Changes to developer contributions?

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It can't have escaped your notice that Theresa May recently announced the publication and consultation in respect of a revised National Planning Policy Framework. However, at the same time, the Government, somewhat under the radar, has also published a separate consultation on its proposals for change to the developer contribution system.

The consultation can be traced back to a November 2015 review, commissioned by the Government, into the Community Infrastructure Levy (CIL) and its relationship with planning obligations.

This review was published in February 2017 and concluded that developer contributions post adoption of the CIL regime were not as "fast, simple, certain or transparent" as had originally been intended.

The reforms proposed in the new consultation are aiming to improve the developer contribution system making it more transparent and accountable, thereby benefitting the local authorities who administer them, the developers who pay them and the communities where development takes place. But are they likely to achieve this?

Earlier this month, the Ministry of Housing, Communities and Local Government (as it is now called) published the results of a study that it had instructed, carried out by a panel of eminent academics. The study examined *"The Incidence, Value and Delivery of Planning Obligations and Community Infrastructure Levy in England in 2016-17"* (financial year). The last time one of these studies was carried out was 2011-12 FY – so this is the first planning contributions study carried out in a post CIL world. Some of the key findings were:

- Despite the introduction of CIL in 2010, 85% of planning obligations agreed come from negotiated S106 agreements. At the end of 2016-17, 133 authorities out of a possible 339 were charging CIL.

- CIL was proving most effective on small, uncomplicated sites in areas of high demand. Outside these high demand contexts there remains a strong residual preference for S106. A large part of this is relates to the site-specific association between development and planning obligations agreed to make it acceptable. When considered in isolation CIL breaks this connection.

- Where the scale of development is significant or the site was complex and/or occupied a strategically

significant location, CIL was rarely adequate to mitigate site-specific issues, and was often accompanied by a tandem S106 agreement.

- There is evidence that negotiations relating to S106 agreements, including agreeing viability, can add delays to the planning process. But CIL takes time to introduce, and thereafter update, and is a relatively inflexible alternative.

In summary, the study concluded that we are faced with a discretionary planning system where developer contributions are intimately bound up with site-specific context, mitigation and development viability.

The government firmly believes that certainty and transparency in the planning system will up the house building rates. Whilst some believed that CIL might be abolished, it is also clear that the government are currently seeking to retain it, but make it more attractive and user friendly, both for LPAs and developers.

Accordingly, the government has launched a consultation, entitled "*Supporting housing delivery through developer contributions"* which contains a raft of proposals to shake up the system. I'll briefly take you through some of the key proposals, but would urge you all to read the consultation and engage.

Changes to CIL charging schedules

The current system requires two consultations on proposed CIL rates to be undertaken followed by a statutory examination in public before a schedule can be adopted. To speed up the process, the Government proposes to replace the current statutory formal consultation requirement with a simple requirement for the local authority to publish a statement confirming how they have sought the appropriate level of engagement. This will speed up both the initial adoption of CIL and revising the charging schedule to meet changing infrastructure needs.

Lifting the s106 pooling restriction

Regulation 123 currently prevents local authorities from using more than five planning obligations secured through s106 Agreements to fund a single infrastructure project. It was meant to incentivise local authorities to introduce CIL and to reduce the need to rely on 106 obligations. The CIL review identified that the pooling restriction could have distortionary effects. To address this, the Government is proposing to remove the pooling restriction in areas that –

1. Have adopted CIL;
2. Where land values are so low that it cannot feasibly be charged; or
3. Where development is planned on several strategic sites.

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This in itself introduces further layers of uncertainty. Personally, I would actually advocate removing the pooling restriction altogether. Provided the S106 obligation meets the Regulation 122 tests for planning obligations, why do we need the pooling test at all? The reality, as we have all experienced, is that local authorities get round the pooling restriction anyway by drafting the use of planning obligations in a very detailed and specific manner in their S106 agreements.

Changes to CIL rates

The current regulations allow for different CIL rates to be set –

(a) within different areas of a charging authority's boundary; and

(b) on the basis of the type and scale of the proposed development.

However, the review highlighted that this meant that the rates a charging authority set does not necessarily reflect the increase in land value which can occur once a planning permission has been granted. To address this the proposed reforms are seeking to allow CIL charging schedules to be set based on the existing use of the land. It is considered by the Government that this will better capture an amount which represents the infrastructure needs and the value generated through planning permissions. However, bringing existing land values into the CIL equation is quite possibly a dangerous game. It could for example, incentivise some landowners to simply "landbank" and wait for what they believe is an optimum moment. It also introduces some uncertainty for the developer as to what CIL might be payable, which goes against the whole rationale behind the introduction of CIL in the first place. My view, therefore is that it could be counterproductive to the Government's desire to build more homes

Indexation

It is often forgotten in my experience that CIL is indexed on an annual basis. CIL indexation rules could also be changed so that rates are pegged to house price inflation rather than build costs (and therefore hopefully rise more slowly). I have seen some scary increases recently, which can catch an unwary developer out who has based their appraisal on the rate in the charging schedule.

Introduction of a Strategic Infrastructure Tariff

Currently, as I am sure you are all aware, the Mayor of London is able to charge CIL in addition to the London boroughs. This is used to collect funding towards travel infrastructure and has proved successful. Following this success the Government is proposing to allow combined authorities and joint committees, where they are looking to fund a piece of strategic infrastructure, to introduce a separate tariff.

Whilst the proposed changes at the moment focus on changes to local powers, the consultation mentions that

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the proposed reforms could act as a springboard for further reform. This seems to be a thinly veiled threat that if developers and LPAs cannot sort out the system themselves the government will do it for them! One such proposal being floated is the potential for a national and non-negotiable system of tariffed developer contributions for both infrastructure and affordable housing.

A nationally set tariff would cut out all negotiation when it comes to developer contributions. On the one hand this could create certainty and speed up housing delivery, but on the other it could create a barrier to future housebuilding. It reminds me somewhat of what happened with PD rights for changes of use a while back – where the government took control away from local authorities by allowing all sorts of changes of use to residential when it felt local authorities were not doing enough to deliver housing.

The consultation on the draft changes to developer contributions as well as the proposed changes to the NPPF runs until 10 May 2018. We could encourage you to engage.

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