Real Estate Client Alert

The Community Infrastructure Levy: the devil is in the detail

It was only last October when the property industry was celebrating the demise of the planning gain supplement, but, less than 11 months later, its proposed replacement, the Community Infrastructure Levy (**"CIL"**) is looking decidedly unattractive. There is, in our view, a real risk that the introduction of CIL at this time could seriously damage an already fragile development industry.

Last week the Department for Communities and Local Government published more detail on CIL, but, despite the report's 96 pages, the Government is still failing to make concrete proposals to deal with some of the key questions around the application of CIL. In this Alert, we look at the main issues arising from the latest report, as well as some of the critical questions to which the Government urgently needs to provide answers. We begin by looking at the background and main characteristics of CIL.

12 August 2008

1. What is CIL?

The CIL is a standardised charge which local authorities will be permitted to levy on development in their areas to fund local and sub-regional infrastructure.

The charge is likely to take the form of a tariff levied on a fixed amount per square metre of new development or per dwelling. The levy will apply to most types of development, subject to a de minimis threshold, expected to cover minor household development.

It is envisaged that local authorities will be required to:

- prepare and publish a list of infrastructure projects to be funded by CIL. This will include specific projects needed, for example, for planned urban extensions as well as infrastructure not specifically identified e.g. new schools which are not allocated specific locations but are known to be needed;
- assess the availability of public funding; and
- develop a draft charging schedule setting out how the levy will be calculated.

The Government proposes that the charging schedule should not form part of the development plan, but should be examined by an independent person, whose report will be binding on the charging authority.

This is presumably to address the concern that had been expressed that the introduction of CIL would hold up the adoption of development plan documents (**"DPDs"**) and so lead to more uncertainty in the planning process. However, the property industry has consistently fought to have the charging schedule embedded in the DPD so that appeal rights would be available.

There must also be a concern, at least in some cases, that the charging schedule will require strategic environmental assessment under the SEA Directive. If that is right, then legal challenge (and more uncertainty) could be the result.

2. The end for s106?

The introduction of CIL will not remove the right of local authorities to require contributions through s106 obligations. First, the Planning Bill only **empowers** local authorities to use CIL. They may, instead, prefer to stick with the current arrangements under s106. Secondly, the Government is proposing to preserve the s106 mechanism to cover matters such as affordable housing and other site-specific matters. However, the Government's latest report fails to propose what parameters a more limited s106 will have and the mechanism for implementing this. Understandably, therefore, the property industry remains concerned about the risk of double-charging (through CIL and then s106 obligations).

3. Paying for CIL

CIL will be calculated on the date of the grant of planning permission: different rates will apply to different kinds of development, probably reflecting the current Use Classes Order. It will then, as a general rule, be payable within 28 days of the commencement of development. That said, the latest Government report also, albeit rather cryptically, refers to the possibility of requiring payments on account.

The "commencement of development" will, on current thinking, be as defined in s56 of the Town and Country Planning Act 1990. That includes minor development such as digging trenches etc.

We think the property sector should be pressing for an amended definition of "commencement of development" which excludes minor development and works of demolition. This would more accurately reflect the current practice under s106 agreements where developers' contributions are triggered only by the commencement of significant development.

Even more worrying is that phased payments are, it seems, to be the exception: where phasing is embedded in outline permissions and reserved matters approvals, CIL payments can be phased. Other than that, the Government is considering whether developers with liabilities over a certain amount may be able to pay by instalments. Regrettably, the Government has ruled out the possibility of individually negotiated payment schedules.

Finally, the Government has confirmed that payments calculated at the date of the grant of permission will be subject to indexation.

4. What are the key issues with the CIL?

One of the consistent complaints of the property sector, MPs and now members of the House of Lords, is that the Government has been reluctant to publish the detail of how CIL will operate. The provisions in the Planning Bill are very general and still no draft Regulations have been published. That is despite the fact that CIL is due to go live in the Autumn of 2009. Our concerns include that:

- the Government has not made concrete proposals for ensuring that the viability of particular developments will be taken into account. The latest report does acknowledge that different rates may be charged in different areas within local authority areas, but it has not articulated how additional costs associated with, for example, brownfield re-development or compliance with the Code for Sustainable Homes will, if at all, impact on CIL;

- there is no definition of the kind of "development" which will attract CIL: consideration needs to be given to whether, for example, CIL should be applied to certain renewables developments given the Government's policy on renewables as expressed in its Renewables Strategy as recently as June this year. The latest report acknowledges that there will be limited exemptions but gives no details;
- there is no definition of the "infrastructure" to which funds raised by CIL will be applied. The wider the definition, potentially the greater economic impact CIL is going to have. Whilst the property sector might support the inclusion of highways, water and some waste infrastructure, would it also be reasonable to include crematoria, hospitals or prisons?
- there is no provision for any repayment in the event that the planned infrastructure is not brought forward within a reasonable timescale;
- if land values continue to fall, are there adequate mechanisms in place to ensure that the charging schedule will be revised? The Government has said that the charging schedule should regularly be reviewed. What that means in practice e.g. what the frequency of such revisions will be, is unclear;
- until the Government sets out the scope of the more limited s106 obligations, there remains a risk of double-charging; and
- the optional nature of CIL could lead to inconsistency and unfairness. For example, if within one region some local authorities adopt CIL and others do not and the Regional Spatial Strategy identifies the need for sub-regional infrastructure, there is a risk that developers in the areas in which CIL applies will be required to make disproportionate contributions, given the wider scope as compared to s106 obligations.

These are some of our concerns. What is clear is that the timing of the introduction of CIL is looking very bad. As recently happened with the fiasco surrounding Government intervention on stamp duty, economic instability is being exacerbated by regulatory uncertainty. It was precisely the lack of predictability in the planning process that CIL was supposed to address.

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August 2008