COMMUNITY INFRASTRUCTURE LEVY

Scott Lyness

Landmark Chambers[1]

Introduction: what is the Community Infrastructure Levy (CIL)?

1. CIL is a tax on development introduced by the Planning Act 2008 to fund the wide range of infrastructure needed as a result of development.[2] It is a response to criticism of the lack of transparency and certainty, along with the delay, associated with the negotiation of s. 106 contributions.[3] CIL has been sold by government as fairer (by requiring more developments to contribute than has occurred with planning obligations), flexible (by allowing authorities to decide how to use funding across their full range of priorities) and more remunerative (by yielding an estimated £1bn extra a year by 2016 when compared with planning obligations). Its overall purpose is to ensure that costs incurred in supporting the development of an area can be funded (wholly or in part) by the owners or developers of land in a way that does not make the development of the area economically unviable.[4]

2. The new regime came into force in April 2010. Everyone involved in real estate and development – whether it be local authorities or developers – need to get to grips with the changes. The Mayoral CIL, which applies different rate across different zones to raise funds for Crossrail, has applied to most permissions granted in London after 1 April this year.[5] Most London boroughs are now in CIL preparation.

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[2] The declared purpose of CIL is to ensure that developers pay for "all costs incurred in supporting the development of an area can be funded (wholly or partly) by owners or developers of land in a way that does not make development of the area economically unviable": s. 205(2) of the Planning Act 2008 as amended by Part 6 Chapter 2 of the Localism Act 2011 s. 115(2). Hereafter references to primary legislation are to the 2008 Act 9as amended) unless otherwise stated. References to regulations are to the 2010 Regulations (as amended), unless otherwise stated.

[3] It is the second attempt to move away from the system of s. 106 obligations under the Town and Country Planning Act 1990: see the prospective repeal of ss. 106 and 106A in the Planning and Compulsory Purchase Act 2004 (ss. 46-8 and Sch. 9) which are in turn repealed by s. 225.

[4] S. 205(2).

[5] See http://www.london.gov.uk/publication/mayoral-community-infrastructure-levy (nil rates are applied to development relating to medical or health services and the provision of education).

3. Despite government believing that "the system is very simple"[6], all are grappling with legislation that is complex and in places confusing. Those who wait for the legal landscape in this area to settle down before taking any action risk waiting a while. They may also lose out on revenues and the opportunity to reduce the number and/or complexity of section 106 agreements, along with the time spent negotiating them.

4. The legal framework for the new regime is primarily set out in Part 11 of the Planning Act 2008 (as amended by the Localism Act 2011), which set the framework for the Community Infrastructure Levy Regulations 2010 (as amended by the Community Infrastructure Levy (Amendment) Regulations 2011.[7] Various guidance documents appear on DCLG website.[8]

5. The structure and language of the legislation is different from the conventional sources of planning regulation, perhaps reflecting the influence of civil servants in the Treasury. The purpose of this presentation is to summarise the key elements of the new system and to identify practical issues which may arise at various stages when the levy is being prepared and applied.

Who can charge CIL?

6. A "charging authority" can charge CIL in respect of development in its area. Local planning authorities are charging authorities. In London the Mayor is also a charging authority in addition to the boroughs (although there are restrictions on the infrastructure in respect of which he can charge - see further below).[9]

What do they need to do to charge it?

Charging schedule

[6] See http://www.communities.gov.uk/planningandbuilding/planningsystem/communityinfrastructurelevy/

[7] See too the Draft Community Infrastructure Levy (Amendment) Regulations 2012, on which consultation has taken place, which may primarily provide for Mayoral Development Corporations to charge and collect CIL and for parish councils to receive CIL receipts within their areas: see the explanatory memorandum at. http://www.communities.gov.uk/documents/planningandbuilding/pdf/2004771. It is also worth being aware of the Local Authorities (Contracting Out of Community Infrastructure Levy Functions) Order 2011, which allows CIL authorities to contract out certain functions to authorised contractors.

[8] http://www.communities.gov.uk/planningandbuilding/planningsystem/communityinfrastructurelevy/ . See in particular "The Community Infrastructure Levy: summary", "Community Infrastructure Levy: An overview", "Community Infrastructure Levy Guidance: Charge setting and charging schedule procedures", "Community Infrastructure Levy – collection and enforcement "and "Community Infrastructure Levy Relief: Information document". See too the Planning Portal: http://www.planningportal.gov.uk/planning/applications/howtoapply/whattosubmit/cil and the Planning Advisory Service: http://www.pas.gov.uk/pas/core/page.do?pageId=122677.

[9] See generally s. 206.

7. The central feature of the new system is the preparation of a "charging schedule" by the charging authority. The charging authority must issue a schedule setting rates or other criteria by reference to which the CIL in respect of development in the area is to be determined. Liability to pay CIL does not arise in respect of development if, on the day when planning permission is granted for that development, it is situated in an area in which no charging schedule is in effect.[10]

8. In setting rates, an authority must:

   "aim to strike a balance between what appears to the charging authority to be an appropriate balance between:

   (a) the desirability of funding from CIL (in whole or in part) the actual and expected estimated total cost of infrastructure required to support the development of its area, taking into account other actual and expected sources of funding; and
   (b) the potential effects (taken as a whole) of the imposition of CIL on the economic viability of development across its area".[11]

9. In short, an authority should propose a rate that would not put at serious risk the overall development of their area, using the infrastructure planning which underpinned the development plan to identify projects or types of infrastructure that are likely to fall into the funding gap that the levy is intended to support.

10. An authority must have regard to costs of infrastructure and sources of funding for infrastructure, both actual and expected, and use "appropriate available evidence" to inform the preparation of the schedule. It is intended that the schedule will sit within the folder of documents making up the local planning authority's local development framework, although the schedule will not be part of the development plan and will not require inclusion within a local development scheme.

11. An authority can also take into account actual and expected administrative expenses in connection with CIL.[12]

[10] Reg. 128(1). In the case of a "relevant general consent" (including a permission granted by development order - see below), liability does not arise in any event if development was commenced before 6th April 2013: reg 128(2).
[11] Reg. 14(1).
[12] Reg. 14(2) and 61.

12. In London, when considering the effect of imposing CIL on economic viability of development, boroughs must also take into account rates set by the Mayor, that is before consultation on the preliminary draft charging schedule begins.[13]

13. In determining the size of its aggregate funding gap, the authority should consider known and expected infrastructure costs and the other sources of funding likely to be available to meet those costs, to identify a CIL funding target. The target may be informed by a selection of infrastructure projects or types, drawn from infrastructure planning for the area, which are indicative of the infrastructure likely to be funded by CIL in the area.

14. Government expects that the evidence to support CIL will include an "up-to-date development strategy" for the area, which should normally be set out in a draft or adopted core strategy. Information on infrastructure needs should wherever possible be drawn from the planning that underpins the development plan, as this ought to have identified the quantum and type of infrastructure needed to realise local development needs.[14] Where a charging authority considers that the infrastructure planning underpinning its development plan is weak, it may undertake some additional bespoke planning to identify the gap.[15]

15. In response to the reality that it will be impossible to predict exactly what funding will be required over a large number of years, when an authority will not know its revenue sources over the same period, "the government recognises that there will be uncertainty in pinpointing other infrastructure funding sources, particularly beyond the short-term. The focus should be on providing evidence of an aggregate funding gap that demonstrates the need to levy CIL". The role of this evidence is "not to provide absolute upfront assurances as to how authorities intend to spend CIL…but to illustrate that their intended CIL target is justifiable…Authorities may spend their CIL revenues on different projects and types from those identified as indicative for the purpose of charge setting". The approach should be area-based (and should not focus on the potential implications of setting CIL for individual sites). It appears to follow from all of this that the amount needed for infrastructure will not necessarily have to match the amount sought from CIL – indeed the aggregate funding gap may well be larger than the amount CIL is intended to raise.

[13] Reg. 14(3).
[14] Cf para. 175 of the NPPF, which advises that where practicable, CIL charges should be worked up alongside the local plan.
[15] Community Infrastructure Levy Guidance "Charge setting and charging schedule procedure", para. 16.

16. Whilst there is no requirement to use any of the valuation models and methodologies available to prepare viability evidence, it is recognised that authorities may find this helpful. Many authorities may choose to do so by engaging external consultants, in the same way as occurs in addressing viability issues relating to affordable housing cases. It will however be important to ensure that close working relationships are established between different service areas within an authority when preparing the evidence. In reality a viability assessment obtained from consultants seeking to predict infrastructure needs and budgets a number of years in advance will create a range of potential charges and officers will still need to exercise considerable judgment based on experience of the area.

17. When preparing evidence relating to economic viability, guidance suggests that authorities may need to sample a limited number of sites in their areas and that they may want to build on work undertaken to inform their strategic housing land availability assessments. Authorities that decide to set differential rates (see below) are encouraged to undertake more "fine-grained sampling" to help them estimate the boundaries for their differential rates. It is recognised that local circumstances will vary so that some charging authorities "may place a high premium on funding infrastructure if they see it as important to future economic growth in the area, or if they consider they have flexibility to identify alternative development sites, or that some sites can be re-designed to make them viable. These charging authorities may be comfortable in putting a higher percentage of potential development at risk, as they anticipate an overall benefit". There is not much guidance on what evidence to bring forward to show why rates would not put overall development across the area at risk, beyond reference to the example of using SHLAA evidence to explain that more sites could be brought forward to offset risk.

Differential rates

18. An authority may set differential rates "for different zones" or "by reference to different intended uses of development", using supplementary charges, nil rates, increased rates or reductions.[16]

[16] Reg 13.

19. Guidance recognises that uniform rates may be simpler but advises that authorities may want to consider setting differential rates as a way of dealing with different levels of economic viability within the same charging area. Authorities "should not set differential rates by reference to the costs of infrastructure, either in different zones or for different classes of development".[17] However, differential rates can be articulated by reference to different intended uses of development (eg residential and commercial development) "provided that the differential rates can be justified by a comparative assessment of the economic viability of those categories of development".[18]

20. Zero rates should not be set unless justified in viability terms and individual sites should not be made exempt through setting differential rates.[19] Differential rates should not therefore be used to manage development into desirable areas by charging zero or very low rates – rates should be determined through viability evidence. Differential rates must be set so as not to give rise to notifiable state aid – there must be consistent evidence relating to economic viability that constitutes the basis for any such differences in treatment.[20]

21. Faced with the choice of opting for more differential rates, authorities may find it prudent nonetheless to go for a reasonable simple rate. This may yield less money overall, however the system, at least in its infancy, will be more straightforward to justify (and therefore less prone to challenge at examination) and easier to operate. This is a lesson that is already being learned, amongst others by authorities who considered seeking differential rates even within a type of development – retail – but decided to drop the proposals faced with legal uncertainty with the ability to implement such rates, irrespective of potential issues relating to the evidence to justify it.

Public consultation

22. An authority must prepare a "preliminary draft charging schedule" and consult upon it with:

[17] DCLG "Community Infrastructure Levy Guidance: Charge setting and charging schedule procedures", para. 34.
[18] Para. 36.
[19] Para. 38.
[20] Para. 40.

a. "consultation bodies" including local planning authorities whose area is in or adjoining the charging authority's area (and in the case of a London borough the Mayor);
b. persons who are resident or carrying on business in the area;
c. voluntary bodies or bodies representing the interests of those carrying on business in the area, as the authority thinks appropriate.[21]

23. No length of consultation is stipulated, although guidance recommends at least 6 weeks.[22] Any consultation responses must be taken into account when preparing draft schedule for examination.

24. There must then be prepared a "draft charging schedule" submitted for examination, which must contain the name of the name of the authority, the rate(s) (at £ psm) at which CIL is to be chargeable in the area, where differential rates are set, a map which identifies the different zones and an explanation of how the chargeable amount will be calculated.[23] Otherwise the format and content is up to the authority.[24]

Examination

25. Before approving a charging schedule the authority must appoint an examiner to examine it who in its opinion is independent and has appropriate qualifications and experience.[25] Others, such as expert assessors from the Valuation Office Agency may be appointed to assist if the examiner agrees.[26]

26. Before submitting a draft schedule for examination, the authority must make a copy of the draft, the relevant evidence and a statement of the representations procedure available for inspection, publish the same on the website. It must also send a copy of the draft to the consultation bodies, along with a statement of the representations procedure, and advertise the statement by local advertisement notice.[27] The statement

[21] Reg 15(3),(5).
[22] Para. 47.
[23] Reg 12(2).
[24] Reg. 12(1).
[25] S. 212(1),(2).
[26] S. 212(3). Provision is made for the joint examination of more than one draft charging schedule and of a charging schedule with a development plan document or local development plan (including the joint examination of a charging schedule and spatial development strategy prepared by the Mayor): see reg. 22 generally.
[27] Reg. 16(1).

must specify matters including the period for representations,[28] which must not be less than 4 weeks from the advertisement notice.[29]

27. The authority must then submit to the examiner the draft, any representations and a summary of them, any modifications to the draft after its publication and copies of the relevant evidence.[30] It can only do so after any modifications to the draft following publication have been sent to the consultation bodies and published on its website.[31]

28. As soon as practicable after submission to the examiner, the authority must make available copies of the documents supplied to him and publish at least some of an identified list on their website, as well as give notice to those who requested it of the submission to the examiner.[32]

29. Anyone making representations on the draft must, if they so request, be heard by the examiner, if they submit their request within the time for making representations.[33] It is up to the examiner to decide the procedure at the examination.[34] Procedure is intended to be similar for examinations into draft development plan documents.[35]

30. The examiner must consider whether the "drafting requirements" have been met. These are the requirements of Part 11 of the 2008 Act and the Regulations, which include the requirements to "aim to strike what appears to the charging authority to be an appropriate balance between the desirability of funding from CIL…the actual and estimated total cost of infrastructure required to support the development of its area, taking into account other actual and expected sources of funding; and the potential effects (taken as a whole) of the imposition of CIL on the economic development across its area".[36] They also include requirement to have regard to actual and expected expenses in connection with CIL.[37]

31. In practice, the examiner will check that:
    a. the authority has complied with the required procedures;

[28] See reg. 16(2).
[29] Reg 17(3).
[30] Reg. 19. "Relevant evidence" is evidence which is readily available and which, in the opinion of the authority, has informed the preparation of the draft charging schedule: reg. 11(1).
[31] Reg. 19(4).
[32] Reg. 16(3): see reg 16(3)(b) for documents which are to go on the website.
[33] Reg. 21.
[34] S. 212(9) of the 2008 Act and reg.21(12).
[35] DCLG "Community Infrastructure Levy: An overview", para.31.
[36] See reg. 14.
[37] Reg. 14(2).

b. the draft schedule is supported by appropriate available evidence;
c. the proposed rates are informed by and consistent with the evidence on economic viability across the authority's area;
d. evidence has been provided that shows the proposed rate would not put at serious risk the overall development of the area.[38]

32. Guidance advises that "the examiner should not use the CIL examination to question the choice of a charging authority in terms of 'the appropriate balance', unless the evidence shows that the proposed rate (or rates) will put the overall development of the area at serious risk…[T]he examiner should only be concerned with whether the proposed CIL rate will make a material or significant difference to the level of that risk. It may be that the development plan and its targets would be at serious risk in the absence of CIL."[39] It is clear therefore that only "an" appropriate balance needs to be struck- it is not for the examiner to determine that it is "the" appropriate balance.

33. Further, it is not the role of the CIL examination to challenge the soundness of an adopted development plan; and where infrastructure planning has been undertaken for CIL without being tested as part of another examination, the examiner will "only need to test that the evidence is sufficient in order to confirm the aggregate funding gap and total target amount that the authority proposes to raise".

34. The examiner may recommend that schedule be approved, rejected or approved with modifications, giving reasons which must be published by the authority,[40] as soon as practicable after receipt.[41]

35. The examiner must recommend rejection if any drafting requirements have not been complied with and this cannot be remedied by modifications.[42] If he considers that there is a remedy he must recommend modifications and that the draft be approved with those modifications or other modifications necessary and sufficient to remedy non-compliance.[43]

[38] DCLG "Community Infrastructure Levy: Charge setting and charging schedule procedures", para. 9.
[39] Para. 10.
[40] S. 212(7).
[41] Reg. 23.
[42] S. 212A(2).
[43] S. 212A(3)-(4).

36. Subject to this, the examiner must recommend that the draft be approved,[44] potentially with other recommended modifications.[45]

Approval

37. The authority may only approve a schedule if it has been the subject of recommendations regarding the drafting requirements and the authority has taken account of them and the reasons for them.[46] It cannot approve a schedule if the examiner has recommended rejection.[47]

38. If modifications to meet the drafting requirements are recommended, the authority can only approve the schedule if it makes modifications that are necessary and sufficient to ensure the requirements are met, although they need not be the same as those recommended;[48] and it may make other modifications.[49] If the examiner recommended modifications to remedy non-compliance with the drafting requirements, the authority must publish a report on approval setting out how the schedule remedies it.

39. An approved charging schedule cannot take effect before publication,[50] which must take place as soon as practicable after approval.[51] It takes effect on the date specified in the schedule.[52] It must, along with the required contents of the draft, contain the date of approval, the date on which it takes effect and a statement that it has been issued, approved and published in accordance with the Regulations and the 2008 Act.[53]

40. Errors in the charging schedule may be corrected for a period of 6 months after approval, where this would have no effect on charging or it is necessary to give effect to modifications recommended by the examiner. The schedule must then be republished.[54]

[44] S. 212(5).
[45] S. 212A(6)-(7).
[46] S. 213(1).
[47] S. 213(1A).
[48] S. 213(1B).
[49] S. 213(1C)-(1D).
[50] S. 214(1); reg. 28(2).
[51] Reg. 25.
[52] Reg. 28(1).
[53] Reg. 12(3).
[54] Reg. 26.

41. It will be important for authorities to ensure that measures are in place to administer the levy following the examination. Staff will need to be ready - different departments need to know the work that is to be carried on by others – internal systems including forms and IT will need to be prepared. It may be prudent to leave a reasonable gap between formal approval of the schedule by the authority and its first implementation, to avoid too many issues arising when the system starts up.

When does liability arise?

Assumption and fixing of liability

42. In short, the development of most buildings that people normally go into will result in liability to pay the levy, subject to allowances for buildings that are already in lawful use including those that are to be demolished. The process of determining liability is complex. It is useful to start by distinguishing between the assumption and fixing of liability.

43. Liability to pay the levy may be "assumed" by any person before development commences.[55] This recognises that although ultimate liability rests with the landowner (see below), others involved in development may wish to pay. It also encourages greater certainty earlier in the process by enabling more generous payment windows on commencement of development (see below) where liability has been assumed.

44. A person who wishes to assume liability must submit an "assumption of liability notice"[56] to the collecting authority, which will be the local planning authority as charging authority.[57] Liability is deemed to be assumed on the day the collecting authority receives a valid notice.[58] If a notice is received the authority must acknowledge its receipt.[59]

45. The relevant person is fixed with liability by becoming liable "on commencement of the chargeable development to pay an amount of CIL equal to the chargeable amount less the amount of relief granted in respect of the chargeable development" (see further below).

[55] S. 208(2).
[56] This must be in a form published by the Secretary of State (or a form to substantially the same effect(: reg. 31(2).
[57] Reg. 10(1). Note that in London the borough councils are the collecting authorities for the Mayor's CIL: reg 10(2).
[58] Reg 31(4).
[59] Reg. 31(5).

46. If no-one has assumed liability by the time a chargeable development has commenced, liability will default to the landowners and payment becomes due on the commencement of development. Thus liability is apportioned between each "material interest" in the "relevant land".[60] Apportionment is by a defined formula which distributes liability according to the relative value of the material interest when set against the total values of all material interests.[61] Before apportionment the authority may serve an "information notice" on an owner of the relevant land.[62]

47. Where a person has assumed liability and the authority is unable to collect CIL, it may determine that liability to pay is transferred to the landowners and issue a "default of liability notice" and apportion liability between each material interest according to the same formula.[63]

48. Liability can be transferred to another person before or after development commences but this must occur before the final CIL payment is due.[64] If a "transfer of liability notice" is received the authority must acknowledge its receipt to those previously and newly liable.[65]

Definitions and scope

49. There are four main and recurrent legal concepts to be aware of here:

50. "Development" is anything done by way of or for the purpose of the creation of a new building, or anything done to or in respect of an existing building.[66] It is not:
    a. anything done by way of, or for the purpose of, the creation of a building into which people "do not normally go" or "go only intermittently for the purpose of inspecting or maintaining fixed plant or machinery";
    b. the carrying out of work to, or in respect of, an existing building, if after the work it remains a building as described above;

[60] Reg. 33.
[61] Reg. 34.
[62] Reg 35.
[63] Reg. 36.
[64] Reg. 32(3).
[65] Reg. 32(4).
[66] S. 209(1).

c. the carrying out of work where planning permission is only required because of controls on internal floorspace additions (effectively mezzanines) pursuant to s. 55(2A) of the 1990 Act;
d. the change of use of any building previously used as a single dwellinghouse to use as two or more separate dwellinghouses.[67]

51. "Chargeable development" is the "development for which permission is granted", although in the case of an outline permission which permits phased implementation, each phase is a separate chargeable development.[68]

52. "Planning permission" includes permissions granted by local planning authorities (including section 73 and 73A applications) and the Secretary of State, along with development consents under the 2008 Act and "general consents", which are mainly permissions granted under the GPDO and development granted permission by Act of Parliament (such as Crossrail).[69] It does not include temporary permissions.[70]

53. "Commencement": development commences on the "earliest date on which any material operation[71] begins to be carried out on the relevant land", the "relevant land" being the land to which the permission relates or, in the case of phased development under an outline permission, "the land to which the phase relates".[72]

54. There are a few potential difficulties which arise from the operation of these concepts.

55. The inclusion of s. 73 permissions within the scope of the regime has attracted much criticism, on the grounds that development not liable to pay CIL before a charging schedule comes into effect would be caught afterwards when permissions may need to be amended, as often occurs on large schemes, placing its viability at risk. The government has confirmed that it is proposing to revise the Regulations to remove liability in such circumstances,[73] however it is unclear whether the amendments will remove another related difficulty – revised permissions implemented for similar development on the same site would appear to trigger multiple CIL liabilities each

[67] Reg 6. "Building" is not positively defined in the Regulations and the definition of "building" in the Town and Country Planning Act 1990 is not applied to the CIL regime: see s. 235 of the 2008 Act. However DCLG "Community Infrastructure Levy: An overview" suggests that pylons and wind farms are structures excluded from the operation of the legislation: para. 38.
[68] Reg. 9(4).
[69] Reg 5(3).
[70] Reg. 5(2).Note that where permission is granted under section 73 so as to extend the time within which development must be commenced, the chargeable development tis that granted under the previous permission: reg 9(5).
[71] See reg. 7 and s. 56(4) of the Town and Country Planning Act 1990.
[72] Reg. 7(2) and 2(1).
[73] http://www.out-law.com/en/articles/2012/june/developers-will-not-be-charged-cil-for-amendments-to-applications-says-dclg-/

time a permission is implemented. There is presently no mechanism for off-setting between these permissions, which could cause problems on schemes where sensible revisions need to be made, even during the lifetime of the project.

56. Assessing whether a building is one which people normally go into appears to offer scope for some debate.

57. Defining the commencement of development by reference to the earliest date on which any material operation takes place may be regarded as penalising those who take the step of clearing a site to ready it for redevelopment.

58. Another difficulty is that the legislation anticipates that outline permissions may involve development taking place in phases, each of which is a separate chargeable development involving calculation of the chargeable amount when final approval is obtained for the last reserved matter associated with that phase. However, the underlying assumption is that development is neither able to nor does actually commence until all reserved matters have been approved. Depending on the circumstances of an individual case, may be possible on terms of any permission to commence before all approvals are forthcoming eg demolition of existing buildings or approval of all reserved matters for some buildings within an overall phase. The legislation does not appear to have considered or made any allowances for such events.

How is liability calculated?

Time reference

59. The amount of any liability for CIL is to be calculated by reference to the time when planning permission "first permits development" as a result of which the levy becomes payable.[74]

60. Planning permission "first permits development" on the day permission is granted for that development,[75] although where it has a condition "requiring further approval to

[74] S. 208(6).
[75] Reg 8(2).

be obtained before development can commence", it first permits development on the day final approval is given.[76] .

61. In the case of an outline permission, the relevant time is the "day of the final approval of the last reserved matter associated with the permission"[77] or, where an outline permission permits phased implementation, "on the day of the final approval of the last reserved matter associated with that phase"[78]

Chargeable amount

62. The amount of CIL payable ("the chargeable amount") is the aggregate of CIL that is chargeable at the relevant rate(s), in respect of a "chargeable development". The relevant rates are taken from the charging schedules which are in effect when planning permission first permits the chargeable development.[79]

63. The CIL amount is charged in £psm on the net additional increase in floorspace of any given development. New build is only liable for the levy if it has 100 sqm or more of gross internal floorspace or involves the creation of additional dwellings, with an allowance for floorspace in continuous lawful use prior to permission being granted or for buildings that are in lawful use but are to be demolished on completion.

64. The charge is to be calculated by reference to a complex formula which essentially involves the multiplication of the relevant rate by the "deemed net area chargeable" at that rate, with an allowance for indexation between the date when the charging schedule took effect and the time when planning permission was granted.[80]

65. The "deemed net chargeable area" is also calculated using a formula, which basically allows a deduction for buildings are in lawful use and will become part of the chargeable development, and also for any buildings in lawful use that are to be demolished before completion:
    a. calculate gross internal area of the part of the chargeable development that is chargeable at the relevant rate [C];

[76] Reg 8(6).
[77] Reg. 8(3).
[78] Reg 8(5). See reg. 8(7) for the position in relation to general consents.
[79] Reg 40 generally.
[80] Reg 40(5). Indexation is the national All-in Tender Price Index or, if it ceases to be published, the RPI: reg. 40(7)-(8).

b. subtract the aggregate gross internal area of all buildings (excluding any new build) on completion of the chargeable development which:
    i. are in lawful use when planning permission first permits the chargeable development;
    ii. will be part of the chargeable development upon completion; and
    iii. will be chargeable at the relevant rate;
c. multiply the resulting figure [CR] by the difference between:
    i. the gross internal area of the chargeable development [C] ; and
    ii. the aggregate gross internal area of all buildings which were in lawful use when planning permission first permitted the chargeable development and are to be demolished before completion [E];
d. divide that figure [CR x (C-E)] by the gross internal area of the chargeable development.

66. When calculating the charge, similar allowances are made to those which apply when assessing whether development attracts liability in the first place. Thus for calculation purposes a building does not include a building into which people "do not normally go", or "go only intermittently for the purpose of maintaining or inspecting machinery" or "for which planning permission was granted for a limited period".[81] "new build" is new buildings and enlargements to existing buildings.[82]

67. A building is "in use" if "a part of that building has been in use for a continuous period of at least six months within the period of 12 months ending on the day planning permission first permits the chargeable development".[83]

68. Note that where the collecting authority does not have sufficient information or information of sufficient quality, to establish gross internal area of whether building is in lawful use, it may deem the gross internal area to be zero.[84] Where an amount is less than £50 the chargeable mount is deemed to be zero.[85]

[81] Reg 40(11).
[82] Reg. 40(12).
[83] Reg 40(10).
[84] Reg. 40(9).
[85] Reg. 40(3).

69. It is understood that national planning application forms will be amended by the government to require further floor area information to be made available, however until this occurs Councils may wish to supplement their forms to request the necessary floorspace information.

70. In summary, when an application is received by an authority, development control officers will have to ask whether:
    a. there are any existing buildings on the site in lawful use;
    b. any aspect of the application involves building works adding a new floor area;
    c. any aspect of the application involves demolition of existing buildings in lawful use;
    d. the building works apply to a building that people do not normally go into or only go for routine maintenance;
    e. the application provides information for existing and proposed gross internal floor area;
    f. if the application is not for one or more dwellings, whether the gross internal floor area of new building work is less than 100sqm.

71. There are a few other areas of uncertainty associated with this methodology, beyond those identified earlier which may also apply here.

72. Whilst "in use" is defined to mean "a continuous period of at least 6 months within the period of 12 months ending on the day planning permission first permits development", there is no explanation of what is "lawful". It seems at least arguable that any use which is lawful under the planning legislation would qualify, although the relationship between the factual occupation anticipated by the definition of "in use" and the potential for lawful uses to be dormant may require further elaboration. The uncertainty may encourage developers to test mechanisms for minimal occupation to limit CIL liability.

73. Where only part of the building has been in use, there is nothing to indicate whether or if so how the size or proportion of the part occupied should be taken into account.

74. Beyond identifying that gross internal area must be measured in square metres, there appears to be no explanation of how the measurement is actually to take place, in which case reliance will probably be placed on professional good practice codes.

75. Further, CIL applies to permissions issued on or after the day there is a charging schedule in force,[86] such that there may be some applications which were submitted before the regime comes into force and remain undecided. In such a case the authority will need to seek relevant information on floorspace etc, although in cases where information cannot reasonably be obtained, the new floorspace could be deemed to be zero.[87] There may also be unsigned s. 106 agreements which developers will want to sign before a charging schedule takes effect, given the potential to be faced with a higher CIL charge. Whilst authorities may be content for unfinalised agreements to be overtaken by CIL, the reality is that they may well be faced with significant administrative issues when large numbers of developers put them pressure under pressure to sign agreements in a short period of time if the process is not managed in advance.

76. Reference is made above to the possible difficulties associated with the relationship between fixing liability and the commencement of multi-phased development. When calculating liability, it may be that there has to be an assumed worst case CIL payment for the entire phase subject to any overpayment provisions being engaged[88] when the actual CIL charge is known following final approval of the final reserved matter.

How is CIL collected?[89]

77. The "collecting authority" will in most cases be the charging authority, but in London the boroughs will collect the levy on behalf of the Mayor.[90]

78. In summary, the process is as follows:
    a. details of planning permissions are shared between charging and collecting authorities (or teams within authorities) to determine whether development is chargeable;
    b. where permission is granted by general consent, a notice of chargeable development from the developer or landowner is submitted;

[86] Reg. 128(1).
[87] Reg 40(9).
[88] Reg. 75.
[89] See generally DCLG "Community Infrastructure Levy – collection and enforcement".
[90] Reg. 10(3). The Homes and Communities Agency, urban development corporations and enterprise zone authorities can also be collecting authorities where they grant permission, if the relevant charging authority agrees: reg. 10(6).

c. where permission is granted specifically or by way of general consent, the collecting authority will expect to receive an assumption of liability notice from the developer or landowner;
d. collecting authority issues a liability notice;
e. if liability has been assumed, the relevant person will submit a commencement notice setting out when development will start;
f. collecting authority issues a demand notice;
g. developer follows payment procedure;
h. collecting authority issues a receipt for payments.

79. Further details appear below.[91]

80. When a local planning authority grants permission for what it considers to be chargeable development, it must pass details to the collecting authority within 14 days.[92] In most cases this will be an internal procedure.

81. The collecting authority must issue a "liability notice" as soon as practicable after a planning permission first permits development.[93]

82. It must be on a form issued by the Secretary of State (or a form to substantially the same effect) and contained prescribed information[94] including a description of the chargeable development, the amount and any relevant relief.

83. It must be served on the applicant for planning permission (or any subsequent approval),[95] anyone who has assumed liability and each person known to be an owner of the relevant land.[96]

84. Liability notices must be revised if relief changes or a new instalment policy is issued.[97] A notice ceases to have effect if CIL is fully paid or if liability would no longer arise.[98]

[91] For the position with general consents see reg.s 64 and 64A. Liability does not arise if development is commenced before 6 April 2013: reg. 128(2).
[92] Reg.s 77-8.
[93] Reg. 65)(1).
[94] Reg. 65(2).
[95] Reg. 65(3), (12) – or in the case of a general consent the person who submits a notice of chargeable development. For provisions relating to the submission of notices for chargeable development in relation to general consents, see reg. 64; see too reg 64A.
[96] Reg. 65.3).
[97] Reg. 65(4).
[98] Reg. 65(9), (10).

85. A "commencement notice" must be submitted to the authority no later than the day before the day on which the chargeable development is to be commenced.[99] This effectively acts as the trigger for the authority to issue a demand notice (see below). The commencement notice must be submitted on form published by the Secretary of State (or a form to substantially the same effect) and contain prescribed information including the intended commencement date of the chargeable development.[100] The person submitting must serve a copy on each person known to be an owner of the land.[101]

86. If no commencement notice is received, or the authority has reason to believe that it was commenced before the intended commencement date, the authority must determine the day when chargeable development was commenced.[102]

87. If development is commenced without planning permission, it may be enforced against, such that the unlawful development is removed (in which case no CIL will apply), it may considered that it is not expedient to take action (probably unusual in CIL cases, but no CIL would apply), or planning permission is granted retrospectively, possibly on appeal, (in which case CIL becomes payable on the date of the permission).

88. The authority must serve a "demand notice" on each person liable to pay CIL.[103] It must be on a form issued by the Secretary of State (or a form to substantially the same effect) and contain prescribed information including the intended or deemed commencement date and the amount payable.[104]

89. A person served with a demand notice may request the collecting authority to make a declaration that he is not required to pay until works which are part of the chargeable development are commenced on land in which he has a material interest.[105] A declaration must be made if the authority is satisfied that liability arose because of

[99] Reg. 67(1).
[100] Reg. 67(2).
[101] Reg. 67(3).
[102] Reg. 68.
[103] Reg. 69(1).
[104] Reg. 69(2).
[105] Reg 69A(1)-(2).

apportionment,[106] no work has commenced on the land, there has been no agreement to commence or transfer the land and it is reasonable to suspend payment.[107]

When must CIL be paid?

90. CIL is due in full when development is commenced in accordance with the permission, unless an authority has a policy in place or, if there is no policy, where someone has assumed responsibility. The process works as follows.

91. An authority may publish policy relating to the payment of CIL in instalments.[108] After the commencement notice the money is then payable in accordance with that policy.[109] In London, where a charge is made by either a borough alone, or the borough and the Mayor, and the borough has issued a policy, payments are made in accordance with that policy; but where it has not issued a policy, payments are to be made in accordance with any policy of the Mayor.[110]

92. In all other cases where liability has been assumed, payment is due at the end of 60 days beginning with the intended commencement date for the chargeable development.[111] Where the money is not paid when due the authority must send a copy of the demand notice to each owner of the relevant land.[112]

93. Where nobody has assumed liability, payment is due in full on the intended commencement date if the authority has received a commencement notice[113] or, if the authority has determined a deemed commencement, on the deemed commencement date.[114]

94. In London, boroughs collect Mayoral CIL. Money must be returned to TfL, minus administrative expenses, at the end of each financial quarter.[115]

[106] Either under the default liability provisions (where no-one assumes liability before development is commenced) or the "default of liability" provisions where the authority has been unable to recover CIL from someone who is liable and it is apportioned amongst the material interests in the relevant land.
[107] Reg. 69A(3).
[108] Reg. 69B.
[109] Reg. 69B and 70(5).
[110] Reg. 70(3)-(5).
[111] Reg. 70(7).
[112] Reg. 70(8).
[113] Reg. 71(1).
[114] Reg 71(2).
[115] Reg. 76.

95. There may be cases, probably unusual, where it will be more desirable for the authority to receive land instead of money, for instance where the most suitable land for infrastructure is within the ownership of the party liable for the payment of the levy. Therefore, authorities may accept land transfers as payments in kind, but only if this is done with the intention of using the land to provide, or facilitate the provision of, infrastructure to support development in the area. Thus payment can be received in kind[116] by way of a "land payment". The CIL paid is an amount equal to the value of the acquired land,[117] which must be determined by an independent person according to sale on the open market.[118] The authority must "aim to ensure" that acquired land is used for a "relevant purpose" that is to provide or facilitate in any way the provision of infrastructure to support the development of the authority's area.[119] A land payment must not be accepted unless the land is acquired by the authority or by a person nominated by the authority with that person's agreement (who the authority must be satisfied intends to use the land for a relevant purpose). An agreement to make the land payment must be entered into before the development is commenced.[120] Payments in kind must be provided to the same timescales as cash payments.[121] If the land is not used for a relevant purpose, the charging authority must deem an appropriate cash amount held by it to be CIL, according to a defined formula.[122]

What about exemptions and relief?

96. Provisions relating to exemptions and relief are complex and what appears below is only a brief overview.

97. Minor development: liability does not arise where the "gross internal area of new build on the relevant land will be less than 100 sqm",[123] except where the development comprises 1 or more dwellings.[124]

98. Charities: exemptions: charitable landowners will be exempt from liability where their portion of the development is used for charitable purposes. Thus charitable

[116] Reg. 73.
[117] Reg. 73(3)
[118] Reg 73(11).
[119] Reg. 73(5), (13).
[120] Reg. 73(6), (8).
[121] Reg. 74(2).
[122] Reg. 73(9)-(10).
[123] Reg. 42(1).
[124] Reg. 42(2).

institutions owning material interests in the relevant land are exempt if the chargeable development will be used wholly or mainly for charitable purposes, unless the used part of the development is not occupied by or under the control of a charitable institution, or the material interest is jointly owned by a person who is not a charitable institution, or an exemption would amount to state aid.[125]

99. Charities: relief: a charging authority can also choose to offer discretionary relief to a charity landowner where the greater part of the chargeable development will be held as an investment from which the profit are applied for charitable purposes[126] relief is not available if the material interest is jointly owned with a person who is not a charitable institution or occupation is intended to be for trading activities other than the sale of goods donated to the charity. Relief may not be granted if the authority is satisfied that it would constitute notifiable state aid which must be approved by the European Commission.

100. Where a charging authority wishes to make discretionary relief available it must comply with notification requirements including the publication of a document setting out its policy on relief.[127] Claims for relief must be received before the commencement of the chargeable development to which the claim relates.[128]

101. Relief is withdrawn is withdrawn if a "disqualifying event" (a cessation in eligibility, or transfer or reversion of a relevant interest to someone who is not eligible).[129]

102. Social housing relief: a chargeable development which comprises or is to comprise "qualifying dwellings" in whole or in part is eligible for relief. Qualifying dwellings are let by a registered provider of social housing, registered social landlord or a local housing authority under specified tenancies;[130] and a range of other conditions are all met, including occupation in accordance with shared ownership arrangements under the Housing and Regeneration Act 2008, the premium paid on the grant of a lease does not exceed 75% of the market value, the annual rent payable is not more than 3% of the value of the unsold interest and in any given year the rent does not increase more than 0.5% beyond RPI[131] the "qualifying amount" for any relief is calculated according to a specified and complex formula which is intended to apply the relevant

[125] Reg 43.
[126] Reg. 44.
[127] See reg 46.
[128] See reg. 47 for the wider procedure for making claims.
[129] See reg. 48.
[130] Reg. 49.
[131] Reg. 49.

rate to the net internal area of the development devoted to qualifying dwellings, with allowances again made for buildings that are in lawful use when planning permission first permits development, or are to be demolished on completion.[132]

103. Claimants must have assumed liability and be an owner of the relevant land. Claims must be received before the commencement of development.[133] Provision is made for relief to be deemed to apply to transferees of land on which qualifying dwellings would be located[134] and for the withdrawal of relief where qualifying dwellings cease to be such.[135] To ensure that relief from the levy is not used to avoid proper liability for the levy, any relief must be repaid, by way of "clawback", if the development no longer qualifies for the relief granted within a period of 7 years from commencement of the chargeable development.[136]

104. Exceptional circumstances relief: a charging authority may grant relief from CIL liability on a chargeable development if it appears that there are exceptional circumstances and it considers it expedient to do so. It can only do so where it has made such relief available in its area, a s. 106 obligation has been entered into in respect of the development, the cost of complying with the obligation is greater than the chargeable amount that is payable and requiring payment of CIL would have an unacceptable impact on the economic viability of the development. The authority must also be satisfied that it would not constitute a notifiable state aid which the European Commission must approve.[137] An authority wishing to make relief for exceptional circumstances available in its area must publish and make available for inspection a statement giving notice of its availability.[138]

105. Relief for exceptional circumstances must be claimed by an owner of a material interest in the relevant land and made on a form published by the Secretary of State (or a form to substantially the same effect), containing prescribed information,[139] including an assessment carried out by an independent person (appointed by the claimant with the agreement of the charging authority) of the economic viability of the development and an explanation of why the payment of the chargeable amount would have an unacceptable impact on its viability. Where there is more than one

[132] Reg. 50.
[133] See reg. 51 generally.
[134] Reg. 52.
[135] Reg. 53.
[136] Reg. 53 and 2(1).
[137] Reg. 55.
[138] Reg. 56.
[139] Reg. 57.

material interest in the relevant land, there must also be an apportionment assessment. Exceptional circumstances relief is no longer eligible if, before the chargeable development is commenced, charitable or social housing relief is granted in respect of the development, an owner of a material interest makes a material disposal of his interest.

106. The Mayor cannot grant such relief unless a claim is referred to him by a London borough.[140] This assumes that the Mayor has made relief available, and either the borough has not made relief or considers that despite the relief it proposes to grant, requiring payment of CIL would still have an unacceptable impact on viability.[141]

107. It appears that there is nothing to prevent the necessary policies from being drafted at fairly short notice and authorities wanting to keep the implementation of the new regime as simple as possible may consider it prudent to wait until experience suggests that a policy is necessary. It is not entirely clear at this stage how many charities will engage in new build which would be liable to CIL in the first place.

What can CIL be spent on?

108. CIL must be applied to funding infrastructure to support the development of the charging authority's area.[142] This will involve the "provision, improvement, replacement, operation or maintenance of infrastructure".[143] Guidance indicates that authorities may spend their levy monies on projects that are different to those identified during the rate-setting process.[144]

109. Infrastructure "includes roads and other transport facilities, flood defences, schools and other educational facilities, medical facilities, sporting and recreation facilities and open spaces.[145] Note there is no absolute definition.

110. CIL applied by the Mayor must be applied to funding roads or other transport facilities (including Crossrail).[146]

[140] See reg. 55(4) and 58(3).
[141] See reg. 58.
[142] Reg. 59(1).
[143] S. 216(2).
[144] DCLG "Community Infrastructure Levy: An overview", para. 24.
[145] S. 216(2).
[146] Reg. 59(2).An authority may use CIL to funding infrastructure outside its area: reg. 59(3).

111. CIL may be applied to reimburse expenditure already incurred on infrastructure,[147] to repay money borrowed (and interest) to fund infrastructure [148] or to pay a proportion of administrative expenses involved in charging and collection.[149] 5% of local receipts can be applied to administrative expenses. London boroughs may keep up to 4% of the Mayor's CIL for such expenses, on top of the borough CIL.[150]

How do we know what the money is spent on?

112. Those who contribute to infrastructure through CIL do not have a formal mechanism within the legislation to ensure delivery. Charging authorities must prepare a report for any financial year in which it collects CIL. The report must include total receipts and expenditure, total retained receipts and summary details of expenditure including items of infrastructure to which CIL has been applied, CIL expenditure on each item, CIL applied to repay money and fund administration.[151]

113. Notwithstanding these requirements, there would appear to be nothing to prevent developers reaching framework agreements with the collecting authority where appropriate, to the effect that money will be applied for certain infrastructure relating to the use of the development in question.

How will payment be enforced?

114. Enforcement comes in the following main forms. There are surcharges where:
    a. chargeable development has commenced with no assumption of liability: surcharge of £50 on each person liable to pay;[152]
    b. an authority is required to apportion liability to pay CIL between different owners: surcharge of £500 payable by owner of each material interest;[153]

[147] Reg 60(1).
[148] Provided CIL has been collected for at least a full financial year before CIL is to be applied and the total amount to be applied does not exceed a percentage of CIL collected the previous financial year, as directed by the SS Reg 60(2)-(5). Where the GLA or TfL has borrowed money to fund roads or other transport facilities, the Mayor may apply CIL to repay that money, if the same conditions are met: reg. 60(3) and (8).
[149] Reg. 61 generally.
[150] Reg. 61(3)-(4).
[151] Reg. 62 generally.
[152] Reg. 80.
[153] Reg. 81.

c. development has commenced under a general consent before receipt of notice if chargeable development: surcharge of 20% of chargeable amount or £2500, whichever is lower;[154]
d. commencement of development before receipt of valid commencement notice: same as above;[155]
e. a person who is required to notify the authority of a disqualifying event fails to do so within 14 days of the event: same as above;[156]
f. a person who has not paid in full after 30 days from due date: surcharge of 5% or £200, whichever is the greater;[157]
g. a person who fails to comply with an information notice after 14 days from service:[158] surcharge of 20% of payable CIL or £2000, whichever is lower.

115. Interest is payable on late CIL payments, at 2.5% above Bank of England base rate starting on day after day when payment was due and ending on day payment received.[159]

116. The issuing of surcharges (not the charging of interest) is discretionary. Surcharges or interest are treated as if they were CIL.[160]

117. Stop notices may be used where payment has not been received and the authority considers it "expedient that development should stop until the amount has been paid".[161] It must first issue a warning notice[162] on the person liable to pay, owners and occupiers of the relevant land, and any other person who the authority considers may be materially affected by a stop notice [reg. 89(3)]. The notice must contain prescribed information and give not less than 3 days' or more than 28 days' notice of the issue of a stop notice [reg. 89(4)].

118. If the amount specified in the notice remains unpaid then a stop notice may be served on the same people containing prescribed information, specifying "any activity connected with the chargeable development" which must cease.[163] Contravention of a

[154] Reg. 82.
[155] Reg. 83.
[156] Reg. 84.
[157] Reg. 85.
[158] Reg. 86.
[159] Reg. 87.
[160] Reg. 88.
[161] Reg. 89(1).
[162] Reg. 89(2).
[163] Reg. 90(3)-(4).

stop notice is an offence,[164] (£20,000 fine on summary conviction, unlimited fine on conviction on indictment).[165]

119. The collecting authority may apply to the High Court or County Court for an injunction if it considers it "necessary or expedient for any actual or apprehended breach of a CIL stop notice" to be so restrained.[166]

120. Collecting authorities may apply to the magistrates' court for a "liability order" against person who has failed to pay CIL,[167] 7 days after service of a reminder notice[168] any time after the payment becomes due. An application for an order cannot be made more than 6 years after payment became due. Provision is made for levy by distress and committal to prison where a liability notice has not been complied with.[169] The magistrates may issue charging orders on assets where at least £2000 of an amount covered by the liability order remains outstanding.[170] Committal is available against individuals where recovery has not been possible by way of distress or a charging order but only if the court is satisfied that failure to pay is a result of wilful failure or culpable neglect.[171]

121. CIL is a local land charge until all amounts due have been paid or liability no longer arises. It may be enforced with the consent of the court, such that the authority may act as mortgagee and force the sale of the CIL land to recover the outstanding amount.[172]

122. Alternatively, where a liability order has not been made, the authority can be recovered in a court of competent jurisdiction eg small claims in a County Court.[173]

Appeals

123. There is a variety of potential appeals available under the new regime, although it is anticipated that once the charging schedule has been adopted, remaining appeals will

[164] Reg. 93(1).
[165] Reg. 93(7).
[166] Reg. 94
[167] See reg. 97 and 102 generally.
[168] Reg. 96.
[169] Reg. 99-101.
[170] Reg. 103-4.
[171] Reg. 100(3).
[172] Reg. 66 and 107.
[173] Reg. 106.

primarily relate to matters of fact or maths, such as whether the calculation of liability was correct or whether development has commenced at a particular time. It remains to be seen whether the stipulated mode of appeal - by written representations – will be adequate to resolve such issues. The various forms of appeal are as follows:[174]

a. review of the chargeable amount: request to collecting authority within 28 days of issue of liability notice, provided relevant development has not commenced;[175]

b. appeal against chargeable amount following review (or failure to review): to appointed person,[176] within 60 days of liability notice, on grounds that amount "has been calculated incorrectly", provided development not commenced before decision;[177]

c. appeal against apportionment of liability: to appointed person[178] within 28 days from issue of demand notice;[179]

d. appeal against decision to grant charitable relief: to appointed person[180] on ground that value of interest in land incorrectly calculated, within 28 days of decision on claim for relief, provided development not commenced before decision;[181]

e. appeal against imposition of surcharge: to appointed person[182] within 28 days of imposition, on grounds that breach did not occur, that liability notice not served, or that surcharge incorrectly calculated;[183]

f. appeal against deemed commencement: to appointed person[184] on ground that date is wrong, within 28 days of issue of demand notice; revised date to be determined where appeal is allowed and surcharge may be quashed;[185]

g. appeal against stop notice: to appointed person[186] within 60 days of stop notice taking effect, on grounds that no warning notice served or chargeable development not commenced.[187]

[174] See reg.s 120-1 for the relevant procedure including provision for costs awards by the appointed person.
[175] Reg. 113.
[176] Valuation officer or district valuer: reg. 112(1).
[177] Reg. 114.
[178] Valuation officer or district valuer: reg. 112(1).
[179] Reg. 115.
[180] Valuation officer or district valuer: reg. 112(1).
[181] Ref. 116.
[182] Secretary of State or person appointed by him: reg. 112(1).
[183] Reg. 117.
[184] Secretary of State or person appointed by the Secretary of State: reg. 112(1)..
[185] Reg. 118.
[186] Person appointed by Secretary of State: reg. 112(1).
[187] Reg. 119.

What is relationship now with planning obligations?

124. CIL should be regarded as separate from s. 106 obligations. The new system is intended to provide infrastructure to support the development of an area, rather than to make individual planning applications acceptable in planning terms, which has been the central purpose of the s. 106 regime.

125. Accordingly there may be some site-specific and localised mitigation requirements without which a development should not be granted planning permission, but which are not covered by the levy. S. 106 obligations will still have a role to play so that authorities can be confident that the consequences of a development can be mitigated. Thus where independent assessments of scheme viability take place CIL can be regarded as a separate cost entry to s. 106 costs.

126. However, to ensure the complementary operation of the levy and obligations, the use of obligations has been scaled back and focussed.

127. Since 6th April 2010 the policy tests on the use of obligations, as set out in Circular 5/05, have been put on a statutory footing. The rationale is to reinforce the purpose of obligations in seeking only essential contributions and to provide a stronger basis to dispute practice which breaches these tests.[188] Such a s. 106 planning obligation may only constitute a reason for granting planning permission if the obligation is necessary to make the development acceptable, directly related to the development and fairly and reasonably related in kind to it.[189]

128. Further, the use of obligations is restricted to ensure that developments are not charged for the same items through both obligations and the levy. Where an authority sets out that it intends to fund an item of infrastructure through the levy then it cannot seek a contribution towards the same infrastructure. The legislation achieves this by providing that an obligation may not constitute a reason for granting permission to the extent that the obligation provides for the funding of infrastructure listed on the charging authority's website as infrastructure that will or may be funded by CIL.[190] This list can be amended as infrastructure priorities change over time, separately from any review of the charging schedule.[191] If an authority does not publish a list, this is

[188] See DCLG "Community Infrastructure Levy: An overview", para. 61.
[189] Reg. 122(2).
[190] Reg. 123(2), (4).
[191] DCLG, Community Infrastructure Levy: An overview, para. 66.

taken to mean that the authority was intending to use levy money to be used for any type of infrastructure capable of being funded by the levy,[192] such that a planning obligation could not be sought.

129. There would appear to be nothing to prevent the list referring to infrastructure types and projects which are different to those included in the evidence base which justified the charging schedule. This ought to give authorities to flexibility to address changing priorities.

130. Lastly, on local adoption of the levy or nationally after a transitional period of 4 years (to 6 April 2014) the use of pooled contributions is restricted. Contributions may be sought from up to 5 separate obligations for infrastructure that is intended to be funded by the levy (looking back to agreements entered into since 6 April 2010). The legislation achieves this by providing that an obligation may not constitute a reason for granting permission to the extent that it provides for the funding or provision of an infrastructure project or type of infrastructure and 5 or more separate obligations relating to development within the area provide for the same.[193]

Conclusion

131. CIL is as new to local planning authorities and developers alike. Neither can avoid being proactive as the regime requires action from both. Developers wanting to make the most of the system will have to ensure that they have robust evidence on matters including the lawful and actual use of existing buildings on their relevant development sites. Draft charging schedules will need to be scrutinised closely as the opportunity to appeal substantively against a levy is restricted. Authorities will have to ensure that there is a corporate desire to make the new system work whilst understanding that it will not pay for all of the infrastructure needs in the area. Anyone reading the legislation and guidance should realise that there is scope for uncertainty. Authorities are best advised to keeping charging schedules as simple as possible at the outset, and to ensure that sufficient information can be gathered when applications are submitted to make the calculation of the levy as straightforward as possible.

[192] Reg. 123(4).
[193] Reg. 123(3).