



## Planning Briefing April 2008

### **The New Planning Bill**

Ellisons' Solicitor and Planning Specialist *Tom McPhie* provides details of the government's latest proposals for Developer contributions towards the cost of infrastructure

## 1) Introduction

It would be fair to say that the planning system is currently experiencing an unprecedented amount of alteration.

The Act that most of us will know is the Town and Country Planning Act 1990, which had been pretty stable (apart from some tinkering in 1991) for more than a decade.

That all changed with the Planning and Compensation Act 2004, which was introduced onto the statute book as the vehicle for sweeping changes, most of which were to be introduced via further (secondary) legislation, i.e. statutory instrument, after lengthy consultation.

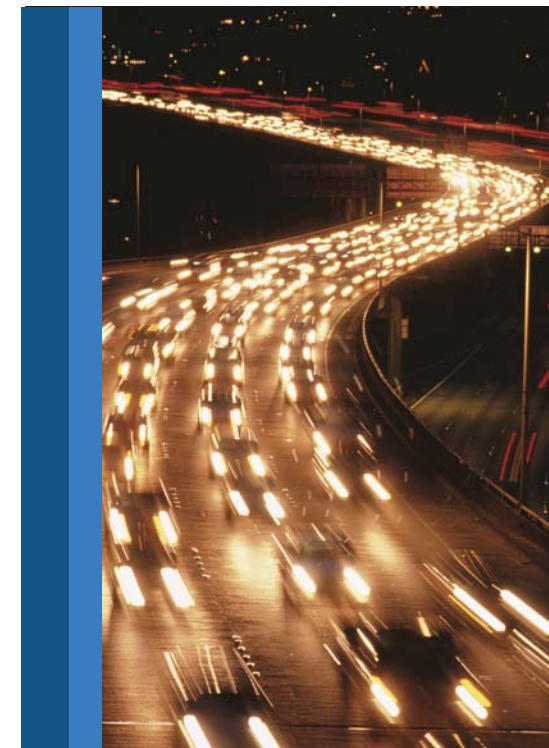
The 2004 Act set up the process for totally changing the way that development land is identified by local planning authorities and then allocated for potential development (i.e. by the introduction of the local development framework and local development documents etc etc). It also had as a central aim the complete re-working of the way that infrastructure improvements funded by developments are dealt with.

We are all, I'm sure, very familiar with the Section 106 Agreement that developers (or rather landowners) have traditionally been required to enter into before getting their hands on a planning permission. The 106 Agreement generally required the usual measures to mitigate against the impact of the development (for example - highway infrastructure improvements, the payment of an education contribution etc etc) to be funded by the developer and it also required provision to be made for a percentage of the dwellings to be affordable dwellings, subject to thresholds.

The government fanfare that announced the introduction of the 2004 Act effectively demonised the Section 106 Agreement as being too slow and of holding up developments (which was a common complaint of developers). The apparent cure to speeding up the process was

meant to be the Planning Gain Supplement (PGS), which, when it was brought into effect via secondary legislation, would put an end to the developers' woes.

However, the concept of the PGS lasted a little over 2 years and was finally kicked into obscurity on 9 October 2007, when the Minister of State (Yvette Cooper) gave a statement saying that the government intended to bring in further planning reforms via the new Planning Bill, and that that Bill would not bring into effect the PGS but would instead introduce to us all the new "statutory planning charge" to enable Councils to "capture greater levels of planning gain to support new infrastructure and housing". It was further announced that the new statutory planning charge will be "in addition to Section 106 Agreements". So, after at first receiving a good kickin' back in 2004, the Section 106 Agreement received a warm welcome back into the arms of the government.



## 2) The New (Proposed) Regime – Part One

More details on the new statutory planning charge have emerged recently from the government. For a start it is now to be known as the Community Infrastructure Levy (or CIL).

The first document to emerge was the “Community Infrastructure Levy – Initial Impact Assessment” published by the Department for Communities and Local Government (DCLG) in November 2007.

Some key paragraphs from that document are as follows:

- “The CIL... [will] enable local authorities to apply a levy to all new developments (residential and commercial) in their area, subject to a low de minimis threshold. Where appropriate the local planning authority would use a CIL to supplement a negotiated agreement, which may be required for site specific matters, including affordable housing”. My comment – whereas most planning gain agreements are for residential developments, the new CIL will apply to all commercial developments as well, subject to thresholds
- “The CIL [will] break the current planning obligation regime’s required link between a contribution and a particular development”.

My comment – whereas planning obligations had to pass a number of policy tests to be lawful (i.e. they effectively had to be a package of measures to mitigate against the impact of the specific development to which they related), that will no longer be the case with the CIL. A development that does not require a Section 106 Agreement may, nevertheless, be caught by the new CIL regime

- “The CIL should be factored into land prices for development of residential and commercial property. Robust local planning authority processes and ongoing consultation with developers in their area should mitigate risks around pass-back into the land price for land transactions which are already underway when the CIL takes effect”. My comment – we’ll see !!

The November 2007 document also has a paragraph titled “Certainty”, which says that the introduction of the CIL: (a) **could** simplify the planning process, achieve greater consistency of funding for infrastructure provision across local authorities and reduce the time that it takes to negotiate a planning obligation; and (b) that it **could** speed up the planning application process. I’m not sure how much comfort developers will draw from that level of certainty!

## 3) The New (Proposed) Regime – Part Two

A second document was produced by the DCLG in January 2008, which had the simple title of “The Community Infrastructure Levy”. This is effectively a companion document to explain the CIL provisions as they appear in the new Planning Bill.

The companion document makes it clear in the Introduction that local planning authorities will have the choice whether or not bring the new CIL provisions into effect in their area (it talks of regulations being brought into effect to “empower” local councils to apply a CIL on developments in their area) but that if they do, “the level of CIL must be set to ensure it supports and does not prevent development”. Quite clearly, the government does not want the CIL to put in any jeopardy its stated priority that 3 million new homes are provided by 2020. But the government has said (at paragraph 24 of the document) that it “believes that [CIL] has the potential to raise hundreds of millions of pounds of extra funding for infrastructure”.

The document refers to the vital role that good infrastructure has to play in ensuring that new homes and jobs are sustainable, in which case “it is conceivable that in many areas a substantial proportion of [CIL] receipts will be spent on transport infrastructure”.

CIL is considered by the government to be a better mechanism to ensure that infrastructure costs are evenly proportioned on multi developer sites. There are, apparently, problems with such sites whereby either the first developer or the last developer end up contributing disproportionately to the costs on infrastructure required in the area. A standard charge such as CIL will spread the burden more fairly and evenly, and it will also result in a more predictable flow of income to the authority.

Key features of the new CIL are as follows:

- the regulations (that will bring CIL into effect) will prescribe the procedure to be followed in setting the charge and a requirement to report on how the money raised has been spent. The way that CIL is to be charged is still to be consulted on and determined
- authorities seeking to charge CIL will need to undertake 2 main steps, which are: (a) identifying what infrastructure is needed and how much it will cost; and (b) working out what contribution each development should make to that cost
- the CIL regulations must ensure that:
  - (a) CIL is payable in respect of land when development is commenced in reliance on planning permission
  - (b) liability to pay CIL attaches to the owner or developer of land at the time when CIL becomes payable in respect of it
  - (c) the amount of CIL is determined at, or by reference to, the time when planning permission first permits the development as a result of which CIL becomes payable
- the government’s preference is that the traditional planning obligation will still be used for affordable housing delivered on-site, but affordable housing is included within the definition of “infrastructure” in the Bill so that affordable housing could be included in CIL if evidence later shows that it is necessary. Infrastructure is defined in the Bill as including:
  - (a) roads and transport facilities
  - (b) flood defences
  - (c) schools and other educational facilities
  - (d) medical facilities
  - (e) sporting and recreational facilities
  - (f) open spaces
  - (g) affordable housing





- CIL spending will need to be underpinned by a costed list of infrastructure projects that are needed to support development
- a proportion of CIL may be used to fund “sub-regional infrastructure”, which are large infrastructure projects (such as hospitals, larger transport projects or waste facilities) that could span more than one local authority area. The regulations could contain a number of powers aimed at ensuring that CIL can be an effective contributor towards sub-regional infrastructure
- CIL may (for that read “will”) make reference to the likely increase in value arising from the grant of planning permission
- if the level of CIL set by a charging authority does not meet the government’s objectives (which effectively will mean that it’s set too high and is stifling development rather than helping it move forward) then the regulations will reserve a power for the Secretary of State to cap the amount of CIL that the authority can raise
- for those authorities that choose not to introduce CIL to fund local infrastructure, planning obligations (i.e. Section 106 Agreements) will continue as the only mechanism available to the authority to secure developer contributions

- for those authorities that do introduce CIL, planning obligations will still be used for site specific matters such as access improvements into the site, on-site archaeology, the protection of endangered species and (for now at least) affordable housing
- payment of CIL will be front-loaded, i.e. payable at the point that development is commenced
- it’s possible that CIL may be payable in installments
- failure to pay CIL when it’s due may result in development being stopped
- failure to pay CIL on time will mean that the CIL liability is subject to interest
- there will be criminal offences relating to:  
(a) the evasion or attempted evasion of payment of CIL; and (b) the supplying of misleading information for the purpose of avoiding a CIL liability
- the government expects to formally consult on the draft CIL regulations in Autumn 2008, with a view to those regulations being finalised by Spring 2009 ready to be brought into effect

#### 4) Conclusions

The Bill still has to undergo the usual route through both houses of parliament (at the time of writing this, it’s still in the House of Commons), and so there probably will be further changes made before it finally makes it onto the statute book, but the above overview of things is unlikely to alter very much.

But one thing is clear, as authorities will be given the option to introduce CIL into their area (and with the amount of work involved in setting the level of CIL, it would be no surprise if quite a few chose not to), developers are going to be faced with different regimes depending on the location of their development sites. I’m not sure that that helps to create consistency!



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#### About the author:

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- drafting planning agreements
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