HBF BACKGROUND PAPER

Community Infrastructure Levy: *The Future*

August 2015

Introduction

1. Introduced in 2010, the Community Infrastructure Levy (CIL) was billed as fairer, faster and more certain and transparent than the system of planning obligations which caused delay as a result of lengthy negotiations. It was designed to create a fairer system, with all but the smallest building projects making a contribution towards additional infrastructure that is needed as a result of their development. It was meant to provide far greater certainty that the planning obligations system alone could not easily achieve; enabling, for example, the mitigation of cumulative impacts from development.

2. Now 6 years old the Levy has still not been universally adopted by charging authorities and various changes to the regulations all appear to have failed to meet the original aims of the Levy to provide certainty, transparency and a fairer and faster process.

3. The DCLG have recently commissioned an empirical evidence study of CIL looking at its take up, contributions and expenditure but this paper discusses whether or not CIL is still fit for purpose or, indeed, is the correct tool to secure contributions from development towards infrastructure.

Setting CIL

4. Charging authorities who have proposed CIL have set their charges based on a viability study, usually undertaken by third party consultants and based on generic site typologies. However, this is often done without reflecting other planning policy requirements in an area or by making assumptions about the costs of meeting such policy requirements.

5. Unfortunately, these policy requirements are often not a true reflection of the development plan requirements for an area or, the assumptions made within the CIL viability appraisal are not reflected in the emerging policies within the development plan. Because CIL is not a flexible, negotiated charge on development it is not possible to negotiate the amount of levy paid on a site specific development. CIL is too inflexible to allow the difference between generic viability assessment and site specific viability appraisal to be adequately reflected in the charges set through the charging schedule.

6. This runs the risk of CIL, as a proportion of development value, being too high and threatening delivery of development proposals. Alternatively the high level of CIL threatens the delivery of other policy requirement, the most common of which is the delivery of affordable housing contributions from developments.

7. The main reason behind the problems of setting a CIL charge is that it is a complex calculation. This means that very few charging authorities have the necessary skills to produce viability assessment for development within their area and thus employ external consultants. This has considerable resource implications for local authorities and reduces "ownership" of the assessment process. It means that charging schedules are not reviewed often enough (due to resource implications) and are thus, not responsive to changes in the market until it is too late and development has been rendered unviable and abandoned.

Capturing land value

8. Many charging authorities abused the process of Section 106 agreements to attempt to capture the maximum amount of the uplift in value of sites with the benefit of planning permission. Indeed, it was this that drove many authorities to seek to capture land value to the "margin of viability" – the point at which the development was just viable yet the maximum package of developer contributions had been achieved. It is not possible to achieve this level of land value capture through the use of CIL, primarily because viability assessment for CIL is done using generic rather than site specific viability assessment. In order to allow all sites to be viable the CIL charge should be set at the value that ensures the least viable sites are still developable. However, most charging authorities set CIL at the mid-point (or higher) of their viability assessment meaning that almost half of the sites on which they are relying to deliver their development aspirations are made unviable.

9. This paradox is driven by a charging authority's desire to capture the maximum amount of uplift in land value on each and every site. Under CIL the setting of a standard contribution means inevitably that some sites will be on the margin of viability but the vast majority of sites will be well within the range of viability. This, believe many charging authorities, means that some of the uplift on land value has been "lost".

Flexibility

10. CIL is inherently inflexible. Once the charge has been set it must be paid by all development. If the specific site cannot meet the level of CIL payments then the site is unviable and development will not take place. Once CIL is set it is only the site specific infrastructure that can be flexed to make the site viable again. This site specific infrastructure includes any contributions towards affordable housing subsidy.

11. Site specific infrastructure is that which is genuinely required as a result of the development and without which planning permission should not be granted. It

should not, therefore, be negotiated away in favour of a generic payment towards CIL. This leaves just affordable housing contributions that can legitimately be negotiated as a way of making a development viable since affordable housing is merely a negotiable benefit not a direct impact of the development itself which should be mitigated through a planning obligation.

12. CIL is, therefore a very blunt tool. Once set it is very inflexible and, if set so high as to threaten delivery of development, its modification takes a considerable period of time, meaning reaction to the market is very slow.

Exemptions

13. Because of this inflexibility of CIL the government has introduced a number of exemptions. Affordable housing itself is allowed to be exempt as is self-build housing and the new starter homes scheme houses are also to be granted exemption from CIL.

14. Not only does this demonstrate the inflexibility of the CIL approach towards developer contributions towards infrastructure it also goes against one of the original objectives of CIL – that "all but the smallest building projects making a contribution towards additional infrastructure that is needed as a result of their development". In fact the myriad exemptions from CIL means that a smaller and smaller proportion of development is actually contributing towards CIL, reducing both its fairness and certainty.

Provision of infrastructure

15. The DCLG research will, no doubt, include evidence of how CIL has been spent. However, it is already clear that charging authorities have been uneasy about forward funding infrastructure provision to facilitate development and then to use the collection of CIL receipts to recoup this expenditure. Indeed, many charging authorities are looking to zero rate large scale development for CIL preferring instead to use site specific S106 agreements to secure the necessary infrastructure for these major developments, despite some of it clearly being strategic infrastructure for which CIL contributions were originally conceived.

16. This new approach of zero rating major development leaves an even smaller proportion of development paying CIL, suggesting that its aim of being a universal charge is not being met and that its fairness and transparency is being called into question.

17. This problem is leading to many planning permissions being granted with negative conditions – so called Grampian conditions. These conditions stop development from going ahead until particular pieces of infrastructure have been

delivered. Unfortunately there is little that the developer can do to ensure delivery of such infrastructure (since they are reliant upon third parties for delivery) and thus planning permissions are rendered un-implementable.

18. This creates an impression that developers with planning permission are "landbanking" or holding on to permissioned land when, in fact, they cannot implement the permission until a third party has provided a particular piece of infrastructure. This leads to confusion and concern whereby increases in planning permissions are not reflected in increased starts and completions of developments.

Local impact of development

19. One of the key objectives of CIL was that all development should pay towards its cumulative impact and that CIL receipts did not have to be directly linked to the specific development from which the receipt was taken. However, a subsequent amendment to the CIL regulations was to ensure that a large proportion of CIL money was given to local administrations to be spent on local infrastructure. This proportion is even greater in areas with an adopted neighbourhood plan yet is paid regardless of their need for local, let alone, strategic infrastructure.

20. Using CIL receipts to meet local, rather than strategic infrastructure needs is anathema to the principle of CIL and reduces certainty for charging authorities to be able to rely on future CIL receipts to pay for upfront strategic infrastructure investment.

Conclusion on CIL

21. It is clear from the above analysis that there are fundamental problems of CIL that suggest that it is poorly understood, struggles to deliver the benefits of the simple, faster and fairer process of its original aims and that it is failing to deliver either strategic infrastructure or support much needed development in many areas of the country.

22. These issues cannot be addressed through even more amendments to the CIL regulations. It requires a more fundamental review of CIL as a concept, setting out very clearly what CIL is trying to achieve and how it should achieve it.

23. The current system of CIL is vague, opaque, inflexible and unfair. It is not fit for purpose and certainly does not meet its original objectives.

ALTERNATIVES TO CIL

Planning Obligations secured through Section 106 agreements

24. The most obvious alternative to CIL is the previous system of planning obligations secured through Section 106 agreements. However, this approach previously suffered from requiring long, drawn out negotiations on many development proposals. However, most of these negotiations were over whether or not a particular piece of infrastructure was actually necessary for the development to go ahead and without which planning permission should not be granted.

25. The new statutory tests associated with the CIL regulations regarding the type of infrastructure that can be rightly required to mitigate the impact of the development itself (rather than contributing towards a cumulative impact of all development) means that a return to the previous S106 agreements would be more sharply focussed and would be easier and more transparent. Removing the "policy creep" of the past, letting local planning authorities stretch the interpretation of "directly related to the development" would result in a much faster negotiation process.

26. It would be possible to combine CIL and S106 agreements using a site size threshold below which development pays a standard levy (however calculated – see suggestions below) and above which developments mitigate their own impacts including, potentially, their cumulative impact. The threshold to be applied would need to be a matter of discussion but the current threshold to which Environmental Impact Assessment is automatically applied (250 dwellings) would seem a reasonable starting point.

27. Alternatively a planning obligations process based on a tariff system has considerable merit, particularly if it is combined with the statutory tests for necessity of such an obligation. Previous attempts at tariff based systems have either been too specific to a local area or have failed to properly apply the necessity tests, applying the tariff to all development regardless of whether or not the infrastructure is required to mitigate the impact of the particular development proposal itself.

Contributions towards cumulative impacts

28. Contributions towards the cumulative impact of development should either be seen in the context of the new development paying local taxes in future years (Council tax or business rates) or a much simpler approach towards a standard contribution than CIL should be devised. This could, for example, be related to a

proportion of the value of the development in the way that planning gain supplement (PGS) was proposed. This latter proposal was previously rejected by government and the development industry as being too difficult to calculate since it relied on establishing the value of the development at the end of the process rather than at the beginning, thereby making development investment decisions impossible.

29. This simple approach would, therefore, need a national measure of an index against which developer contributions were made for different land uses (such as a proportion of the average house price in a market area, or the market rent for commercial property in an area) that would be paid as a contribution towards strategic infrastructure. Thus could be related to any number of easily accessible indices that were publicly available and published on a regular (at least annual) basis.

Local Authority choice

30. In any model of developer contributions it should be recognised that there is a finite amount of contributions above which a development will be rendered unviable. While much debate is held over what are reasonable returns to landowners or developers themselves it remains the case that there is always a viability limit.

31. This has led to many local authorities lamenting the fact that, once CIL is paid the amount of cross subsidy available for affordable housing is reduced meaning their policy priority for affordable housing delivery is similarly diminished.

32. While this is, of course, a product of setting CIL rates to high and too near the margins of viability for most sites the problem is recognised as being real and should be addressed through any reform of CIL.

33. One possible solution to the issue of meeting competing local authority priorities would be to give local authorities choice over how developer contributions are spent. Developer contributions policy could establish a proportional contribution limit on development and then allow for flexibility within that capped value as to where the contributions are directed. A local authority could use all of the contribution towards strategic infrastructure or all of the contribution towards affordable housing, or it could present a more balanced solution within the limit of the overall contribution.

"In kind" provision of infrastructure

34. Certainly within any proposed system of developer contributions there is a requirement for provision of contributions "in kind".

35. Delivery of infrastructure is critical to ensuring that development does not have unwarranted adverse impacts on existing facilities. However, it is also often critical for infrastructure to be in place to facilitate the development itself. CIL is particularly poor at addressing this issue with very little infrastructure having currently been provided through CIL receipts. Certainly there is very little appetite for charging authorities to provide up-front, facilitating infrastructure for development schemes, particularly major schemes.

36. Any scheme replacing CIL should, therefore, allow developers to provide infrastructure in kind. To do so would be both pragmatic and good planning.

Land taxation

37. Historic attempts at capturing land value have failed by being too complicated, unfair or encouraging evasion of payment. However, land transaction tax (primarily through stamp duty land tax) is both simple and difficult to avoid.

38. It would be possible to raise income from development through a proportionate tax on sales value which could be paid either locally or collected centrally and distributed locally, possibly using new joint structures such as LEPs. This process would be far more certain for local authorities who would become more confident in planning for, bidding for and investing in the infrastructure for their areas that is actually needed to facilitate development.

Conclusion

39. It is becoming clear that CIL is not fit for purpose. It is complicated, opaque and misunderstood. It fails to guarantee the delivery of infrastructure and misleads local communities with regard to the mitigation of impact of development in their local area.

40. Simple, transparent, and more certain alternative models of securing contributions towards infrastructure, whether local or strategic, are available and should be discussed as a priority by central and local government alongside the development industry rather than merely amending CIL regulations even further.

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About HBF

The Home Builders Federation (HBF) is the representative body of the home building industry in England and Wales. The HBF's members account for around 80% of all new homes built in England and Wales in any one year, and include companies of all sizes, ranging from multi-national, household names through regionally based businesses to small local companies.

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