CHANGES TO THE COMMUNITY INFRASTRUCTURE LEVY AND OTHER PLANNING REFORMS

The Government has published a package of planning reforms aimed at speeding up housing delivery in England. These reforms follow on from the Housing White Paper published in February 2017. Key proposals include changes to the Community Infrastructure Levy (CIL) imposed on developers. The Government has also published a draft updated National Planning Policy Framework. This briefing focuses on the CIL proposals and also considers some of the other planning reforms.

Key issues

- Reforms proposed to Community Infrastructure Levy but short of the wide-ranging reform recommended by the independent CIL Review Team.
- New draft National Planning Policy Framework published with key changes for viability assessment, housing need and delivery, affordable housing and Build-to-Rent development.
- New draft Planning Practice Guidance on viability assessment published.

COMMUNITY INFRASTRUCTURE LEVY

Proposals to reform the CIL regime are contained in a new Ministry of Housing, Communities and Local Government (MCHLG) consultation paper. They follow some of the recommendations made by the independent report of the independent Government-appointed CIL Review team published in November 2016 (see our briefing on the Housing White Paper and CIL report). The key changes proposed are discussed below.

Removing the Regulation 123 infrastructure list and pooling restriction

MHCLG has recognised that local authorities' Regulation 123 infrastructure lists never gave certainty as to exactly what CIL funds would be used for, and that there was often an incentive for authorities to put limited infrastructure on the list, allowing Section 106 Agreements to be used in more circumstances. MHCLG has have decided to abolish these lists and the associated restriction on entering into Section 106 planning obligations to fund infrastructure on the list. Instead local authorities would have to publish an annual infrastructure funding statement to identify future plans for using funds and identify how funds already received have been used.

A related proposal is to remove, in certain circumstances, the restriction from pooling funds for an infrastructure project, or type of infrastructure, from more than five planning obligations (set out in Regulation 123 of the CIL Regulations). These circumstances would be broadly:

- Where an authority already has a CIL regime in place (on the basis that the restriction was largely aimed at forcing authorities to establish a CIL regime);

- Where it would be too expensive for an authority to operate a CIL; or
- Where development is planned on several strategic sites, even where a CIL has not been adopted. Two alternative options have been proposed for removing the restriction. It could apply either:
  - Where the sites would together deliver a large proportion of homes needed in an authority area; or
  - By simply counting all planning obligations from a large site together as a single planning obligation.

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Developers and local authorities alike will no doubt be keen to see the last of Regulation 123 lists. However, without allowing some form of set-off of CIL liability against Section 106 obligations (as proposed by the CIL Review Team) or incorporating separate restrictions on the uses to which CIL funds can be put, these proposals seem to lead to a very real risk of double-counting: authorities could include infrastructure projects within their infrastructure funding projections used for setting their CIL Schedule, and then also continue to seek Section 106 planning obligations for the same infrastructure in respect of individual sites. It does not seem likely (contrary to MHCLG's view) that the Regulation 122 statutory tests for planning obligations will be sufficient to protect developers from double-counting in this way.

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Setting CIL rates based on the existing use of land

Currently, local authorities can set their CIL rates by reference to the type and scale of proposed development (e.g. different rates for residential and office development). MHCLG notes that the CIL regime does not allow local authorities to reflect increases in value of land in the rates of CIL. MHCLG therefore intends to allow local authorities to set charges based on the pre-existing use of the land (e.g. so that rates could differ for a change from *office* to residential, compared with a change from *industrial* to residential).

Recognising that complex development sites can be made up of different pre-existing uses, MHCLG proposes:

- Charging a single specified rate for large strategic sites;
- Charging for the whole site on the basis of a single use which makes up at least 80% of smaller sites; and
- Apportioning charges between existing uses on other complex sites (or deciding not to base rates on existing uses at all).

Apportioned charges would be based on the relevant floorspaces of different pre-existing uses, with ancillary uses treated in the same way as the main use (e.g. office car parking would be classed as office use). Where apportionment is suggested for smaller sites, it is not clear how this would work for sites with both multiple pre-existing uses and differing rates for mixed use future development. In any event, the potential for complexity arising in determining the CIL liability for complex sites is clear.

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Indexation of CIL Rates

In a further effort to build land value increases over time into CIL rates, MHCLG proposes that indexation of CIL rates (between CIL Schedule adoption and grant of permission) would no longer be based on development costs using the BCIS index but on the following:

- For residential CIL rates: the House Prices Index (HPI); and

- For non-residential CIL rates: either the Consumer Prices Index (CPI) or a combination of CPI and HPI.

Indexation on the new basis would apply as from entry into force of the implementing regulations.

Strategic Infrastructure Tariffs

MHCLG proposes that Combined Authorities or joint committees of authorities should be able to establish a Strategic Infrastructure Tariff (SIT) similar to the London Mayoral CIL where they have planning powers. This would be used to fund a specific piece of infrastructure or for mitigation works across local authority boundaries.

The provisions will need to be carefully drafted to ensure unreasonable demands are not placed on developers (i.e. SIT, CIL and planning obligations) and that double-counting is avoided. This could be similar to the credit system that operates in London for Mayoral CIL and Crossrail planning obligations.

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Other related reforms

In addition to various technical clarifications, a number of other associated reforms to CIL are contained in the consultation paper including:

- Preparation of CIL Schedules: Removal of the current prescriptive requirements for authorities to conduct two rounds of formal consultation on the CIL schedule, and replacing it with a requirement for a statement identifying how the authority will conduct "an appropriate level of engagement".
- Grace Period: Establishment of a grace period where development subject to CIL is commenced before service of a Commencement Notice.
- Recovery of Section 106 monitoring costs: Allowing CIL to be used for the costs of monitoring compliance with section 106 agreements.
- Offsetting of CIL across development phases: Allowing offsets in CIL liability between different phases, where a pre-CIL approved development is amended after CIL has been put in place.

Further reform?

The proposals fall somewhat short of the wide-ranging reform recommended in the CIL Review Team's report. In particular, the following recommendations have not been taken forward at this stage:

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- Establishing a low level Local Infrastructure Tariff (LIT) with developer contributions set on a national basis; and
- Allowing Section 106 agreements for larger developments to be used not only for site-specific mitigation but for a wider variety of mitigation purposes, with a possibility for payments-in-kind and offsetting of LIT payments against Section 106 contributions.

However, the Government is "continuing to explore" whether additional reform is warranted in due course. The consultation paper can be found here. Responses to the consultation paper can be made until 10 May 2018.

UPDATED NATIONAL PLANNING POLICY FRAMEWORK

A draft updated National Planning Policy Framework (NPPF) has been published for consultation. The draft not only takes forward proposals from the Housing White Paper, but also consolidates recent policy from Written

Ministerial Changes and caselaw on planning interpretation since the NPPF was first introduced in 2012.

Key changes include:

- 5-yearly Plan Review: Reflecting the requirement for local plans to be reviewed every 5 years which comes into force on 1 April 2018 under the Town and Country Planning (Local Planning)(England) Regulations 2012.
- Presumption in Favour of Sustainable Development: Clarifying the operation of the presumption in favour of sustainable development. Most significantly the presumption is clarified to operate when "*the most important policies* for determining the application are out-of-date" rather than simply when "relevant policies" are out-of-date.
- Development contributions: New express policy requiring development plans to set out the authority's expectations for developer contributions and requiring them to avoid setting contributions at a level which would cause development to be unviable.
- Viability Assessments: A new approach focusing on viability assessment at the development plan-making stage. A policy against requiring developers to submit viability assessments where proposed development accords with the development plan. See also below on new viability guidance.
- Housing Need Calculation: A new standardised method for calculating local housing need.
- New Housing Delivery Test: A new housing delivery test which triggers operation of the presumption in favour of sustainable development where:
  - An authority cannot show a 5 year deliverable housing supply (as previously applicable except with strengthened provisions for increasing the supply figures by way of 'buffers'); or
  - Delivery of housing in an authority area falls below specified percentages of the LPA's housing requirements (25% from November 2018, 45% from November 2019, 75% from November 2020). These provisions do not yet appear to be properly implemented in the drafting of the updated NPPF.
- Non-implementation of earlier Housing Schemes: Non-implementation of previous consented schemes on a development site will be a material consideration in determining further housing applications for the site. MHCLG is still considering whether the particular developer's record in delivering housing schemes should also be taken into account.
- Commencement of Development: LPAs should consider a planning condition requiring development to commence within two years except where this would affect viability or deliverability.
- Housing density: In areas with a shortage of land for housing, LPAs should include policies for minimum housing density standards for urban centres that are well served by public transport.
- Build-to-Rent (BTR): The BTR sector is now formally recognised and supported in the draft NPPF. A definition of BTR is included in the glossary and there is a specific policy requirement for authorities to plan for the provision of properties for rent.
- New inclusions in the 'Affordable Housing' definition (relevant for developer contributions): The draft NPPF adds:

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  - *Affordable Private Rent* – This will apply to BTR properties let at least 20% below market rent, with the discount to continue indefinitely or be recycled to alternative affordable housing provision. Landlords will not need to be registered providers for this category to apply.
  - *Starter Homes* **–** to be aimed at those purchasing a home with maximum household incomes of £80,000 (£90,000 in Greater London). This is accompanied by a general policy requirement for at least 10% of homes on major housing development sites to be for affordable home ownership (with an exemption for BTR homes).
- "Agent of Change" principle introduced: A new principle is established that developers will be responsible for identifying and solving noise problems arising as a result of development proposals in proximity to venues that could cause noise impacts.
- Green Belt land: Green Belt protections are broadly maintained. There is a new requirement to ensure all other reasonable options have been fully examined before determining whether 'exceptional circumstances' exist that justify changes to the Green Belt boundaries (and also taking into account a new set of criteria). Also, where Green Belt land is to be released, previously-developed land, or land with good accessibility, should be considered first. Brownfield land might also be considered appropriate an location in the Green Belt for new affordable housing where this would cause no substantial harm to openness.
- Re-allocating land: LPAs should re-allocate land where there is no reasonable prospect of development coming forward for an allocated use.
- National Infrastructure Commission: Specifying that National Infrastructure Commission-endorsed recommendations will become material considerations in planning decisions.

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PLANNING PRACTICE GUIDANCE ON VIABILITY

MHCLG has issued new draft planning practice guidance on viability assessment. It is intended that this guidance would be used not only for development plan-making, but also for Section 106 planning obligations and community infrastructure levy.

Key aspects in relation to the application to developer viability assessments include:

- A recommendation that review mechanisms should be incorporated into Section 106 Agreements for large or multi-phased schemes to enable the capture of significant increases in development value over time, along with details of how any increases should be apportioned between the developer and LPA.
- Encouragement for LPAs to use the 'existing use value plus a premium (EUV+)' method in order to benchmark land values.
- A recommendation for a general assumption of 20% of Gross Development Value to be used as a suitable return for developers in the viability assessment. This might be altered for other development types such as BTR or for affordable housing.

Viability assessments should be made publicly accessible other than in exceptional circumstances.

OTHER REFORMS

A number of other reforms are contained in the reform package including:

- Completion Notices: The following proposals will be implemented when Parliamentary time allows:
  - Removing the requirement for the Secretary of State to approve service of a completion notice by the LPA; and
  - Allowing LPAs to serve a completion notice before the deadline for commencement of development has passed (but only where works have begun).
- Planning Appeal Fees: A fee will be introduced for making planning appeals, with a consultation on the detail to follow later this year.

The consultation and draft updated NPPF can be found here. Responses to the consultation can be made until 10 May 2018.

CLIFFORD
CHANCE

CONTACTS

Nigel Howorth
Partner, Environment & Planning Group

T +44 20 7006 4076
E nigel.howorth @cliffordchance.com

Michael Coxall
Senior Professional Support Lawyer, Environment & Planning Group

T +44 20 7006 4315
E michael.coxall @cliffordchance.com

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

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