred to another party. For example, a private sector developer might obtain exemption from CIL for an element of affordable housing provision and then transfer this asset to an RSL. If the occupier then staircases out of the subsidy it is unclear as to whether the original housebuilder, the RSL or the occupier would become liable for the "lost" CIL. If clawback is to be retained this important point must be adequately addressed in the regulations.

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

88. If clawback is considered to be a reasonable approach within CIL (which we adamantly reject in our submission above) then there must be a reasonable time limit to the liability of clawback provisions. We accept the proposal of 7 years.

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

89. The contrived and complex requirements of these apportionments of liability show the entire folly of the granting of exemption from CIL to charities. While we accept that this exemption is now within the primary legislation it is critical that everything possible is done to stop abuse of such provision.

Exceptional Circumstances

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?

90. We believe that, as a generality, the setting of the CIL charging schedule and differential rates should afford considerable flexibility for charging authorities to ensure that development is not thwarted by the imposition of CIL we also recognise that there might be some, very rare, exceptional sites that would require exceptional provision within the CIL regulations.

91. The regulations should allow the charging authority to be able to agree exceptional circumstances (and charges) with an applicant where the development was a windfall opportunity that had not been addressed through the development plan process but for which there was considered, by the local planning authority, to be other planning considerations in favour of the timely development of the site.

Establishing Liability for CIL

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

92. We agree with the provisions for assuming liability for CIL including those relating to the arrangements whereby multiple parties assume joint or several liability through private agreements rather than through CIL.

93. However, once again we draw attention to the fact that the regulations appear to spend a disproportionate amount of time and effort on seeking to establish liability to pay yet spend no time at all on establishing a liability to spend CIL receipts or provide infrastructure.

Collecting CIL

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

94. The charging authority cannot discharge its own liability for the provision for infrastructure merely by passing on receipts from CIL. The regulations need to be very clear that the charging authority has a responsibility to ensure delivery of the infrastructure to which it has contributed.

Payment of CIL in Kind

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

95. It is critical that the regulations address the provision of payment of CIL in kind. The alternative would be to create a very complicated and confusing circular payment of CIL to the charging authority who would then procure the necessary development from the CIL paying company. Such ridiculous practice should be avoided if at all possible.

96. Similarly, unless CIL regulations remove any possibility of imposing Grampian conditions on a permission that limit its implementation until a certain piece of infrastructure is

provided then it must be within the power of the applicant to accept liability for the provision of that infrastructure. This, in turn, must result in them being credited with the cost of that piece of infrastructure as an offset of their CIL payment.

97. At the very least the regulations should allow for “offsetting” of on-site provision of items such as serviced land for community infrastructure for schools, hospitals etc. Alternatively the regulations should be clear that such additional subsidy from the development itself should not be required.

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

98. The “value” of the in kind payment should be agreed between the applicant and the charging authority. This would ensure value for money and would allow the authority to log the in kind provision in their reporting of CIL receipts, thereby overcoming the problem of lack of transparency.

99. There is clearly an inter-relationship between the payment of CIL, the infrastructure requirement within the wider area of the development, the restrictions on S106 relating to the development itself and the delivery of infrastructure as set out in the infrastructure plan. Thus, in general, the liability of provision of infrastructure under CIL passes from the applicant to the charging authority. However, If local authorities are allowed to impose Grampian conditions on a development then it cannot continue to make the decision on when that piece of infrastructure is provided. This could, in effect, render many permissions unimplementable. This problem must, therefore, be addressed through the allowance of payment in kind through the delivery of the infrastructure itself rather than a more general CIL contribution.

Payment by Instalments

35: (a) Should payment by instalments be provided for in the final CIL regulations in addition to the ability to pay CIL by phases of development?

100. Payment by instalments should be supported within CIL. We believe that such schedules should be allowed to be agreed with the charging authority rather than through the regulations. We also suggest that there should be a threshold above which charging authorities are obliged to agree a payment schedule. For residential development this is suggest as 50 dwellings, a level representing, on average, a one year development programme.

(b) How should the instalments be structured?

101. We suggest that payment instalments are agreed with the charging authority based on an agreed development schedule with payments made at specified milestones. These might be date or threshold triggers as agreed with the authority with longstop dates to ensure the payment within a known time period.

102. In order to discourage frivolous applications for payments by instalment we suggest that such payments are allowed to be indexed to the time of payment rather than set at the time of permission being granted.

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

103. Agreed.

Duty on Authority to Remove the Local Land Charge

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

104. Yes. There would appear to be no reason why this should not be so.

Enforcement of CIL Liabilities

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?

105. Yes.

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?

106. This appears to be unduly complicated and existing forms of debt recovery should be employed rather than seeking to introduce new CIL specific enforcement provisions. There is far too much emphasis in the regulations on enforcement and penalty for non payment yet no significant provision to ensure delivery of promised infrastructure or spending of CIL within a reasonable timescale.

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?

107. If clawback is to be pursued (which we do not support) then appropriate provisions to ensure its payment would certainly be necessary.

Compensation for Wrongful Enforcement Action

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

108. Existing procedures are considered to be adequate to cope with most of the enforcement issues associated with CIL and new, specific regimes are considered to be unnecessary.

General Comments

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

109. There is far too much emphasis on enforcement and actions over non payment rather than seeking to ensure the delivery of infrastructure to which CIL is supposed to be

contributing or on placing obligations on charging authorities to ensure that CIL is spent within a reasonable length of time. This lack of balance must be addressed.

110. Payment of CIL is proposed to be tied to the commencement of development. We would suggest that this should, instead, be related to the construction of the buildings to which CIL liability is attached to allow for other engineering operations to take place where appropriate.

111. We are also unsure of the tax implications of CIL. At present S106 payments are tax neutral and we would seek clarification that this will also be the case with regard to CIL payments.

CHAPTER 5: PLANNING OBLIGATIONS AND OTHER POWERS

Restricting the use of Planning Obligations

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?

112. This is a critical element of the introduction of CIL.

113. The original discussion in 2003/04 regarding the problems of S106 and policy creep sought to replace S106 with an optional tariff based system. Unfortunately that proposal was bastardised in the drafting of Circular 05/2005 meaning that we are now faced with tariff based approaches to S106 without the application of the test of necessity (even though they too are contained within C5/05).

114. CIL too, should, therefore, seek to be a replacement for S106 agreements not additional to existing approaches towards developer contributions. Unfortunately it appears that, despite discussing the provisions of CIL for the last 2 years government continues to send out confusing messages about CIL being voluntary for local authorities and implying that S106 agreements will remain in place either as an alternative route for local authorities to choose to use, or, perhaps more worryingly, to continue to apply S106 necessity principles to individual site proposals while also requiring CIL payments towards wider infrastructure.

115. This confusion must be clarified both within the regulations and the guidance that replaces C5/05.

116. As well as the 5 tests set out in regulation 94 we believe that they should include a statement that S106 cannot be used to secure contributions towards infrastructure that is the subject of the authority's CIL charge. This would assist in militating against double charging for the same infrastructure through both CIL and S106.

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?

117. We believe that placing the tests of necessity as set out in regulation 94 within the regulations will be a useful tool in trying to limit S106 and tariff arrangements. It should, however, be made clear that authorities should pay due regard to the new status of these

tests and that seeking to negotiate for a contribution that does not meet the 5 tests is, in itself, unlawful.

118. However, we believe that the power of placing the tests in the regulations also requires the explicit removal of existing tariff based contributions towards infrastructure. Similarly site-specific requirements can be adequately addressed through conditions on the permission, thereby ensuring that they can be tested through the appeals process rather than the more costly and more time consuming, court process.

119. We suggest that it is the 3rd test of necessity that has caused the most problems through its implementation under S106 and we suggest that it should be replaced with the following:

"required solely to mitigate the direct impact of the development itself;".

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. And if so what should it be and why is such a period required?

120. No transition period is required. If local authorities are really already applying the tests of C5/05 in a rigorous way they will not need to change their approach.

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?

121. This is essential to the successful implementation of CIL as a replacement of S106. Without such universal application many authorities will continue to ignore CIL and will continue to apply the current approach under S106.

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?

122. Yes. This approach is advocated under C5/05 solely because it was then envisaged that we would introduce an optional tariff basis of developer contributions. The use of tariffs and pooled contributions should be undertaken through the CIL regulations or not at all.

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 or similar effect?

123. We have suggested alternative wording for the 3rd test of necessity which we believe more clearly state that S106 obligations should be related to the mitigation of the direct impact of the development.

124. However, we do remain concerned over policy creep, even under the statutory status of the test, given the experience of the past 12 years whereby the definition of "solely" and the other tests of necessity have been constantly stretched beyond their intended limits.

125. We therefore advocate the use of conditions on planning permissions as a useable alternative to "on site" or "site specific" residual S106 contributions.

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?

126. We suggest that, in order to move quickly to the benefits of CIL over current S106 abuses the period should be as short as possible. We suggest a maximum of 2 years.

127. Many local authorities will argue that they will not have up to date development plans in place within that time period. However, we have little sympathy for such authorities given that they have already had 5 years to produce up to date development plans under the new 2004 provisions. Similarly, all authorities have agreed local development schemes that suggest that 80% of them will have an adopted core strategy within the next year, thereby allowing them an additional year to adopt a CIL charging schedule.

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?

128. If an authority identifies that it has no requirement for CIL type infrastructure or that a charge would threaten the delivery of development within its area then it should not be able to go on to seek such contributions through the existing S106 approach.

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?

129. While HBF would question why so much emphasis is being placed on the specific provision for CIL within London (and Crossrail in particular) the period of 2 years would seem just as appropriate given the ability of charging authorities to take advice from other agencies in order to adopt consistent strategies and charging schedules over a sub regional area.

Other Changes to Planning Obligations

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?

130. The new circular must focus on the use of CIL as the only way to obtain developer contributions to community infrastructure. It should advocate planning conditions as being the most appropriate way of ensuring that site specific issues can be dealt with.

131. Thus tariff based approaches towards developer contributions must be removed from the circular as should pooled contributions via S106 since these will be replaced by CIL contributions.

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?

132. Given the extensive nature of the CIL regulations there should be little need for additional guidance other than the new circular stressing the above approach towards CIL and planning conditions to address site specific issues.

133. However we think that it might be both appropriate and useful to include guidance on what may and may not be left within S106 given our suggestion above that many of the site specific requirements can be adequately dealt with through conditions.

General Comments

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

134. Guidance on the use of conditions as the principal means of handling site-specific provision of infrastructure would be beneficial and informative and would limit the potential abuse of the residual S106 process within the CIL regime.

Andrew Whitaker
Planning Director