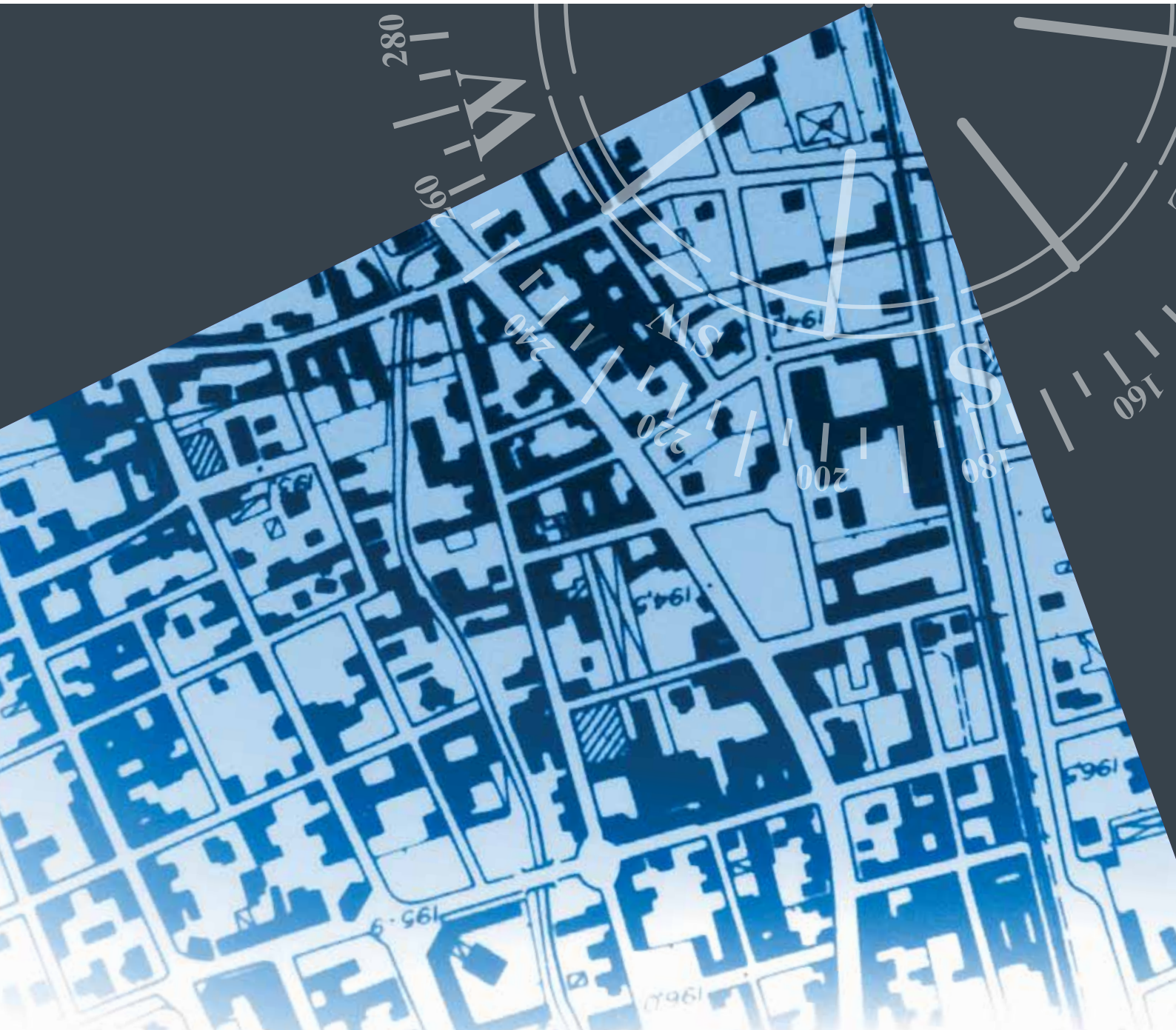


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Capturing Planning Gain – The Transition from Section 106 to the Community Infrastructure Levy



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The background of the slide is a purple-tinted aerial map of a city grid. It shows a dense arrangement of building footprints, streets, and some green spaces. Several street names are visible, including '191.5', '192.5', '194.3', and '196'. The text is overlaid on the upper left portion of the map.

Capturing planning gain – The transition from Section 106 to the Community Infrastructure Levy

Report for Royal Institution of Chartered Surveyors

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A report for Royal Institution of Chartered Surveyors

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Executive Summary

The UK development control system has always included the potential for local authorities to require developers to mitigate the site specific negative impacts of their activities. Planning agreements normally place obligations on developers as a way of accessing part of the development value created by the granting of planning permission. The imposition of planning obligations is intended to make what would otherwise be unacceptable development acceptable in planning terms (Fourt, 2011). Most agreements are currently made under Section 106 of the Town and Country Planning Act 1990 (S106). However, a new system for capturing planning obligations is being developed. The Community Infrastructure Levy came into force in April 2010 (DCLG, 2011a). It allows local authorities in England and Wales to raise funds from developers undertaking new building projects in their area and the money can be used to fund a wide range of infrastructure that is needed as a result of development. This research explores the issues arising in the transition to the new system.

Key findings

- The Community Infrastructure Levy, with a scaled back S106, is broadly welcomed by local authorities and most local authorities are planning to introduce a CIL within the next three years.
- The main finding from the research is that, whilst seen as a positive change, there is still a lot of uncertainty about the CIL – how to develop the evidence base, how to determine an appropriate charging schedule, how to use S106 alongside the CIL and how to collect the CIL funds.
- It is apparent that, although intended to simplify the planning system, the CIL with a scaled back S106 will be complicated to develop, implement and collect.
- Local authorities are looking at the CIL frontrunners, who are receiving support, to see how to develop their own CILs. There is considerable discussion between different local authorities to share knowledge.
- All participants in the research were keen to know what other local authorities were doing and what issues they were grappling with. They raised the same concerns about the transition to the CIL.
- One was about the economic viability of charging a CIL and the impact on development, particularly where values vary within a district.
- There is particular concern in London about how the Mayoral CIL will impact on viability, as it will be charged along with individual Borough CILs and S106.
- There is concern that there will be a funding gap for providing infrastructure as CIL will not meet all costs. CIL will not raise sufficient funds to pay for everything and there are concerns that expectations of what it can deliver are unrealistic.
- There is a lot of uncertainty about the interface between S106 and CIL and some concerns that less affordable housing will be secured through S106 once CIL is implemented.
- There have been suggestions of using the CIL to collect contributions for affordable housing, but this was largely criticised by research participants, mainly because it would not deliver on site affordable housing and would not support the development of mixed communities.
- Developing a CIL is a complex process and many local authorities, whilst welcoming the CIL, felt that the system will be very complicated, even though it was intended to simplify the planning process.

1.0 Introduction

Planning agreements are the outcomes of negotiations between planning authorities and those with interests in land ('developers') about matters related to developments (Crook et al., 2010). These agreements, most of which are currently made under S106 of the Town and Country Planning Act 1990, are 'struck' alongside the process of securing planning permission (ibid). Agreements normally place obligations on developers as a way of accessing part of the development value created by the granting of planning permission to make development acceptable in planning terms when it would otherwise be unacceptable. This value is used to provide for infrastructure and other wider needs associated with the development (ibid), such as to fund education contributions and open space.

A new system for capturing planning gain is being developed. The Community Infrastructure Levy (CIL) came into force in April 2010 (DCLG, 2011a). It allows local authorities in England and Wales to raise funds from developers undertaking new building projects in their area and the money can be used to fund a wide range of infrastructure that is needed as a result of development (ibid).

This research explored the issues arising in the transition to the new system.

1.1 Aims of the research

The aim of this research was to explore the changing use of S106 to secure planning gain and the issues that are arising in the transition to a new system where the Community Infrastructure Levy will be used alongside a scaled back S106.

Research questions

1. What has the impact of the property market downturn been on the securing of planning gain through S106?
2. How is the system for capturing planning gain changing?
3. What preparatory work is being carried out for the introduction of the Community Infrastructure Levy?
4. What issues are arising in the interface between S106 and CIL?
5. What might be the impact on the delivery of affordable housing?

1.2 Methods

A review of existing literature, policy and legislation was conducted to synthesise existing material relating to S106, CIL and the delivery of affordable housing through the planning system and the downturn, including analysis of available data. An online survey was sent to all local authority planning departments and County Councils asking questions about S106 and CIL. The response rate was 13%. Once the results had been analysed, in depth telephone interviews were conducted with a sample of respondents to discuss the issues raised in more depth. The research was conducted in the summer of 2011.



2.0 Background – Collecting Planning Obligations

The objective of development control in the UK is both to enable and structure new development that is beneficial to the economy and the locality (Burgess et al., 2011).

However, such development will at the same time often generate negative impacts both on the immediate locality and on services and infrastructure more widely. This in turn can result in local opposition to development. An important aspect of the land use planning system has therefore been to mitigate these negative impacts and to provide benefits, especially to the local community.

The UK development control system has always included the potential for local authorities to require developers to mitigate site specific negative impacts of their activities. Since 1990, local planning authorities (LPAs) have had powers to require contributions from developers both in the form of affordable housing and through financial contributions. The imposition of planning obligations is intended to make what would otherwise be unacceptable development acceptable in planning terms (Fourt, 2011). Planning obligations may fund infrastructure provision but are also used to deliver affordable housing through the planning system. Nationally (before the downturn) more than half of all new affordable housing provided by local authorities and Registered Social Landlords (RSLs) was developed on S106 sites and 75% of residential developments of more than 10 units were subject to S106 Agreements (Monk et al., 2008).

2.1 The value of planning obligations

A recent study analysing the value of planning obligations found that the obligations secured has increased since 2005-06 (Crook et al., 2010). Those secured in 2007-08 were worth £4.9bn, of which approximately half was for new affordable housing (ibid). This represents an increase of just under a quarter, compared with the £4bn negotiated in 2005-06. It is, however, smaller than the 57% increase experienced between 2003-04 and 2005-06, reflecting in part the smaller rise in development values in the more recent period (ibid). Variations still persist between LPAs in the numbers of agreements and value of obligations. Evidence suggests that variations in development pressure and land values rather than LPA policy and practice now explain these variations. The total value of all obligations agreed in 2007-08 in England was £4.9bn, an increase of 24% (nominal) on 2005-06. Of this:

- £2.6bn was for affordable housing (increase of 31%);
- £235m was for open space (9% increase);
- £462m was for transport and travel (28% increase);
- £192m was for community and leisure facilities (155% increase);
- £271m was for education (76% increase);
- £183m was for other obligations (60% increase);
- £16m was for obligations entered into directly with county councils related to waste and minerals permissions (60% increase);
- £900m was for land contributions for uses other than for affordable housing (much of this was secured in London) (Crook et al., 2010).

The total value of direct payment obligations per LPA agreed in 2007-08 was £3.55m (£2.67m in 2005-06) (Crook et al., 2010). Standard charging was widely used (e.g. 63% for affordable housing; 81% for open space; 75% for education); 86% of LPAs pool charges (including 11% across the LPA and across the sub-region); and 12% of LPAs used a defined 'tariff style' agreement (ibid).

2.2 The GFC and property market downturn

Following the collapse of the sub-prime mortgage market in the United States, the global financial system has undergone a period of unprecedented turmoil (Adair et al., 2009). In relation to property performance, the IPD All Property Total Return Index for the UK was -24% for 2008 and the SCS/IPD Index for Ireland was -34.2% for 2008. House prices have also fallen dramatically since early 2008. The downturn in both the commercial and residential markets allied with the limited availability of credit and tightened lending criteria have contributed to a dramatic fall in both transactions and development activity.

A fundamental concern with respect to the S106 approach has been the extent to which contributions depend on levels of market activity and on the economic environment (Burgess et al., 2011). The recession has negatively affected both these factors – and therefore hampered effective delivery.

2003-2004 to 2007-2008 was one of sustained development pressure and increased land and development values (Crook et al., 2010). These were favourable circumstances for LPAs when negotiating with developers to mitigate the consequences of their proposals, but that period has now been succeeded by one of lower development pressure and falling development values (ibid).

A recent study found that as a result of the property market and economic downturn, LPAs taking part in the research had more instances in which they had to threaten developers with legal proceedings because they were increasingly failing to pay their contributions on time (Burgess et al., 2011). LPA officers were spending more time chasing payments and there were more breached

agreements than ever before. A number of LPAs said that they were pursuing late payments through legal channels, often for the first time. Some were also putting notes on the local land charges register if there was an outstanding contribution on a site, to try to ensure that the obligation could be pursued if the site was sold on so that payment would rest with the new owners in the future (ibid).

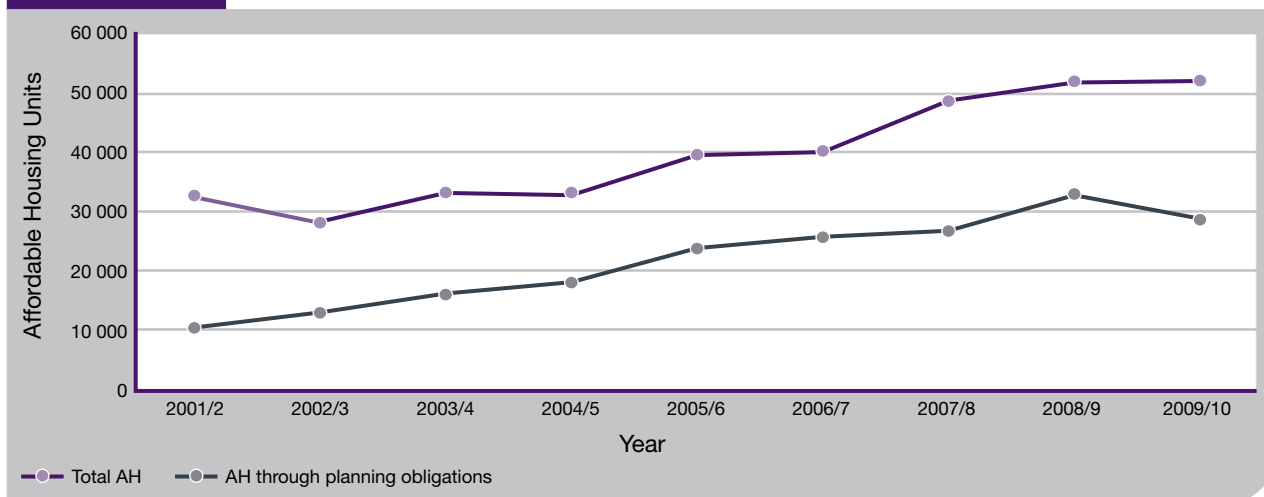
Some LPAs had seen increased amounts of affordable housing delivered as developers sold whole developments to RSLs since the downturn (ibid). Some schemes that had a proportion, for example, 30%, of the housing agreed to be affordable in the S106 were being sold to RSLs so in fact they will be 100% affordable. Some developers were building the affordable housing first to help their cash flow. There were a few instances of reducing the amount of shared ownership units as these have become more difficult to sell recently and instead increasing the amount of social rent, or exploring 'Rent to Buy'.

Many of the case studies LPAs had re-negotiated payment schedules for financial contributions both formally and informally since the downturn, often moving triggers from early stages such as on commencement to later stages in the development (ibid). Developers had asked to re-negotiate lower contributions on existing agreements, arguing that schemes were no longer viable since the downturn. In only one case had the LPA accepted a lower contribution. However, most said that they were "taking a hard line" and refusing to reduce contributions. Any renegotiation would require developers to submit viability studies at their own cost and also to pay for the LPA's due diligence on their submitted study.

Even before the downturn, a new approach was proposed to capture planning gain, the Community Infrastructure Levy, which would be implemented alongside a scaled back S106.

Figure 1

Total affordable housing delivered and proportion secured through planning obligations.



Source: HSSA, DCLG

2.3 A shifting policy environment – the Community Infrastructure Levy

The Community Infrastructure Levy (CIL) is a new planning charge that came into force on 6 April 2010 through the Community Infrastructure Levy Regulations 2010 (now amended by the Community Infrastructure Levy (Amendment) Regulations 2011 (DCLG, 2011).

The CIL came into force in April 2010. It allows local authorities in England and Wales to raise funds from developers undertaking new building projects in their area (DCLG, 2011). The money can be used to fund a wide range of infrastructure that is needed as a result of development. This includes new or safer road schemes, flood defences, schools, hospitals and other health and social care facilities, park improvements, green spaces and leisure centres (ibid).

The Community Infrastructure Levy charging authorities in England will be district and metropolitan district councils, London borough councils, unitary authorities, national park authorities, The Broads Authority and the Mayor of London (DCLG, 2011). In Wales, the county and county borough councils and the national park authorities will have the power to charge the levy. These bodies all prepare development plans for their areas, which are informed by assessments of the infrastructure needs for which the levy may be collected (ibid).

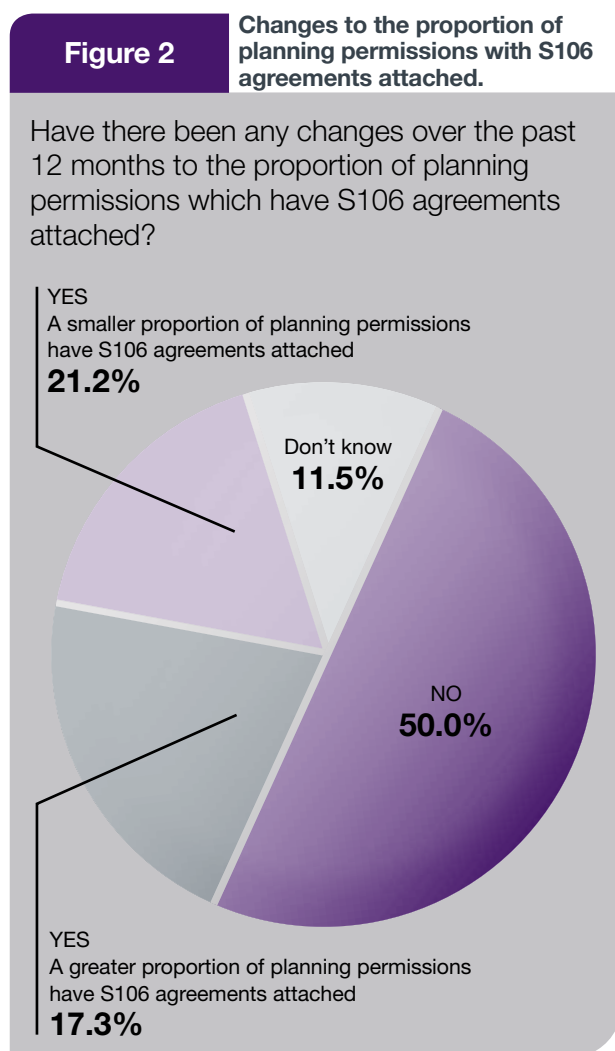
The Community Infrastructure Levy is intended to be fairer, faster and more certain and transparent than the current system of planning obligations which has been accused of causing delays as a result of lengthy negotiations (DCLG, 2011). Levy rates are intended to be set in consultation with local communities and developers and it is anticipated that CIL will provide developers with much more certainty 'up front' about how much money they will be expected to contribute (ibid).

The introduction of the levy has the potential to raise an estimated additional £1bn a year of funding for local infrastructure by 2016 (DCLG, 2011). The levy is expected to make a significant contribution to infrastructure provision (ibid). The levy is intended to fill the funding gaps that remain once existing sources (to the extent that they are known) have been taken into account. Local authorities will be able to look across their full range of funding streams and decide how best to deliver their infrastructure priorities, including how to utilise monies from the levy. This flexibility to mix funding sources at a local level is intended to enable local authorities to be more efficient in delivering the outcomes that local communities want (ibid).

One issue raised by commentators such as the National Housing Federation (NHF) is a concern that the amount of affordable housing may be reduced with the introduction of CIL (Ashworth and Watt, 2011). While the NHF broadly supports the CIL as a means of simplifying the planning system, it has pointed out that there are features of the system as currently set out that "will tend to prejudice the delivery of affordable housing" (ibid, page 1). When setting CIL, charging authorities must consider the effect of the planned CIL level on the viability of development. In the absence of target numbers of affordable homes to be delivered by the planning system, it is difficult for local authorities to establish whether any particular CIL level will affect the viability of development including an affordable housing contribution. A review of published draft CIL charges suggested that in some cases affordable housing has been ignored or dealt with in a summary fashion, while the majority of draft schemes appear to assume that the chosen CIL level will reduce affordable housing delivery (ibid, page 4). The NHF believes that there should be an explicit requirement for a charging authority to consider the effect of CIL on the delivery of affordable housing and for the CIL to be set so that it will not prejudice affordable housing delivery.

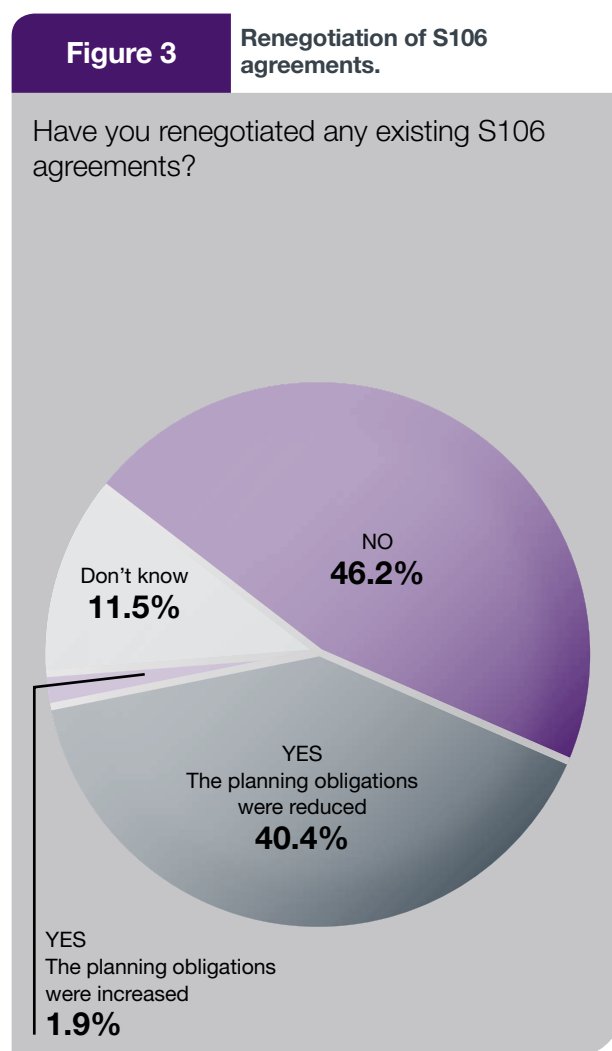
This research explored emerging issues in the transition to the new system.

The survey of planning departments gave a national picture on how the use of S106 has changed and how preparations for the CIL are unfolding:



3.1 Changes to the proportion of planning permissions with S106 agreements attached

The result showed that half of the local authorities reported that, despite the downturn and associated viability issues, the proportion of planning permissions with S106 agreements attached had not changed.

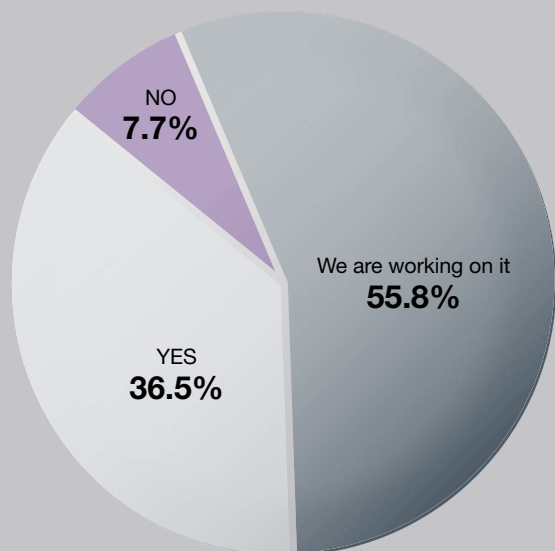


3.2 Renegotiation of S106 agreements

The result showed that almost half of the local authorities reported that, despite the downturn, S106 agreements had not been renegotiated. However, a considerable proportion reported having renegotiated agreements with less planning obligations, most likely as viability issues meant that what had originally agreed was no longer feasible.

Figure 4 LDFs in place.

Have you got a Local Development Framework in place?

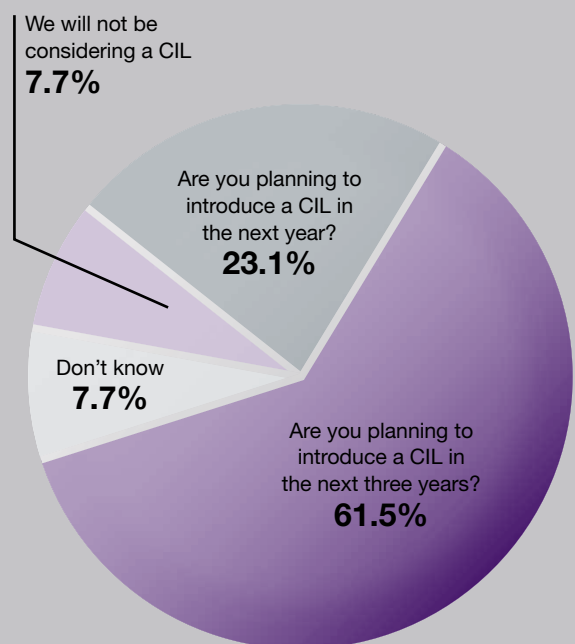


3.3 Local Development Frameworks

The law places a duty on the Council to produce a series of documents that form a Local Development Framework (LDF) for the district. The LDF allows the Council to manage development in the area and set out the factors it will take into account when deciding planning applications. The LDF consists of a series of documents, known as local development documents which contain the planning policies for the district. Most local authorities are still preparing plans.

Figure 5 If and when a CIL will be introduced.

When will you be introducing a CIL?



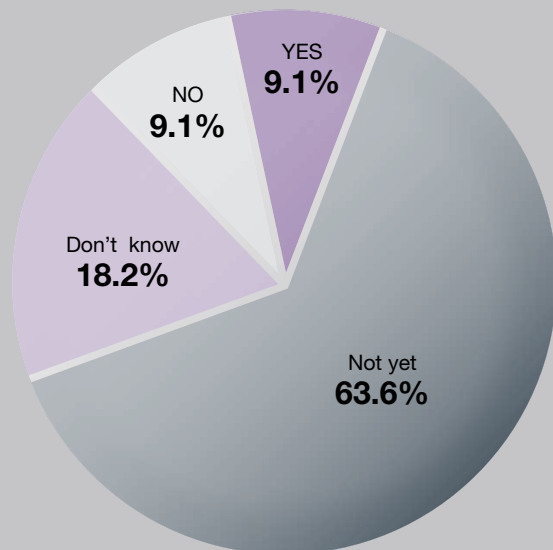
3.4 Introduction of a CIL

Most local authorities are planning to introduce a CIL within the next three years.

Figure 6

Change in S106 policy.

If you have introduced a CIL have you also changed your policy or practice in relation to S106?



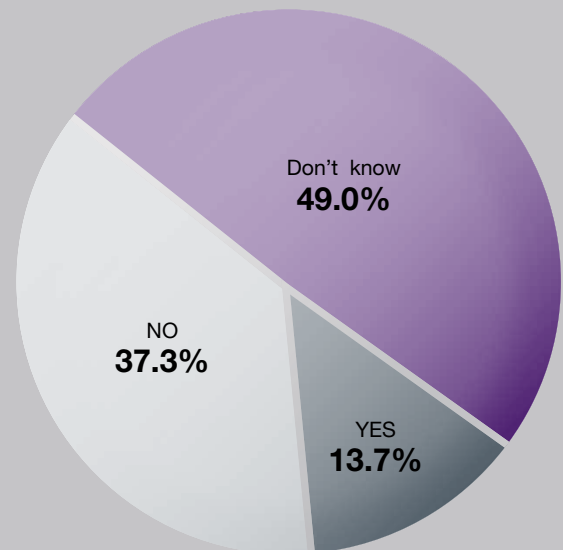
3.5 Changes in S106 policy for the introduction of CIL

Few local authorities have yet made changes to their S106 policy.

Figure 7

Expected change in securing of affordable housing.

Do you expect to secure less affordable housing through S106 once the CIL is implemented?



3.6 Impact of CIL on delivery of affordable housing through S106

The expected impact of the CIL upon the delivery of affordable housing secured through S106 is largely uncertain, with almost half of respondents saying they did not know.

3.7 The New Homes Bonus

The New Homes Bonus will sit alongside the existing planning framework for making planning decisions. Local planning authorities will continue to be bound by their obligations under planning law and, in particular, the New Homes Bonus is not intended to encourage housing development which would otherwise be inappropriate in planning terms (DCLG, 2011b).

The Bonus commenced in April 2011, and will match fund the additional council tax raised for new homes and properties brought back into use, with an additional amount for affordable homes, for the following six years (DCLG, 2011b).

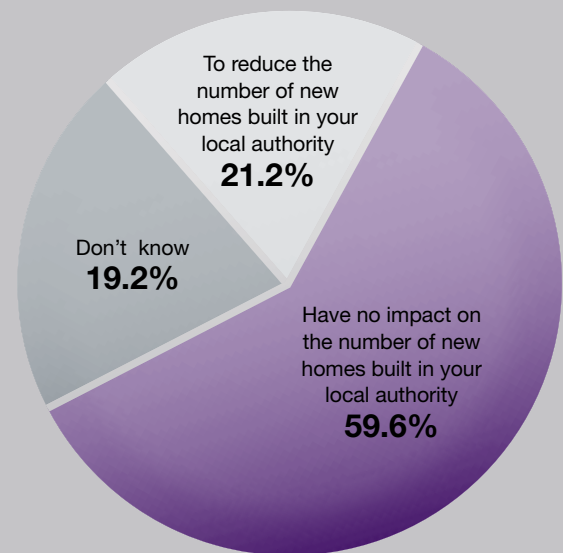
The New Homes Bonus addresses the disincentive within the local government finance system for local areas to welcome growth (DCLG, 2011b). Until now, increased housing in communities has meant increased strain on public services and reduced amenities (ibid). The New Homes Bonus will remove this disincentive by providing local authorities with the means to mitigate the strain the increased population causes. This will ensure that the economic benefits of growth are returned to the local authorities and communities where growth takes place. In addition, in doing so the New Homes Bonus should help engender a more positive attitude to growth, and create an environment in which new housing is more readily accepted.

Most respondents expected the New Homes Bonus to have no impact on the number of new homes built in their authority:

Figure 8

Expected impact of the New Homes Bonus.

Do you expect the New Homes Bonus to ...



Whilst most local authorities and County Councils welcomed the CIL, there were some concerns about the transition to the new system which were broadly similar across authorities:

4.1 Planning documents

There is pressure on local authorities to put all their other planning documents in place. This can be a time consuming and uncertain process:

“The main issues are to do with the development plan as CIL has to be based on an up to date development plan but we don’t really know if we are in an era of Core Strategies or Local Plans any more and the uncertainty with the abolition of the RSS.”
(Interviewee)

4.2 Two tier authorities

There are issues in two tier authorities. County Councils will not charge a CIL but are working with authorities in the County to support the development of CILs. They stressed the need for close joint working to develop CILs that work for both the local authority and the County:

“As a two tier authority area, the preparation of a CIL will require close working and engagement between parties as the service provider for many important infrastructure areas (i.e. County) would not be a CIL charging authority (District’s, National Parks). Provided parties work closely together however there should be little difficult in this respect.” (Survey respondent)

“[X] County Council as an upper tier authority. Under the current CIL regulations, upper tier authorities cannot be a charging authority for a CIL. Nevertheless, we are committed to working with Cumbria’s Local Planning Authorities when preparing CIL charging schedules should they choose to implement a CIL.”
(Survey respondent)

“We are a County Council, therefore not the CIL setting Authority. We support the principle of a CIL but are reliant on our LPA partners to introduce a CIL.” (Survey respondent)

The need for joint working is particularly pressing where there is major infrastructure development across boundaries:

“A key issue for [X county] is how to deal with major infrastructure around new nuclear power and grid upgrades. This is major investment across boundaries. S106 was not perfect but we have worked with it and it is tried and tested. CILs across the county will have to collect for this investment as it has impacts across the county. It is significant as it requires things like road and rail upgrades, issues around broadband etc and is very complicated. We need to get them all working well together in the new framework.” (Interviewee)

There was some concern that there may be tension between what local authorities decide to spend their CIL funds on and County infrastructure needs, with worries that there will not be sufficient funds allocated to the County:

“We will be involved in developing charging schedules in some districts. There will be tension as there are two authorities involved and the pot is finite. It could be an issue that we don’t think there is enough for the County, for example, quality school provision is an issue, but the district may want to spend it on affordable housing. It is different world in a two tier system.” (Interviewee)

“As a County Council, we won’t have a CIL ourselves. However, our districts are planning to introduce CILs and we will be relying on our districts to collect funds and pass them on to us to spend on their behalf. There is a risk however that districts will not identify the more strategic infrastructure in their Regulation 123 List and we will lose funding to more local priorities such as open space and public art.”
(Survey respondent)

One County described how they had been working with local authorities to help them understand how the new system will work, but found that they were struggling to understand the new system:



"A concern about S106 is that even officers who sort of understand the difference between S106 and CIL are incapable of differentiating. I had a meeting last week and they all pushed development contributions into one group that had to be related to development. But when I said that CIL can be raised in one area and spent in another area their chins hit the floor. S106 does have to be scheme-related. But they can't get their heads round that CIL can be raised in one place and spent somewhere else on something else. And you can't get this across to members that there are two separate channels, so there is a worry that they will miss out on the strategic infrastructure part." (Interviewee)

4.3 Working across boundaries

There is some concern about the practicality of working across local authority boundaries:

"Impact on cross authority working to mitigate the impacts of new development on the [X] Special Protection Area. How can this be done when the 14 affected authorities are all at different stages with S106/CIL?" (Survey respondent)

4.4 The Mayoral CIL

There is concern about how the London Mayoral CIL will impact on viability as it will be charged alongside individual Borough CILs and S106:

"We feel that we can accommodate CIL, but we are concerned that the Mayor's CIL will make ours more challenging to deliver, given that his rate is not variable within the Borough. Viability issues are different across the borough and therefore rates cannot be set as a flat rate across one borough." (Survey respondent)

"For the Mayoral CIL, we are in the highest charging zone but we think that the Mayor has calculated it in a simplistic way and it is not fair. It is only calculated on residential but CIL will be charged on all uses but in this borough there are lower values for commercial, but we still have to charge CIL at the highest rate. This will impact on what we can charge on our CIL and on other types of provision such as affordable housing and on site open space.... We have parts of the borough that need regeneration and here developments are hard to get off the ground. But these schemes will be charged more than in the high value areas with more viability in neighbouring boroughs. This is the impact of the variable rate. Developers will go where it is most commercially viable and where there is less CIL. We have written to the Mayor about this." (Interviewee)

Since the research was conducted the report on the examination of the draft Mayoral Community Infrastructure Levy charging schedule has been published and concluded that it provides an appropriate basis for the collection of the levy in Greater London because there was deemed to be sufficient evidence to support the schedule and that the levy is set at a level that will not put the overall development of the area at risk (The Planning Inspectorate, 2012).



4.5 Infrastructure funding gap

There is concern that there will be a funding gap for providing infrastructure as CIL will not meet all costs:

“In fast growing areas such as [X district], expensive infrastructure is required to support growth and this cannot be funded totally from developer contributions – there is a funding gap.” (Survey respondent)

“We are expecting two major applications next year for around 2000 homes each. The CIL rate applied will largely be based (as per regulations) on viability, which at present will be low, e.g. we will not be able to charge very much, far less than is actually needed to fund the necessary infrastructure for these new communities. The developments may then build out over 10 – 15 years. Viability is likely to improve over this period, but developers will still be paying the rate set in 2011. Their profit will increase; our income will remain inadequate; and the communities will blame the council (not the developer!) for the subsequent shortfall in infrastructure.” (Survey respondent)

“Meeting the infrastructure needs arising from conversions/brownfield development is a particular issue.” (Survey respondent)

Given the pressures on funding, CIL will be a vital mechanism for securing infrastructure funding:

“We have secured a significant amount through S106 and hope to continue through CIL. I think that CIL and S106 will be increasingly important as other funding sources die away. Our capital funding budget is reducing to a fifth of what it has been next year so we will be looking to CIL and S106 for capital investment over the next few years.” (Interviewee)

Some local authorities have found it difficult to evidence their infrastructure gap:

“The requirement to demonstrate an infrastructure funding gap has been difficult in light of the stage that we are at in the LDF and the limited availability of comprehensive information. Many infrastructure requirements will not be fully costed until there is more certainty about their deliverability. Identifying the funding gap has also been made more difficult in light of the current economic climate and lack of certainty over alternative funding sources.” (Interviewee)

4.6 CIL cannot deliver everything

CIL will not raise sufficient funds to pay for everything and there are concerns that expectations of what it can deliver are unrealistic:

“Lowering unrealistic expectations of what can be delivered via CIL.” (Survey respondent)

“The need and costs of supporting major new infrastructure required to support the level of development proposed.” (Survey respondent)

“Expectations of CIL funding, given reductions in other sources, will far exceed what can be delivered within viability constraints. A key issue will be how far to prioritise in advance to manage expectations and how far to keep options open for flexibility.” (Survey respondent)

Most interviewees said that what is expected to be collected through CIL needs to be realistic and needs to start at relatively low whilst expertise in using the new system builds up:

“We need to tone down expectations. We will not collect everything through CIL. Viability in most areas will show that this is impossible. We need good foundations that we can build on as the property market picks up and expertise increases.” (Interviewee)

4.7 Economic viability

A key concern raised was about the economic viability of charging a CIL and the impact on development, particularly where values vary across an area and in some areas may be low. In some cases concerns about viability were focused on the impact of low land values in a local authority:

“Low land values make economic viability an issue meaning it will be challenging to secure sufficient contributions through CIL to deliver the required infrastructure across the city.” (Survey respondent)

“We are in a low demand area. The impact CIL would have on viability is an issue for us.” (Survey respondent)

“Consideration needs to be given to how infrastructure can be funded and areas that suffer from low land values as there will not be the return on private sector development to enable significant contributions via CIL or S106.” (Survey respondent)

“The issue with all of this is clearly viability. Will developers be encouraged to build and provide the levels of CIL needed for future public sector infrastructure investment?” (Survey respondent)

This is particularly relevant in regeneration areas and in areas where a high proportion of development is on small sites:

"The high number of sites of 10 or less dwellings as a proportion of the total numbers delivered is an issue." (Survey respondent)

"It is considered important that CIL charging authorities be alive to issues associated with deliverability, especially in areas requiring regeneration or which contain weak housing markets. Where there are deliverability issues, it will be important that CIL funds be prioritised for areas of infrastructure considered most important to the delivery of development in a sustainable manner. It is considered that S106 agreements will have an important role to play before and following the implementation of a CIL, especially in respect to items of infrastructure solely related to a development or series of smaller developments." (Survey respondent)

A differential rate may be used to try and encourage development in low demand areas:

"One issue is that we have area action plans from being low housing market areas so we may set a differential rate to reduce the cost burden and to encourage developers into these areas. We need to work more effectively with the private sector to develop homes as funding had gone." (Interviewee)

Land values can vary considerably across an area which can make setting a CIL difficult.

Charging schedules may include differential rates, where they can be justified either on the basis of the economic viability of development in different parts of the authority's area or by reference to the economic viability of different types of development within their area (DCLG, 2011a). CIL rates can be variable depending on viability, but this creates a more complex charging schedule:

"Here we often have to try and encourage development as we are not a high pressure area and we need good quality development but land values are lower. Certain areas such as National Parks do have pressure on housing and limitations on employment use, but outside the National Parks we have lower land values, areas of deprivation and they do not attract people in the same way. It is very variable across the county." (Interviewee)

Some areas have specific requirements which create concerns about the viability of some developments once CIL is in place:

"Housing development in this area requires funding contributions towards Special Protection Area mitigation land, and on top of the CIL infrastructure, this casts some doubts on the viability of some developments and/or the affordability of housing." (Survey respondent)

There was also concern that some infrastructure needs are vital but that CIL will not meet all costs:

"In the final analysis, the only real issue is how much money there which can be "afforded" by a development to contribute to infrastructure costs. S106, CIL etc are just mechanisms, they don't create funds. The Government's attitude to infrastructure contributions is also very slippery at the moment – telling local authorities not to 'over burden' developers – but when was a school place or a play area a burden?" (Survey respondent)

4.8 The need to provide viability evidence for differential CIL rates

Local authorities can charge differential rates across the area and for different use categories. However, differential rates can only be based on viability evidence and must not be varied simply to encourage one type of development. But some interviewees were concerned that this regulation was not being followed, which would place them at a disadvantage if developers chose to locate in the area where the CIL rate had been deliberately lowered on one use category:

"State aid is the main issue. You cannot selectively favour one development category over another. It is a development land tax and since it is a taxation system you have to do it right, in particular, you have to follow the viability evidence. If viability evidence shows that you could charge across all categories then you have to do so. You cannot favour one category. We were under pressure to zero rate employment uses but the testing showed that this category could support a small amount of CIL. This is a political issue but we had to charge. Some authorities may prefer not to charge on some categories e.g. employment. If you reduce the charge on one category you have to reduce it proportionally on the others. So if the evidence says that on residential you can charge up to £200 per sq metre, and you charge £100, then you have to reduce it proportionally on the other categories, so half what you could charge on industrial etc. If they have a differential rate for CIL it has to be proportional across all categories. If they don't, this is likely to be legally challenged.... Our worry is that our neighbouring authorities will see this and as it is first think it is a good idea and zero rate it themselves when we have not, effectively creating enterprise zones, but it needs to be a level playing field." (Interviewee)

"We have encountered issues of whether our simplified approach benefits developers and therefore offends EU rules on state aid. This issue has arisen because the CIL rate is ultimately a judgement for the authority based on what it considers to be the right balance between the rate and impact on development viability. As it is based on individual judgement, it has meant that different people have taken different views on the same evidence. (Interviewee)

4.9 Concern about adverse impact of CIL

One authority, which has operated a tariff system for some time, was concerned that they would secure less funding through the CIL than they have been routinely collecting through their current system:

“[X] already operates the [X] Tariff in [part of the district], which includes a forward funded element of funding to install infrastructure to release these sites. The introduction of the CIL stops the Tariff from operating further to those sites (some 2,500 homes) that have not yet obtained an outline consent, and will therefore be liable for CIL not Tariff. This impacts on the amount of properties paying the ‘roof tax’ which therefore impacts on the assumptions for delivery of infrastructure, essentially meaning the programme needs to be re-planning to accommodate the changes to income. [X] also has a good track record of achieving significant developer contributions from development, with pre-CIL S106 requirements of approximately £24k per dwelling plus 30% Affordable Housing (25% Social Rent, 5% Intermediate), with actual funding secured of between £12 – £24k per dwelling on a regular basis. The Tariff is £18,500 index linked to 2004, approximate current value of £20,800 per dwelling. We consider the introduction of the CIL regulations will have an adverse impact on [X’s] position and ability to secure significant levels of developer contributions towards the range of infrastructure requirements and services previously and current catered for through our SPD/Gs.”
(Survey respondent)

Many authorities already have tariff systems and these will be phased out and replaced by a CIL:

“We currently operate a local [X] wide tariff system, but this will be replaced by CIL when it is in place.”
(Survey respondent)

4.10 Managing the transition

There is a need to carefully manage the transition to the new system to ensure that development goes ahead but also to ensure that infrastructure needs are still met and the impact on local communities mitigated:

“It is important to have some certainty to ensure development happens but to mitigate the impacts on communities and infrastructure provision. Dealing with a period of change adds an extra dimension to negotiations.” (Interviewee)

“As a new system, there is inevitably a need for a transitional period in the lead up to introducing CIL. This is because any outstanding planning consents awaiting a signed S106 will fall between the existing system for developer contributions and the new CIL Charging Schedule. It has been important to provide plenty of warning to developers and agents and as such we have incorporated a lead in time by delaying the date CIL will take effect to the 1st January 2012. We have also undertaken extensive publicity to ensure that this effective date is clearly understood.”
(Interviewee)

4.11 Uncertainty about the interface between S106 and CIL

There is a lot of uncertainty about the interface between S106 and CIL:

“The interface between section 106 and CIL will need detailed clarification.” (Survey respondent)

Some concerns centre around the balance between a CIL charge and the affordable housing that can be secured through S106:

“Agreeing the trade off between providing and maximising affordable housing on a site and maximising CIL.” (Survey respondent)



In some areas, a significant proportion of development does not increase floorspace (CIL is charged on additional floorspace), either because it is change of use or regeneration. This raises concerns about what can be secured for infrastructure through CIL in these areas:

“Many developments in the borough involve a change and intensification of use e.g. warehouse to office, office to residential etc but no or limited additional floorspace. CIL cannot be charged in these instances. It is important that we can continue to use S106 agreements to mitigate the impacts of these developments, but limitations have been placed on the use of S106. The interplay between S106 and CIL is very complex and elements of how this will work out in practice are not yet known.” (Survey respondent)

In these cases, local authorities are trying to ensure that they can still use S106 to collect contributions:

“We are producing further planning documents and have to take account of the new National Planning Policy Framework and restrictions on Supplementary Planning Documents. We have to think carefully about what to include in planning documents so that we can still use planning obligations. One issue is that much of our development is replacement floorspace but CIL is only chargeable on additional floorspace so we are restricted on what we can charge CIL in the borough. A change is use, for example from office to residential, would require a 106 but no CIL could be charged. So it is important that we can still negotiate S106s. And we want to continue to base S106 on formulas and standard charges as we have been using rather than site by site negotiation as we need to be able to give developers certainty and not slow things down.” (Interviewee)

Developers need to be reassured that they will not be expected to contribute to the same infrastructure through both the CIL and S106:

“The CIL regulations mean that there is a difficult relationship between CIL and other developer contributions. It has been difficult to understand and establish the relationship between the different contributions in order to provide comfort to developers that they will not be required to pay S106 contributions and CIL for the same infrastructure.” (Interviewee)

Some local authorities have been able to use S106 for very specific and unique purposes, but there is uncertainty about how they will do so under the new system, particularly given the new restrictions on pooling S106 contributions:

“Part of the Borough enjoys Special Protection under European law. To avoid and mitigate impacts upon the integrity of this area, the Council (along with others) has adopted a S106 tariff approach to fund green infrastructure works aiming at deflecting visitors away from this sensitive area. At this time it's not clear how impacts can be mitigated once S106 tariffs are banned after the adoption of a CIL or 2014 (whichever the earlier).” (Survey respondent)

“[X] County Council intends to continue to use S106 agreements in respect to County matters and the mineral and waste applications it determines. I understand that CIL can bring benefits on a national level, particularly where infrastructure providers did not have evidence base or system for collecting S106 to the levels required to support growth. However, we are now in a position on being reliant on the LPAs to adopt a CIL, without a CIL development in larger towns would provide a massive burden on schools and transport without the ability to utilise S106. It is also less adaptable to applications that are not planned for, but may gain approval, for example, under the new NPPF system if deemed “sustainable” development – S106 could have dealt with this situation to ensure all development planned or unplanned contributes to the wider impact, but will now be restricted under CIL 123 post 2014.” (Survey respondent)

It is not necessarily easy to decide what to try and secure through the CIL and what is better secured through S106:

“Will be difficult in some cases to decide what will be attributed to CIL and what to S106. As an example, some of the roads across new communities will have a strategic role as well as a site-specific role.” (Survey respondent)



4.12 Affordable housing

There were some concerns that less affordable housing will be secured once CIL is implemented:

“We anticipated that if the HCA grant for Social Rent remained in place, we would secure the same level of affordable housing as under S106. However, due to the viability of Social Rent without grant, and the S106/CIL requirements, we are looking at how to amend policy because all the above requirements which previously were affordable, under the Affordable Rent model and CIL charging plus S106 as well, it is unlikely that development can support the previous affordable housing requirements. However, Affordable Rent is not a popular housing tenure in [X district] at present as it does not meet housing need, which Social Rent previously did. Therefore, it is not just the CIL that will impact upon affordable housing delivery, but the Affordable Rent tenure and no grant for SR is likely to impact on the amount of “affordable” housing that can be delivered.” (Survey respondent)

It is recognised that there is a balancing act and trade off between what can be charged through the CIL and what affordable housing can be secured through S106:

“There is an opportunity cost between affordable housing and CIL.” (Survey respondent)

“On affordable housing, a balance will have to be struck. We all want to deliver high levels of affordable housing and good quality infrastructure early on. But at best we will get medium levels of affordable housing and some areas will not get infrastructure as early as they would have liked. Affordable housing is the killer issue.” (Interviewee)

“[X] has put priority on delivering affordable housing. We have a lot of small sites so are looking at reducing the threshold. There is conflict between CIL and affordable housing as there is an opportunity cost – if we have a high proportion of affordable housing then we cannot collect CIL on affordable homes. It will be a difficult balancing act between the affordable housing need and infrastructure need.” (Interviewee)

There have been suggestions of using the CIL to collect contributions for affordable housing, but this was largely criticised by research participants, mainly because it would not deliver on site affordable housing and would not support the development of mixed communities:

“Keeping affordable housing under S106 provides much needed flexibility to respond to changing levels of viability through negotiation as economic circumstances change – it also encourages mixed housing development on-site.” (Survey respondent)

“The government is consulting on whether CIL could be used to fund affordable housing but this won’t work. You can’t spend on affordable housing and infrastructure, just one or the other. And of course on site is always best.” (Interviewee)

“There is still uncertainty from government about whether S106 is still suitable for affordable housing or whether it will go into CIL. It may be easier to manage if more obligations are collected through only CIL, rather than separately through CIL and S106. But it adds pressure as it is a relatively small pot so we are not sure if they will still use a separate mechanism for affordable housing. From a political perspective, we need to deliver affordable homes and the danger if we put it all into CIL is that we will get affordable housing but not the infrastructure needed. This is a dilemma.” (Interviewee)

“The S106 will especially be required for affordable housing. Using CIL for affordable housing would be problematic as we prefer mixed tenure development with the affordable housing on site, but developers would prefer to pay and not have any affordable housing on site.... It would be a problem for the mixed communities approach which is best as we have large housing estates here and it is a mixed borough. We do not want the mono tenure development we have had before.” (Interviewee)

4.13 The neighbourhood element of CIL

There is uncertainty about how the new neighbourhood element of CIL will work and whether a high proportion is allocated for the neighbourhood, but has to be spent on infrastructure, that there will be pressures on major infrastructure needs and difficulty in finding appropriate means to spend CIL funds at neighbourhood level:

“Concern about the lack of definition of the ‘significant proportion’ to be apportioned back to the neighbourhood which is affected – too much is open to interpretation.” (Survey respondent)

“The neighbourhood will come up with a list of suggested uses and the authority will say they are not infrastructure, but will suggest infrastructure they could go into partnership with, so the neighbourhood could contribute their share towards the school etc.” (Interviewee)

There was concern in London that the requirement to raise CIL funds both for the central pot (e.g. for Cross Rail) and for the neighbourhood may put pressure on a Borough's capacity to raise its own infrastructure funding through the CIL:

"One issue may be the requirement to provide a 'meaningful proportion' to the local community. We have to provide a share of our own CIL to the Mayor for Cross Rail and if the regulations are prescriptive about the proportion that has to go to the local community then London may get top and bottom sliced. Major infrastructure is required to bring development forward sustainably but community groups will not be building out new infrastructure and that is what CIL has to be spent on. We hope the regulations will not be prescriptive. It depends on how it works. If we have to hand money over to groups, it is different than if we just have to consult on what to spend it on which would be better." (Interviewee)

4.14 Constructing an evidence base

An evidence base is needed to support the introduction of a CIL. This is a complex and time consuming process and there can be a lack of resources and expertise to develop the evidence base:

"Whilst it's not unique, there is a balance to ensure that CIL are produced and fully justified with evidence, within a reduce workforce. We are looking at appointing consultants with neighbouring authorities to produce a CIL schedule." (Survey respondent)

"Problems are a lack of expertise (i.e. viability testing) within [the authority] for introducing CIL and a lack of resources to introduce CIL whilst our policy section is concentrating on Local Area/Neighbourhood Plans as part of Localism Agenda." (Survey respondent)

4.15 Complexity of developing a CIL

Developing a CIL is a complex process and the resulting system has been criticised for being more complicated than the system it is replacing, despite one of its purposes being to simplify the process of capturing planning gain:

"The processes relating to the introduction of CIL are complex and if the challenges are similar to those relating to the introduction of Core Strategies across the country, some local authorities will find it difficult to introduce charging schedules ahead of the April 2014." (Survey respondent)

"The Section 106 system has been unfairly criticised leading in part to the introduction of CIL. In [X] District, we have put in place good policy and practice which has enabled the community to 'benefit' from S106 requirements including financial contributions. CIL appears overly complicated in its preparation and potential implementation and of course will effectively replace S106." (Survey respondent)

There is a lot of work involved in developing a CIL which has resource implications:

“It is apparent that setting the CIL Charging Schedule is just a small part of the work to develop CIL and that a whole host of supporting work needs to be undertaken to ensure that it can be successfully implemented. As part of our work on CIL, a lot of focus has been placed on setting up the mechanisms and processes for implementation, including setting out the review process for infrastructure requirements and priorities and developing the software to deal with the collection and administration of monies. This has required strong links with existing development management processes, in addition to our finance and legal departments. In addition, there has been a clear need for securing corporate buy in across the Council, particularly given our desire to focus CIL around the implementation of the new localism agenda. Given that CIL is a new process for the authority this has had a significant impact in terms of resourcing the work.” (Interviewee)

4.16 The frontrunners

The Planning Advisory Service was asked by the Department of Communities and Local Government (DCLG) to provide support to eight authorities (or groups of authorities) that are likely to be amongst the first to implement the Community Infrastructure Levy (CIL). Following the first phase of front runners, DCLG announced a further phase on the 29th of June 2011. The frontrunners are at different stages of developing the CIL system. There are many stages in the development process:

“We are one of the second wave DCLG frontrunners so we are progressing fairly rapidly but are not as advanced as some others. We are building on work done for our Infrastructure Delivery Plan which supported our Core Strategy adopted in early 2011. We are updating the information collected in early 2009. We are trying to ascertain costings for delivering different types of infrastructure and working out what funding is available from other sources to determine the funding gap. When this is done, we will be looking at different options for CIL charging rates and testing viability which we will do in house as much as possible. We are projecting the amount of development we expect to be done over the time period to feed into working out the CIL rate. We hope to consult at the end of the year or early next year on the draft CIL charging schedule. The second consultation is likely to be next spring and we hope to go to examination in the summer of 2012.” (Interviewee)

The frontrunners have had support but have had to develop their CIL system without working examples:

“The CIL is clearly a new process and one of the main difficulties has been in interpreting the guidance and regulations in the absence of any working examples. As a frontrunner, the Council has had to establish its own understanding of the regulations which has required detailed discussion with, and guidance from CLG. There has been some difference between the regulations and guidance and changes to them throughout the process, which has made interpretation and implementation complex.” (Interviewee)

4.17 Pooling S106 contributions

The CIL regulations scale back the way planning obligations operate. Limitations are placed on the use of planning obligations, including limiting pooled contributions from planning obligations towards infrastructure which may be funded by the levy (DCLG, 2011a). Pooled contributions may be sought from up to five separate planning obligations for an item of infrastructure that is not locally intended to be funded by the levy (Ibid). There was some concern expressed by interviewees that some local authorities were developing CIL schedules that appeared to contravene these rules:

“In most areas across the district they are planning on securing education contributions through S106, for example, specifying to expand a primary school by 11 places, but in one area they need a new secondary school and are planning to collect this through CIL. But this appears against Regulation 123 as you cannot collect for the same thing through both S106 and CIL as it is double counting. Their schedule is for more than 5 through S106. But you can’t get contributions for the same thing through S106 and CIL. This might get through the CIL enquiry but it may fall down when they get to their S106 negotiations.” (Interviewee)

4.18 Collecting and managing the CIL

Collection of the levy will be carried out by the ‘Community Infrastructure Levy collecting authority’ (DCLG, 2011a). In most cases this will be the charging authority but, in London, the Boroughs will collect the levy on behalf of the Mayor. County councils will collect the levy charged by districts on developments for which the county gives consent.

There is still some lack of clarity about how the CIL will be collected and managed. Every collecting authority will need a system but these have yet to be developed. It was suggested that it may be more efficient for authorities to use a system developed by the private sector than for each individual authority to develop their own:

“One issue is in collection. How will this be done? There are savings to be made by encouraging the private sector to bid to collect CIL. They can develop a database that can be used in different authorities and need someone to have the expertise and knowledge to know about what notices to serve and when etc. They could offer consulting e.g. information on charitable status, or what if the S106 is high relative to CIL. No one has got their head round this. The private sector could step in and resource this, provide expertise and a system. It is not worth every authority doing it individually. It would not be efficient or effective.” (Interviewee)

“Another issue is the need for an IT system to monitor and collect CIL as no one has yet developed bespoke software. But all the London authorities will need a system in place when the Mayoral CIL comes in next spring. Different authorities use different IT systems, even between different departments. This is all additional work. You need a tailor made system and the more automated it is the better.” (Interviewee)

Collection of the CIL is further complicated in London by having individual Borough CILs and the Mayoral CIL:

“The regulations on the collection procedure are complex. It will be a complex procedure getting it in the first place and is more difficult because we are collecting the Mayor’s CIL as well so if we do go for a variable rate, there will not be many variations. The regulations state that the collecting authority will collect on behalf of the charging authority. [X] is both the collecting and charging authority for our own CIL, and the collecting authority for the Mayoral CIL which is the charging authority. This is an issue for all London boroughs that even if they do not charge their own CIL, they have to collect the Mayor’s CIL. Another involved process is who liability falls on. It falls on the landowners if no one comes forward. It is complex. Landowners and developers can appeal at any stage about how the CIL is calculated etc. There are also all the rules about charity exemptions. It is very complex and is more akin to business rate collection. Who collects what and where is complicated.” (Interviewee)

4.19 Support to develop CIL

There is support to develop a CIL, for example, from DCLG, the Planning Advisory Service (PAS) and the Homes and Communities Agency (HCA) and local authorities have found this useful:

“The Council have been selected as a pilot CIL ‘front runner’ and work on the CIL will begin shortly with support from PAS and other bodies. (Survey respondent)

“We are the furthest forward and have completed our examination and are waiting for the inspector’s report. We are likely to be the first authority to adopt the CIL and may be charging from October. It has been a learning curve. The regulations are very complex and the charge setting procedure does not tell the whole story. We had a lot of help from DCLG.” (Interviewee)

4.20 Borrowing against the levy

The CIL regulations include provision to enable the Secretary of State to eventually permit authorities to be able to ‘prudentially’ borrow against future income from the levy, should the Government conclude that, subject to the overall fiscal position, there is scope for local authorities to use monies from the levy to repay loans used to support infrastructure (DCLG, 2011a). There were few plans to develop this at the moment amongst research participants but it was considered a future possibility by some:

“The regulations are not in place yet for borrowing against the levy but there are provisions in place. Watch this space. We’ve looked at a range of regeneration funding. I suspect we may be cautious, as we are about Tax Increment Funding (TIF), as you rely on the future infrastructure source to come forward.” (Interviewee)

“We had it in mind to borrow against the future income from CIL but thought that you are not able to do that. [X’s] key infrastructure is a link road and we are looking to borrow against future revenues to fund it through the NHB and TIF so if possible we would consider using CIL.” (Interviewee)

However, some authorities felt that borrowing against the CIL would be risky:

“Borrowing against the levy is pie in the sky as it is not a guaranteed income stream. You need to test a basic, simple CIL first that will not meet all needs then raise it as you learn and the development market improves. The risk is that the property market is highly cyclical and you risk having 5 years of debt left as the market dips and then the only way to meet the debt is out of council tax at a time when they can least afford it.” (Interviewee)

5.0 Conclusions

Whilst most research participants said that they had successfully been using S106 to secure planning gain, sometimes for many years, the Community Infrastructure Levy, with a scaled back S106, is broadly welcomed by local authorities and most local authorities are planning to introduce a CIL within the next three years. However, almost all participants stressed the continued importance of still being able to use S106 to secure contributions for affordable housing, to mitigate specific site related impacts and for unique types of contributions.

The main finding from the research is that, whilst seen as a positive change, there is still a lot of uncertainty about the CIL – how to develop the evidence base, how to determine an appropriate charging schedule, how to use S106 alongside the CIL and how to collect the CIL funds. One point that became clear during the research is that all participants were very keen to know what other local authorities were doing and what issues they were grappling with. The frontrunners will be closely watched by those who will follow later. A number of issues of concern were raised about the transition to the CIL, but these were very similar across all local authorities.

A key concern raised was about the economic viability of charging a CIL and the impact on development, particularly where land values vary across an area. There is particular concern in London about how the Mayoral CIL will impact on viability, as it will be charged along with both individual Borough CILs and S106. Even in high pressure areas, such as in London and the South East, values can vary across the district. Many local authorities are grappling with the technicalities of developing differential rates for the CIL charge across their authority and across different use classes, and there was some confusion about the regulations governing state aid. It is possible to charge less CIL than is proved to be viable, but the reduction has to be proportionate across all use classes.

Pooled contributions secured through S106 may now only be sought from up to five separate planning obligations for an item of infrastructure that is not locally intended to be funded by the levy. Local authorities are finding the decision about what to specify as included in the CIL, and what to continue to seek to secure through S106, a difficult one.

There is concern that there will be a funding gap for providing infrastructure as CIL will not meet all costs. CIL will not raise sufficient funds to pay for everything and there are concerns that expectations of what it can deliver are unrealistic. Priorities will need to be determined locally and there will be difficult decisions to be made. There is a lot of uncertainty about the interface between S106 and CIL and some concerns that less affordable housing will be secured through S106 once CIL is implemented. Again, this will be a balancing act and the balance between what is sought through CIL and what affordable housing is sought through S106 will come down not simply to viability, but to local political priorities. There is not only a trade off between what it is viable to secure through both the CIL and S106, but the greater the proportion of affordable housing sought, the less will be secured through the CIL as it cannot be charged on affordable homes. There have been suggestions of using the CIL to collect contributions for affordable housing, but this was largely criticised by research participants, mainly because it would not deliver on site affordable housing and would not support the development of mixed communities.

It is apparent that, although intended to simplify the planning gain system, the CIL with a scaled back S106 will be a complicated system to develop, implement and collect.

Local authorities are looking at the CIL frontrunners, who are receiving support, to see how they develop their CILs. Everyone will be looking closely at the outcomes of CIL in practice when implemented by the frontrunners, but in a recession, it is likely that the outcomes in the next two or three years may not be a good reflection of the long term outcomes of the CIL. Despite the uncertainty, it is felt to be a fairer and more transparent system for capturing planning gain, but the next few years alone may not necessarily be a good testing ground for its long term success as the pressures are different during a recession.

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