Landmark CHAMBERS

Community Infrastructure Levy and s.106 Obligations

Paul Brown QC

CIL: A Brief History

Introduced by Planning Act 2008

- But regulations not made until 2010

Open Source Planning, Jan 2010:

“We will scrap CIL”

Instead:

- CIL amended by Localism Act 2011

- 3 separate sets of amending regulations

CIL: The latest …

"The government is committed to the levy and to ensuring that it is workable and effective. The primary legislation implementing the levy was designed to permit a flexible and evolutionary approach, and since the levy came into force, the Government has listened carefully to issues being raised in the light of early experience. We have already reformed the levy … There are some changes we think we still need to make …"

- April 2013 consultation on further reforms

CIL: The Basic Concept

- Essentially a tax on “development” which increases floorspace
- To be used to fund “infrastructure”
- Applies where a charging authority has adopted a “charging schedule” setting out CIL rates
- In setting rates, authority must

  > “strike what appears to [it] to be an appropriate balance between [the desirability of funding infrastructure from CIL] and the potential effects .. of the imposition of CIL on the economic viability of development across its area”

- Charging schedules are subject to objection and examination by an independent inspector
- Defined exemptions and reliefs, but otherwise mandatory

The Main Changes to Date (1)
Localism Act 2011

- Authorised regulations defining what was an appropriate evidence base for a charging schedule

- Limited the powers of the examining inspector

- Authorised regulations which expanded the definition of “infrastructure” to include maintenance and operational activities in connection with infrastructure

- Authorised regulations which would require charging authorities to pass on a proportion of receipts to the local community

The Main Changes to Date (2)
CIL Amendment Regulations 2010

- Made provision for authorities wishing to adopt instalment policies
- Exempted retail mezzanine floors
- Removed the threshold for payments in kind

The Main Changes to Date (3)
CIL Amendment Regulations 2012

- Treatment of s. 73 applications:
  - Where original permission predates CIL, CIL only applies if and so far as s.73 permission produces more floorspace
  - Where both permissions postdate CIL, CIL only applies to the most recently commenced permission, but the "date on which the development is first permitted" is referable to the original permission
  - Payments already made credited towards new liability
- Corrected errors on the formulae for calculating liability and social housing relief
- Definition of "infrastructure" expanded (per Localism Act 2011)
- Consents under NDOs included

The Main Changes to Date (4)
CIL Amendment Regulations 2013

- Duty to pass CIL to Local (Parish) Councils
  - 25% where there is a NDP in place
  - 25% if development was granted under an NDO
  - Otherwise, 15%
  - Subject to a maximum of £100 per dwelling p.a. in the area
- Local council may spend on provision, improvement, replacement, operation or maintenance of infrastructure OR "anything else that is concerned with addressing the demands that development places on an area"
- Use it or lose it: repay charging authority if not used within 5 years
- Where no local council, charging authority *may* use same amounts as local council would have been entitled to

What Next?
April 2013 Consultation – Proposed Changes

1. Rate setting: Context

- Statutory test: what appears to the authority to be an appropriate balance
- Early examiner's decisions: very light touch – see e.g. Crossrail CIL:

> "The Mayor's approach is undoubtedly relatively basic"

but

> "it is for the charging authority to decide what evidence to present"

and

> "in adopting a very basic approach the Mayor has taken account of the clear message that the charge should be set on the basis of appropriate *available* evidence."

Proposed Changes:
1. Rate Setting (2)

Context (cont'd)

- Recent decisions more interventionist
  - Southampton Examiner cut residential rate from £90 to £70
  - Exeter Examiner raised further questions because CIL premised on 25% Affordable Housing when Core Strategy required 35%
  - Chorley/Preston/South Ribble Examiner:

    "While there is no requirement for levy rates to exactly mirror the evidence, they must be reasonable given the evidence available. The rate for apartments is wholly inconsistent with the viability evidence produced. That is not reasonable."

Proposed Changes
1: Rate Setting (3)

CLG Proposal:

- Charging authorities required to "strike an appropriate balance"

- A "more evidence-based test" "to assist the examiner in reaching a view as to whether the correct balance has been reached"

> "That evidence should also show and explain how the proposed levy rates will contribute towards the implementation of [the] relevant Plan and support development of [the] area"

Proposed Changes:
2. Differential Rates for Scale

- Regulations currently allow differential rates for different geographical zones and "different intended uses"
- CLG Guidance: "uses" not the same as use class
- 2013 Consultation:

  > "However, differential rates cannot currently be set in relation to the size of a development"

- Is the change actually needed?
  - Portsmouth: lower rate for retail ≤ 280sqm
  - Newark & Sherwood: lower rate for retail ≤ 500 sqm
- Either way, proposed to allow different rates according to scale
- Will require "consistent evidence relating to economic viability that constitutes the basis for any such differences in treatment"

Proposed Changes:
3. The Vacancy Test

Reg 40: CIL liability is discounted for existing floorspace

- But only where building is "in lawful use", where "use" means

  "in use for a continuous period of at least 6 months within the period of 12 months ending on the day planning permission first permits the chargeable development"

- Rationale: infrastructure should be in place to support buildings in active use, but bringing buildings back into use can have an impact
- But can delay development

Proposal: Remove the vacancy test

- CIL payable only on increased floorspace unless previous use abandoned

Proposed Changes:
4. Payments in Kind

Reg 73(1): Payments in kind limited to "land payments"

- i.e. acquisition of land
- size of CIL payment determined by the value of the land

The Proposal:

- Charging authorities to be given a choice to accept a combination of land payments and/or provision of infrastructure
- CIL payment will be the actual cost of the works
- Only possible if the authority has published a policy
- Guidance to make clear: only where there would be cost savings/timing benefits compared to procurement through levy funds

The Query

- **W**hether should be subject to EU procurement thresholds

Proposed Changes:
5 & 6. Phasing and Commencement

Phasing

- **Reg 8/9** – liability for outline permissions can be phased according to approval of RMA for each phase
- **Proposal** - extend this to full permissions which expressly permit or require development in phases

Commencement

- Liability currently determined by date of commencement
- **Reg 7**: commencement tied to "material operation" test
- **Proposal**: where site clearance is the first phase, site preparation can be completed without incurring liability. Liability would only arise once a phase involving the erection of buildings commences

Proposed Changes:
7. Relief for Exceptional Circumstances

Reg 55-58:

- Exceptional relief only allowed where
  - there is a s.106 obligation which exceeds the CIL liability
  - would have unacceptable effect on viability
  - Relief would not be a notifiable State Aid

> "In practice these tests have meant that exceptional circumstances relief has not been used"

- **Proposal:** Remove or vary the requirement for a s.106 obligation which exceeds CIL liability

Proposed Changes
8: The Infrastructure List

Reg 123: authorities may produce a list of infrastructure which they intend to fund from CIL

- But no obligation to do so (subject to reg 123(2))
- Not part of the charging schedule so can amend at any time
- Doesn't restrict what authorities can spend CIL on
- But can impact on what authorities can seek s.106 obligations for

Proposed changes:

- List to be published at same time as draft schedule and part of the appropriate available evidence
- Consultation on replacement lists

Proposed Changes:
9. Restriction on Pooling s.106 Contributions

Reg 123 - post April 2014

- LPAs cannot require:
  - a planning obligation for infrastructure which is on the published list of infrastructure to be funded by CIL
  - more than 5 planning obligations entered into after April 2010 to fund any infrastructure which is not on the list
- If there is no list, LPAs cannot require a s.106 obligation to fund it at all

The Proposal

- Extend the date to April 2015

Other changes

- Extend consultation on draft schedule from 4 to 6 weeks
- Extend r. 123 restrictions to s. 278 agreements
- Extend the abatement provisions (ability to offset past payments against new liability) from s.73 permissions to new stand-alone permissions
- Extending social housing relief to other homes for sale at below market cost
- Relief for self-build housing
- Changing time limits for appeals
- Allowing review/appeals for liability in retrospective permissions

What else is there to change?

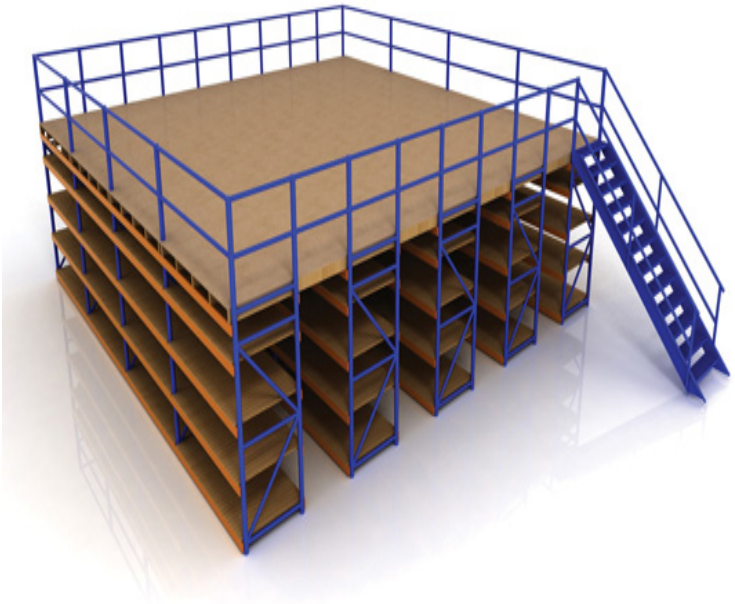
Mezzanine Floors:

- CIL definition of development - s. 208:

  "anything done to or in respect of an existing building"

- Cf. May 2011 CLG Guidance, para 40:

  "Any floorspace resulting from development to the interior of an existing building will be deducted."



- But where is para 40 found in the Regulations?
  - Reg 6(1)(c) – retail mezzanines are **"not to be treated as development"**
  - Reg. 42: only if not **"an enlargement to existing buildings"** - ??
  - Reg. 40: depends on interpretation of K_R in formula - ??

The Future?

"A question which many will now be asking is: will CIL in practice be timed out, allowed to wither on the vine or be eviscerated by a thousand cuts?"

(Ask this man →)