CIL Review Group
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Dear Sirs

COMMUNITY INFRASTRUCTURE REVIEW PANEL QUESTIONNAIRE
A RESPONSE BY THE HOME BUILDERS FEDERATION (HBF)

Thank you for consulting the Home Builders Federation as part of the CIL Review.

The Home Builders Federation is the principal representative body of the housebuilding industry in England and Wales and our representations reflect the views of discussions with our membership of national and multinational plc's, through regional developers to small, local builders. Our members account for over 80% of all new housing built in England and Wales in any one year.

As such our members are responsible for paying CIL and frequently require the provision of infrastructure to enable their developments to go ahead or to become sustainable communities. While some of our members engage directly with CIL charging authorities over the setting of charges we encourage them to form consortia to present collective representations. We facilitate this through an agreement with Savills to enable forming consortia easily and cost effectively.

The HBF also has a Plans Management Group formed of our members who have a specific responsibility for regularly discussing CIL and we retain Savills to provide the group with monthly updates on the progress of CIL charging schedules and the practical operation of CIL.

On Infrastructure:

i. To what extent is CIL contributing, or will it contribute, to infrastructure to support development and is that infrastructure being delivered?

1. There is no doubt that the original "standard charge" for infrastructure – Crossrail – has been very successful. However, this is primarily thought to be because the contributions are low, apply to all development and are contributing to a clearly strategic piece of infrastructure. Similarly, the tariff approach of Milton Keynes was an agreement with landowners to recoup some of the costs of infrastructure delivered upfront to support the development of their land. Both of these good practice schemes were predicated on known, upfront, delivery of infrastructure.

2. Elsewhere in England and Wales, while some money has been collected through CIL it has not been enough to be spent on priority items and the relevant regulation allowing charging authorities to borrow against future receipts has not been enacted. There is, therefore, no evidence of infrastructure being delivered early to facilitate development – all of the examples of such forward funding have come forward via site specific S106 agreements rather than through CIL.

However, even this route to infrastructure delivery is now being restricted through the need to include infrastructure in a R123 list.

3. While we accept that many areas have not had a CIL in place for very long and may argue that they have not had long to build a larger pot of money we do not see a great appetite for charging authorities to become infrastructure deliverers or even enablers. Thus we have serious concerns about whether CIL can provide enough enabling infrastructure in a timely manner to support development. Similarly we have serious concerns over the length of time it is taking for charging authorities to put CIL in place and the lack of review timetables – presumably due to the complexity of the process.

ii. Has the role of the Planning Authority changed with the introduction of CIL and if so where has this worked most effectively?

4. There is no doubt that, in a CIL environment the role of the planning authority must change. Unfortunately, many local authorities are struggling to take responsibility for infrastructure provision or enabling, particularly as they do not often have the in house skills to manage this process. The requirements of both setting and charging CIL has also placed additional administrative burdens on local authorities at a time when resources are diminishing.

5. One of the positive effects of the introduction of CIL has been the much sharper focus on the tests for the relevance of planning obligations secured through S106 agreements. The inclusion of these tests in the CIL regulations has meant that the tests are now more rigorously applied.

6. Some authorities, such as Wokingham, although keen to see infrastructure delivered, have found it difficult to separate out what should be included within CIL and what should still be brought forward through site specific S106 agreements. This is a particular problem with large, strategic sites where the line between strategic infrastructure and infrastructure directly related to the development can be blurred.

7. CIL has, thus, divorced the provision of strategic infrastructure from strategic development making it more difficult for large strategic sites to be developed.

iii. How are large items of essential infrastructure critical for key sites or growth locations being secured in the CIL and s.106 system?

8. In two tier authority areas the relationship between the District Council and the County Council is stressed. This is primarily due to the fact that it is the District Council that is the CIL charging authority yet is frequently the County Council who are the strategic infrastructure providers or enablers. We would be interested in exploring whether County Councils could become collecting authorities in two tier areas.

9. As with London Crossrail, we believe that the larger the area across which CIL is applied, the more effective it can be in delivering truly strategic infrastructure.

10. There is potential for other models of infrastructure funding and delivery, for example, Tax Incremental Financing (TIF), that could be used more to deliver strategic infrastructure related to strategic development.

iv. What role are CIL and s.106 playing alongside other sources of infrastructure funding and could changes to CIL (e.g. the ability to borrow against it or in kind contributions) allow it to be more effective?

11. The ability to borrow against future contributions is available in the CIL Regulations but has not been enacted. We suggest that this should be an available tool for charging authorities.

12. Similarly, we believe that contributions in kind are currently overly restricted due to confusion over whether or not such contributions are "related to the development" and thus should be made through S106 rather than CIL. This confusion is created through the wording of the Regulation 73A(7)(b)(ii) and thus should be changed.

v. What has been the impact of pooling restrictions? Is there a difference between authorities which have adopted CIL and authorities which have not adopted CIL?

13. The HBF (and others) were very concerned about the effect of the restrictions on pooling of S106 contributions prior to the cut-off date of April 2015. Since that date local planning authorities who do not have a CIL in place have, it would appear, found ways around the restrictions through either accepting planning obligation contributions as overcoming a reason for refusal rather than requiring them as a condition for approval, using other legislation (such as various wildlife protection legislation) or merely ignoring the restrictions in the hope that there is no legal challenge of their decision. While we are keen to encourage innovative solutions that allow development to proceed (particularly allowing in kind provision of infrastructure), none of these solutions is a long term reliable solution to the policy restriction.

14. However, the restriction was put in place solely to encourage the adoption of CIL and to stop the apparent free for all on planning obligations secured through S106 that had built up over time and thus its continued inclusion within the regulations should be re-evaluated.

15. In some areas there is no doubt that the restriction is being used as a block on otherwise acceptable development as sites become unable to mitigate their direct impact and thus planning permission is refused. One possible solution to this would be to make it clear that, if a local authority chooses not to implement a CIL but runs into the pooling limits then refusing permission based on impact on infrastructure should not be an option. However, we believe that pooling restrictions should be removed entirely since they have done little to encourage the use of CIL yet have demonstrably caused problems for delivering development in an efficient and effective way.

16. If pooling restrictions are to be retained, they should be applied differently to sites of different sizes. Thus sites of a significant size (150+ dwellings?) should be exempt from the restrictions whereas smaller sites would not be allowed to be refused on the basis of their infrastructure impact not being mitigated solely due to the pooling restriction.

17. As a last resort, if pooling restrictions are retained, local authorities should be allowed to impose negative conditions on planning permissions in all cases. Current guidance (Use of Planning Conditions, Paragraph: 010, Reference ID: 21a-010-20140306) states that such conditions should only be used exceptionally. It would be possible to amend this to apply such conditions where they are being specifically applied to avoid blocking development due to the

pooling restrictions. We are hesitant to suggest this solution since Grampian conditions are not a solution that allows development to go ahead quickly and efficiently. Indeed, they result in permissions which are unimplementable until the condition can be discharged.

vi. What impact do exemptions and reliefs have on delivering infrastructure?

18. The primary function of CIL was for all development to contribute towards the cumulative impact of development within the charging authority area. Thus exemptions call into question the fairness of the policy. Similarly it creates difficulties for local authorities to evaluate their future receipts from CIL as there is no certainty over how much of the development will be exempt from the CIL.

19. Notwithstanding the above criticism of the myriad exemptions it is a difficult process to ensure that the exemption is granted. The administrative processes associated with claiming exemptions places a disproportionate burden on the developer / householder, in ensuring that the correct forms and declarations are completed prior to development commencing. In circumstances where forms have not been correctly completed or acknowledged by the LPA, the CIL liability is not removed. Greater flexibility should, therefore, be provided in the process. If there are to be exemptions then they should be easier to claim, if not made automatically, possibly based on the planning permission itself (for example, through the description of development).

20. Discretionary exemptions by charging authorities mean that there is less certainty within the CIL regime making it harder for developers and investors to accurately assess the potential CIL liability for projects at an early stage of the development process – one of the main benefits of a CIL based contributions policy.

vii. How are local authorities who have not adopted CIL making provision for infrastructure and how effective are these approaches?

21. Most local authorities who do not have a CIL in place are either continuing to use S106 (managing to avoid the policy restrictions as above) or using other legislation to require specific infrastructure to mitigate impact of development. In the case of large strategic sites this continues to be an effective way of delivering infrastructure alongside the development itself, particularly with regard to timing the delivery of infrastructure with the timing of the actual requirements of the development.

22. Of course, some local authorities in low value market areas, continue to grant planning permissions without any obligations on development either suggesting that there is no impact that requires mitigation or that the benefit of the development outweighs such impact.

On Viability

viii. Has a lack of viability resulted in a failure to develop a CIL?

23. It is clear that for most local authorities who do not intend to introduce a CIL the balance between the work necessary to implement a CIL and the potential receipts from sites is based solely on viability within their market areas.

24. However, the main reason for local authorities failing to adopt CIL is the fact that they do not have an up to date local plan. This is essential to being able to fully assess the viability of other policy requirements and the level of CIL.

ix. Have viability concerns resulted in a low CIL level and has this had an adverse impact on the delivery of infrastructure to support development?

25. We have noticed a tendency for examiners of CIL charging schedules to assess the impact or scale of the CIL as a proportion of development value. This is particularly prevalent in areas where viability assessment of charges is marginal and the charging authority propose a "nominal" rate of CIL (often as much as £50 per sqm). Not only is this a threat to viability of development it does not reflect the fact that CIL is a charge on the land value, not on the overall value of the development.

26. Because CIL is a mandatory charge on development there is a subsequent knock on effect on other, negotiated planning obligations, most notably, affordable housing contributions. Therefore, in some marginal market areas the local authorities often put their need for contributions towards affordable housing above their need for CIL receipts. However, this does not reduce their ability to deliver infrastructure any more than it would have done without CIL. This is because the critical infrastructure must still be provided to enable the development to happen. After all, there is only one pot of money gathered from the uplift in land value of development. What is sacrificed is clarity and speed in decision-taking and implementation as the planning gain has to be negotiated at length with every application.

x. Are there appropriate tools available for establishing viability? Would standardisation using just one methodology be helpful or feasible?

27. There are many examples of CIL charging areas in similar market areas where the CIL charge varies massively (for example, Bracknell and Wokingham). This would suggest that a standard methodology for viability assessment would be useful, if only to create comparable charges.

28. However, more importantly, the charging authority should use the same viability assessment model for their CIL, their local plan and for site specific negotiations with subsequent applicants.

xi. Do you have specific examples where non-viability on account of CIL has prevented development?

29. It is very difficult for the industry to provide examples of where this has happened as potential development schemes will be assessed and, if they are unviable, will not be pursued and discarded.

30. However, the costs of CIL plus affordable housing contributions plus site specific S106 contributions are all under pressure to increase as direct public investment is reduced means that it is inevitable that such obligations have a negative effect on viability of development.

31. The argument that all of these costs "come off the land value" and that "landowners will have to accept less", while logical, does not reflect the actual world where the planning system creates local monopolies (of development land) or that many landowners will be prepared to sit out the current development cycle in the hope that the cross subsidy process will change at a later date. For many landowners the development site is their only income generating asset and they will simply not relinquish that unless they are appropriately incentivised to do so.

xii. Is CIL impacting on affordable housing provision?

32. Yes. This must be the case as affordable housing is not included within CIL and is a negotiable benefit from the development process rather than a mandatory charge. Regardless of how viability of sites is calculated or what land value is assumed, there is only one pot of funding that must be split between CIL, affordable housing and site specific mitigation measures through S106 agreements.

33. There is a tendency for charging authorities to seek to maximise the contributions from CIL towards infrastructure provision yet, at the same time, seek to increase their policy requirements for cross subsidy of affordable housing.

34. A recent study by JLL demonstrated this link very clearly and we commend it to the Review Team: http://residential.jll.co.uk/en-GB/new-residential-thinking-home/news/cil-hits-affordable-housing-delivery.aspx

xiii. In setting a CIL Charging Schedule has the development community played their part and been properly consulted on issues of local viability?

35. The housebuilding industry has coordinated its response to emerging CIL charging schedules through the employment of Savills as consultants to the private sector. Not only does this achieve efficiency (since the arguments made by individual developers would, inevitably, be similar) but individual companies find the CIL process (and particularly the regulations) too complicated to engage in a debate with charging authorities.

36. We believe that the industry is now providing a great deal of information to the charge setting process but struggles to do so if the charging authority does not invite such engagement early on in the charge setting process. Indeed, one of our largest concerns over CIL is the lack of transparency behind the evidence used to justify the CIL setting rates in many local authority areas.

37. This is most obvious in the way that the inevitable effect on affordable housing delivery is so often ignored by local authorities or that the assumptions made when setting CIL are not carried through to site specific viability assessments when a planning application is made. This is frustrating for the industry since it invariably attracts the opprobrium of the public for appearing to negotiate down the affordable housing element.

38. We suggest that the viability assumptions used to justify the CIL rate should be published clearly in the charging schedule itself so that subsequent negotiations over site specific applications can be consistent and transparent.

On Charge-setting:

xiv. Is the EIP process suitably robust?

39. There is no doubt that the 2013 changes to the regulations expanding the issues that the examiner was able to look at were helpful to the examination process. However, we are still concerned that there is a gap between assessments undertaken in the local plan process and that of the CIL process. Thus, unless the two assessments are undertaken simultaneously, some important considerations are not adequately addressed in either assessment.

40. Furthermore, we are concerned that, in what is essentially a viability assessment rather than a planning judgement, few examiners appear to have the necessary RICS experience for such assessments.

41. We would also recommend that the regulations are changed to ensure that the examination includes examination of the R123 list and debates what the relevant infrastructure is that should be included on the list.

xv. Should there be a requirement to review charging schedules at set times, if so when and why?

42. Review of CIL should be aligned to when there is a material change affecting the charging schedule. In real terms this should be alongside any relevant amendment to the local plan which would change the viability of development or when the regulation 123 list of relevant infrastructure is changed.

43. We would also like to see a backstop date for review of CIL to ensure that the indexation of the charges has been appropriate in the light of changes in the viability of development in the area. We would suggest that a five year backstop period should be adopted.

xvi. Should partial reviews (eg. types of use or location) be possible?

44. Partial reviews would be beneficial to ensuring that CIL charging schedules are kept up to date. However, constant change is unhelpful to certainty of investment and it is critical that such reviews should be the subject of robust consultation and not unilateral updates by the charging authority on an ad-hoc basis.

On CIL Regulations and Guidance:

xvii. Are the CIL regulations and guidance easy to use and understand?

45. This is a definitive no.

46. The regulations are ridiculously overly complicated and focus far too much on enforcement of non-payment of CIL. They are certainly a long way from simple, fair and transparent process envisaged at the conception of CIL.

47. It is unclear whether or not the guidance is statutory or merely planning guidance now that it has been subsumed into the planning guidance suite. There is a definite benefit to the guidance being statutory as it sets out rules and processes which much be followed rather than guidance which allows discretion.

xviii. Are there improvements that could be made to the arrangements for collecting and spending CIL?

48. We have already drawn attention to the need for infrastructure providers to be more involved in setting CIL charges, particularly County Councils in two tier authority areas (see Qiii).

49. Payment of instalments should be related to specific triggers related to the development rather than merely time.

50. Payment in kind should be allowed when the infrastructure is related to the development itself (see our response to Qiv).

51. There appears to be a fundamental contradiction whereby CIL is a non-negotiable locally based development tariff paid for by the development industry to be used to support development through the funding of relevant infrastructure yet there is no obligation for the charging authority to deliver that infrastructure. There should, therefore, be a corresponding duty for charging authorities to spend the money collected with support available via gap funding or other arrangement and for the infrastructure to be provided in in with the infrastructure plan for the area.

On Neighbourhood issues:

xix. How have the requirements for the Neighbourhood proportion of CIL been implemented?

52. While there might be benefits to such a local payment (see Qxx), the neighbourhood proportion of CIL is not consistent with the principles of the Levy to provide a contribution towards infrastructure.

53. There is currently a total lack of governance over the spending of the neighbourhood proportion of CIL with many local neighbourhoods finding themselves with a windfall payment for which they have no expenditure plans. This leads to the payments often being spent on items that are not infrastructure related or where a proven need has not been demonstrated. This suggests that the neighbourhood proportion of the Levy was not related to infrastructure provision, or that infrastructure that could have been provided with the help of this money is not being provided.

xx. Is this encouraging communities' to support development?

54. There is no evidence that the larger neighbourhood proportion of CIL is leading to more neighbourhood plans being produced nor that it is a significant factor in neighbourhood plans which are being produced. Similarly we are not convinced that access to CIL receipts is a significant issue or consideration over community concerns over development.

55. Despite the fact that many objections to development cite impact on, or lack of infrastructure for the new development there is very little debate over the infrastructure that could be provided as part of the development itself or the infrastructure that could be provided with the neighbourhood element of CIL. Indeed, we frequently see local impacts mitigated through S106 contributions and yet the local community also receive a proportion of CIL.

56. Given our concerns over the validity of the neighbourhood proportion of CIL (see Qxix above) we believe that this element of CIL should be removed.

Finally, on the overall system

xxi. Has the introduction of CIL made the system for securing developer contributions and delivering infrastructure simpler, fairer, more predictable, transparent and efficient?

57. There is a still a great deal of confusion and uncertainty in the CIL process and thus it is certainly not simpler than the previous planning obligations regime. While the idea of a single, pre-calculated planning contribution was, theoretically, simpler for smaller developments and smaller developers, in practice many of these developments were not subject to any planning obligations in the past and thus the process is actually more complicated than the previous system.

58. Despite CIL being in place the residual S106 agreements continue to be complicated as negotiations over what is and isn't included within the CIL charging schedule take place and the pooling restrictions have made this negotiation even more complicated.

59. It is now necessary for almost every planning application to be subject to a viability assessment in order that the balance between CIL, S106 obligations and affordable housing contributions can be made, meaning the system is now more complicated rather than simple.

60. CIL is certainly not equitable or fair. There are too many exceptions and exemptions and "double dipping" is rife. Indeed, the more exemptions that are introduced the more we move away from the original concept of CIL – that all development makes a proportionate contribution to the cumulative impact of development. As seen in the JLL study referred to earlier, it certainly cannot be fair to those in housing need if less housing is being delivered as a result of unduly high and cumbersome CIL requirements, especially given the opaque nature of how CIL funds are levied and spent.

61. This fundamental breech of the original principle of CIL should, on its own, call into question the validity of continuation of CIL as a fair and equitable process for securing developer contributions towards infrastructure.

62. In theory CIL is a more predictable process for securing developer contributions towards infrastructure. However, the fact that charging authorities can change their infrastructure list at any time means that there is still considerable uncertainty within the process. Daventry, for example, made a fundamental change to its R123 list without consultation after the inspector's report reduced the proposed charging rate. The justification for this approach was that infrastructure previously identified on the R123 list could be sought through S106 obligations.

63. CIL is currently not a predictable process for the delivery of infrastructure either. The uncertainty of when CIL receipts will be forthcoming (particularly in the light of the myriad exemptions and exceptions) means that it is difficult to put in place a robust infrastructure delivery plan which relies on CIL contributions.

64. CIL is so complicated that it is not transparent or, indeed, understandable. The fact that the link between development and infrastructure has been broken means that it is also not understandable or transparent for local communities meaning that it is not a positive tool to facilitate positive planning.

xxii. Is the relationship between CIL and s.106 fit for purpose and how is this working in practice?

65. We have serious concerns over the amount of "double dipping" that still occurs between S106 and CIL. There has been a disproportionate effect on large scale developments of this problem as local authorities are confused over what is covered by CIL in their R123 list and what is actually necessarily related to the development itself. For example, contributions towards education provision is often included within the R123 list yet, on large scale developments the provision of a school is often cited as being a direct mitigation of the development itself, requiring provision through S106. If the same amount of development had been dispersed around the local area education contributions would have been made

via CIL yet because the strategy is to group the development into one place the education provision becomes site specific.

66. In order to avoid this type of double dipping, developers must be allowed to deduct contributions via S106 agreements from CIL charges where the infrastructure provided under the S106 agreement relates to the R123 list.

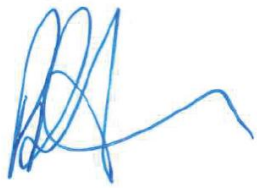
67. Delivery of infrastructure has been poor under CIL but was better under the previous S106 regime. This is because there was a direct link between the infrastructure provision and the development. Indeed, the provision of infrastructure has been so poor that there is now the threat that development will be stalled because mitigation of impact cannot be controlled by the developer but must wait for a third party to bring forward the infrastructure. In effect this is placing Grampian style conditions on all planning permissions. In the case of Hart in NE Hampshire (which has not yet introduced CIL), this is affecting even single dwellings where contributions to SANGS are not to be included within the CIL charge yet cannot be sought through S106 because of the pooling restrictions.

xxiii. Is there a better way of funding the infrastructure needed to support development?

We believe that the best way of providing for infrastructure associated with development planned for in the local plan is through the local plan itself. Thus, if they are to continue, both CIL charges and infrastructure plans (including the R123 list) should be an integral part of the development plan. Not only would this integrate the (currently) separate regimes it would ensure that local plans are kept up to date since, without an up to date local plan, developer contributions through both CIL and S106 obligations could not be levied.

We look forward to seeing and discussing your recommendations in due course.

Yours sincerely,



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