

REPORT TO CABINET

Title: **COMMUNITY INFRASTRUCTURE LEVY (CIL) –
CONSULTATION ON REGULATIONS (Proposals to replace
S106 Planning Agreements)**

Date: 22 October 2009

Member Reporting: Councillor Mrs Knight – Lead Member for Planning and
Development

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Wards affected: All

1. SUMMARY

1.1 What is Community Infrastructure Levy (CIL)?

1.2 CIL will be a new charge which local authorities in England and Wales will be able, but not required, to charge on most types of development in their area. It is designed to help fund needed infrastructure identified in the Local Development Framework, and will be paid primarily by owners and developers of land.

1.3 Under the existing system, developer contributions can be sought under S106 of the Town and Country Planning Act 1990 to mitigate the impact of a proposed new development on local infrastructure and services. Developer contributions are negotiated as part of the planning application process, and are secured by a legal agreement (also known as ‘section 106 agreements’ or ‘planning obligations’).

1.4 It is the Government’s intention that CIL will run alongside the S106 process. However, the Government also plans to limit what can be achieved through the S106 process within as little as 2 years of introducing the CIL legislation. These changes may severely reduce the scope of the S106 process to secure the wide range of infrastructure improvements when compared to present.

1.5 What are the Government consulting on?

1.6 The Government’s Department of Communities and Local Government (DCLG) published the consultation document ‘Detailed proposals and draft regulations for the introduction of the Community Infrastructure Levy’ on 30 July 2009.

1.7 The consultation seeks views on the Government’s detailed proposals for the introduction of the Community Infrastructure Levy (CIL), including draft regulations. It also seeks views on the changes to the existing process for

securing developer contributions under S106 of the Town and Country Planning Act 1990, and the timing of the implementation of these changes.

- 1.8 Consultation responses are due by 23 October 2009. A summary of responses will be published by the Department of Communities and Local Government in January 2010, with the aim of the CIL Regulations coming into force on 6 April 2010. The full document can be viewed on the following link: <http://www.communities.gov.uk/publications/planningandbuilding/communitylevyconsultation>

This report focuses on the following:

- A summary of the CIL Regulations as proposed
- Implications for this authority on the ability to fund infrastructure needed as the result of new development in our area
- The authority's response to the consultation.

1.9 The Borough's response to the consultation

There is some support for CIL based upon:

- transparency and certainty to the development process;
- the ease of collection of contributions towards the necessary infrastructure to support new development.

There are major concerns over the Governments' plans:

- possible diversion of some of the (finitely) available pool of developer contributions from local to sub regional infrastructure projects. Since the CIL Regulations will allow national bodies like the Highways Agency or the Environment Agency to receive some of this funding, there are concerns that the CIL Regulations will lead to a potential undermining of the current system with the diversion of funds from local schemes to larger sub regional projects.
- the introduction of CIL is overly complex, resulting in high revenue costs for set up and annual reporting. Introduction of CIL requires the drawing up of a list of infrastructure needed as a result of new development over the next 10 years (the Infrastructure Plan), plus a draft CIL charging schedule based on evidence of the economic viability of development in an area. These documents must be tested by a Government Inspector alongside the draft Core Strategy before CIL can be implemented. If introduced, the amount of CIL collected and spent, together with a list of projects undertaken, is to be reported to the Government annually. These processes will require resources and expenditure over and above those required to support the current S106 process.

- the timescale for making changes to limit the scope of the current S106 process is not sufficient; It is proposed that changes to S106 legislation will take effect within 2 years of the introduction of the CIL (ie. By April 2012). This will not give sufficient time to work through the complex process that is required to implement CIL.

1.11 The authority is also concerned that whilst the Government has always stated the adoption of CIL by an authority will be voluntary, the scope of the planned changes to the existing S106 legislation are likely to be so severe that, in effect, the Royal Borough may be forced to adopt CIL if it wishes to continue to secure the range and level of contributions currently achieved under the existing S106 process.

1.12 There are also concerns over some of the details of the legislation, further details of which are expanded upon below.

2. RECOMMENDATION That:

- a) The Lead Member for Planning and Development respond to the consultation as detailed in Appendix 1**

What will be different for residents as a result of this decision?
No direct difference. However, by responding to the consultation in this way, the Borough will be defending the need for developers to pay for infrastructure and services that are needed as a result of new development in our area.

3. SUPPORTING INFORMATION

3.1 Background

3.1.1 What has the Borough said before about CIL?

A report on CIL was presented to Cabinet on 25 September 2008. The report outlined the scope of the proposed legislation in anticipation of the publication of the detailed proposals.

This latest report comprises a summary of the detailed proposals, together with recommendations for the Borough's consultation response at Appendix 1.

3.1.2 What are the proposals?

The principal features of the proposals are as follows:

- a) CIL can be used to fund existing infrastructure to increase capacity, or to repair failing existing infrastructure where this is needed to support new development (but not just for repair and refurbishment unrelated to new development). This is similar to the current system of securing

contributions through the S106 process.

- b) The definition of infrastructure that can benefit from CIL is drawn widely, and can include roads and other transport facilities, flood defences, schools and other educational facilities, medical facilities, sporting and recreational facilities and open spaces. The Regulations imply this list is not exhaustive, but it is not clear whether all the service areas, particularly some of the smaller more detailed elements for which this authority currently collects S106 contributions, would be covered. Although affordable housing is defined as infrastructure, it is to be dealt with separately, under the S106 agreement regime.
- c) There has to be an up-to-date development plan (the Core Strategy) in place before CIL can be charged in an area. This should be supported by a list of infrastructure needed as a result of new development over the next 10 years (the Infrastructure Plan) and a draft CIL charging schedule. Alternatively, it would be acceptable for an Authority to submit its draft charging schedule alongside its draft core strategy for joint examination. (In the case of this Authority, the timetable for the Core Strategy is to submit the draft in June 2010, with a view to adoption at the end of 2010/beginning of 2011).
- d) The authority will need to set a target total of CIL funding, and show how it was arrived at. The target amount should be based upon a selection of infrastructure projects or types of infrastructure that are indicative of the types of infrastructure likely to be funded locally from CIL. It is illustrative, not a firm list of schemes to be funded, and needs to be sufficient to show that the CIL target is justifiable against local need. The focus is on identifying a funding gap and justifying charging a CIL, rather than pinpointing exact costs. The other sources of infrastructure funding to complement CIL, for example regional and national grant support, do not need to be fully secured prior to the examination.
- e) The CIL charge is to take account of the economic viability of constructing new buildings in their area. It will be for the local authority to strike the right balance between generating income and making some development sites unviable. The Government will not specify how much unviable development is acceptable. Local authorities should do their assessment by sampling a limited number of sites, particularly lower-value sites, in their area. Authorities should not charge up to the margins of viability for the majority of their sites, so that CIL remains flexible enough to cope with changes in economic circumstances. Officers are concerned over the likely cost of resourcing skills required through consultancy support to undertake this new and complex area of work described in this and the preceding paragraph.
- f) The local authority is the 'Charging authority' for CIL. This means that the Local Authority will collect the funds.
- g) The Charging Authority has to prepare a draft charging schedule subject to

rigorous testing by an 'independent person' (likely to be drawn from the Planning Inspectorate). Infrastructure planning and the charging schedule should be developed and tested together. This subsequent testing will also have significant financial implications for the Borough.

- h) The charging schedule should allocate the amount to be raised from CIL to each main class of development, expressed as a cost per square metre of floorspace. Residential floorspace is also calculated in this way, rather than by number of bedrooms. Officers in Children's Services are concerned that insufficient local and/or national data exists on pupil yields per square metre of residential floorspace to enable a robust justification for education contributions to be put forward. They suggest that setting the levy based on number of bedrooms is a better method, since existing data on pupil yields is held on this basis.
- i) The Government will set out exemptions, inflation indices and other matters at national level. There will be local flexibility in the rates that can be charged. The government is still considering how authorities deal with situations where a developer cannot afford the going rate, but it is envisaged this will only be applicable in very limited, special circumstances.
- j) CIL is to be levied on buildings with a minimum threshold of 100m², with anything under this not charged CIL. Householder development will not be liable. However, other 'permitted developments' under the General Permitted Development Order of over 100 m² would have to pay. Temporary buildings do not pay CIL, unless and until planning consent makes them permanent. Officers are concerned that the minimum threshold is set too high, and that this may lead to a reduction in the total CIL collected compared to the amount of developers' contributions collected under the current S106 regime. Whilst additional income under the CIL would arise from permitted developments over 100m², no realistic estimate can be made of the number of developments that would qualify, since developers have not had a duty in the past to notify the Borough of such types of development. Officers therefore recommend that the minimum threshold for commercial development be set at 20m² (this is just above 19m² which is our minimum space standard for one additional employee in an office development) and one additional unit of residential development.
- k) CIL is payable on changes of use requiring planning permission over 100m². This could be set at a different rate to the rate used for new buildings. Again, Officers are concerned that the minimum threshold is set too high, and that this may lead to a reduction in the total CIL collected compared to the amount of developers' contributions collected under the current S106 regime. However, no CIL is due on changes of use that are permitted under national legislation.
- l) The Government is seeking views as to whether charges should be indexed to a national index of construction costs, running from the year the

schedule takes effect, to the year in which planning consent is granted. Their proposal is to regulate for such an index. It is also proposed that calculation of payment will be based on when development is consented, not when it starts. The Index that would be used for the whole calendar year will be based on its value the preceding November, and could go up or down. Officers are concerned that by charging on such a basis, in times of inflation, CIL income will not keep up with the costs of providing the necessary infrastructure. Officers therefore recommend that a monthly inflationary index be applied.

- m) CIL is payable on commencement of development (as defined in the 1990 Planning Act). Developers must notify the planning authority of the intention to start and are encouraged to give advance notice of who will pay the CIL (in default, the bill goes to the landowner). Developers must also notify the planning authority in the case of permitted developments over 100m² which also attract the levy. The possibility of phased payments and payments in kind is being explored by Government but is not explicit.
- n) The Regulations allow national bodies like the Highways Agency or the Environment Agency to receive CIL funding, but makes it clear that the decision to do so rests with the charging authority. Nevertheless, Officers are concerned that pressure will be put on the authority to use part of the finite pool of contributions on sub regional infrastructure projects.
- o) The monitoring of CIL can make use of existing accounting procedures. However, CIL money needs to be separately identifiable from other funds. Authorities do not have to make links between a single CIL receipt and a specific item of infrastructure.
- p) Charging Authorities must report on CIL on an annual basis every October how much CIL is received, retained and spent on each item of infrastructure. If an exceptions procedure is agreed, it must be reported.
- q) The S106 obligations process will remain. However, its use will be limited to securing affordable housing and to mitigating the effect of the specific development, to prevent tariff schemes being based on S106. (A tariff scheme is one where every application for new development is expected to contribute a fixed financial contribution towards infrastructure, regardless of whether a link has been established between the new development and the need for new infrastructure).
- r) The proposed timescale for these changes is two years after the introduction of CIL. Given that the Borough currently makes extensive use of the S106 process (as supported by the Developer Contributions Supplementary Planning Document (SPD)), the proposed limitations on the use of S106 obligations appears particularly onerous for the Borough. It also puts into question whether the adoption of the CIL process is truly a voluntary one. Furthermore, the introduction of CIL is overly complex, and will result in long lead in times and high revenue costs for setting up the charge. Officers therefore recommend that changes to the S106 process

are not made until at least 5 years after the adoption of CIL legislation.

- s) Affordable housing is to benefit from a reduced rate of CIL. This is supported by Officers in Housing Services as it will reduce the cost of providing affordable housing in the Borough. However, the Borough currently collects developer contributions under the S106 process from affordable housing sites on the basis that the new residents of such schemes will place a similar burden on the Council's infrastructure and services as new residents of open market schemes. Any reduction in CIL compared to the existing income secured under the S106 regime will impact on the ability of the Borough to fund the required infrastructure and services made necessary by these additional residents under its capital programme. Therefore, on balance, officers recommend that affordable housing should not benefit from a reduced rate of contributions
- t) The Regulations propose the definition of affordable housing as being 'housing that is in receipt of, or eligible for, public funding'. Officers in Housing Services consider this is fundamentally flawed as not all affordable housing is publicly funded (especially but not exclusively Low Cost Home Ownership (LCHO)). In addition, Registered Social Landlords (RSLs) will often start on a development using their own funds with the hope of receiving a future grant allocation. In doing so, the development would not fall under the category of 'affordable housing,' RSLs will therefore be deterred from trying to provide affordable housing via this route, resulting in an overall reduction and/or delay in the provision of affordable housing.
- u) It is also proposed that as home owners under Low Cost Home Ownership schemes purchase additional equity in their properties (known as 'staircasing') any benefits of reduced CIL should be paid back to the charging authority (known as Clawback) over a period of seven years. Whilst Officers in Housing Services support the principle of clawing back any CIL relief from dwellings that are staircased to full ownership, they consider there needs to be additional guidance as to the practicality and mechanics of doing so. Finance Officers suggest that clawback on LCHOs be over a period of 10 years in line with existing Right To Buy (RTB) arrangements with Housing Associations. They are concerned that clawing back CIL directly from the homeowner would create additional administration, and the higher risk of bad debts. It would therefore be preferable to collect the clawback from the Housing Association, with an administration charge similar to current RTB arrangements.

A response to the consultation Questionnaire has been completed to take account of the issues raised in the preceding paragraphs (Appendix 1).

3.1.3 The Boroughs response to the consultation

The Council is keen to ensure development proposals contribute to local infrastructure in the most effective way. The current system in place, which uses planning obligations (also know as Section 106 agreements) supported

by Local Plan policies, has been very effective in providing funds for the required infrastructure within this Borough. However, for several years the Government has been concerned that a fairer, and more predictable way of seeking contributions is needed. Accordingly, the Government is proposing to introduce the Community Infrastructure Levy (CIL) on 6 April 2010, enabled by Part 11 of the Planning Act 2008. CIL will be a new charge which local authorities in England and Wales will be able, but not required, to charge on most types of new development in their area. CIL charges will be based on formulae which relate to the size and character of the development paying it. The proceeds of the levy are to be spent on local and sub-regional infrastructure to support the development of the area.

The total funds achievable as developer contributions from new development under either the existing S106 regime or CIL levy are a finite resource, linked to the economic viability of new development in an area. Since the CIL Regulations will allow national bodies like the Highways Agency or the Environment Agency to receive some of this funding, there are concerns that the CIL Regulations will lead to a potential undermining of the current system with the diversion of funds from local schemes to larger sub regional projects.

There are also concerns over some of the details of the legislation, particularly relating to the proposed method of calculating the levy towards education provision, and the definition of affordable housing.

4 OPTIONS AVAILABLE AND RISK ASSESSMENT

4.1 Options

	Option	Comments	Financial Implications
1.	Do nothing.	The Government will be unable to take account of the needs of the Borough in drawing up new legislation, which may lead to insufficient funds being provided to support new development in the area.	Revenue – Need for a skilled resource/consultancy support should CIL be introduced as outlined: To calculate CIL charge, advice on infrastructure requirements and costs; land values and development economics will be needed. Plus cost of examination. Capital – not known at this stage. (£2.3 million S106 contributions collected in 2008/9)
2.	Accept the	The recommendation set out in	Revenue – As above

	Option	Comments	Financial Implications
	Recommendations in this report.	this report will assist the Government in drawing up legislation appropriate to this Borough to ensure that sufficient funds are provided to support new development in the area. This is the recommended action.	but delayed for 3 – 4 years Capital – not known at this stage. (£2.3 million S106 contributions collected in 2008/9)

4.2 Risk assessment

- New legislation could be enacted which does not take account of the needs of the Borough. This may lead to insufficient funds being provided to support new development in the area. Mitigation – The Government will be able to consider the needs of the Borough through the responses given in the Questionnaire.
- Expectation from residents and other interested parties that the necessary infrastructure as a result of new development in their area will not be provided. Mitigation – In the event the emerging legislation does not take full account of this authority’s views, expectations will be managed through communication and explanation of the part this Authority has played in responding to the Government about this consultation on emerging legislation.

5.0 CONSULTATIONS CARRIED OUT

Internal consultations carried out include the S106 Project Board (comprising representatives of the Service Areas currently benefitting from S106 developers contributions) and Planning Policy Officers.

6.0 COMMENTS FROM THE OVERVIEW AND SCRUTINY PANEL

Comment from Corporate Overview and Scrutiny Panel on 6th October 2009:

Members considered the report due to be submitted to Cabinet on 22 October 2009 on Community Infrastructure Levy (CIL) – Consultation on Regulations (Proposals to replace S106 Planning agreements).

Following discussion, the Panel endorsed the proposed response to the Government on the consultation but requested that the answer to Question 51 be reconsidered to include aspects of the Borough’s needs in relation to the Crossrail project. Response – A paragraph has been added in answer to Question 51 of Appendix 1.

The words “and Parish projects” have also been added to the response to Question 1.

7.0 IMPLICATIONS

The following implications have been addressed where indicated below.

Financial	Legal	Human Rights Act	Planning	Sustainable Development	Diversity & Equality
✓	✓	✓	✓	✓	✓

Background Papers:

Detailed Proposals and Draft Regulations for the Introduction of the Community Infrastructure Levy: Consultation; Department of Communities and Local Government; 30 July 2009.

Ministerial Foreword - Detailed proposals and draft regulations for the introduction of the Community Infrastructure Levy – Consultation, July 2009

Report on CIL presented to Cabinet on 25 September 2008.