Planning for a better future

Our planning manifesto for the government

POS
Planning Officers Society

Manifesto Background Paper 2

Infrastructure: funding it in a more effective way

When CIL was introduced it was as an alternative to s106 agreements, but the reality is they are both necessary tools, because they are good at different things. POS recommends some key changes that will combine the best of both current regimes in an integrated way that optimises their effectiveness.

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Planning Officers Society

POS is the single credible voice for public sector planners, pursuing good quality and effective planning practice. The Society's aim is to ensure that planning makes a major contribution to achieving sustainable development in ways that are fair and equitable, and achieve the social, economic and environmental aspirations of all sectors of the community. It is within this context that we have set out this advice to Government so we can plan together for a better future.

POS Manifesto

This started in early 2014 when we looked ahead to the national parliamentary elections in May 2015. The main parties were drafting their manifestos, so we thought about what we could do to help them. This resulted in *Planning for a better future: Our planning manifesto for the next government*. The time since then has seen an unprecedented amount of change to the planning system, so our initial planning manifesto for the next government has morphed into an on-going planning manifesto for government.

These are think pieces that tackle a topical area within planning practice and sets out our recommendations for improvement. They comprise a growing series of Manifesto Background Papers that look in detail at specific issues. Those that are still current are summarised in our main Planning Manifesto paper that sets out the current ask from POS to the government.

The views expressed in these documents reflect the initial view of POS. It is a consensus position. It should not be taken as a final position; rather an informed starting point to debate the issues. It is expected that the recommendations will evolve as the debate progresses.

Where we can, we will work across the sector to craft proposals that have widespread support from the people who operate the planning system at the coalface: land owners, developers, agents, legal, local authorities and politicians. We will be both radical and practical as we look for solutions to tangible problems that will make a real difference to crucial areas. Our objective is to improve the planning system to enable it to deliver its key aim of sustainable development.

Other titles in the series can be viewed from our website.

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Summary

When CIL was introduced it was as an alternative to s106 agreements, but the reality is they are both necessary tools, because they are good at different things. POS recommends some key changes that will combine the best of both current regimes in an integrated way that optimises their effectiveness. These changes are:

- The intention for CIL to be funded via the land value rather than through development finance should be clearly stated by government and become a clear feature of the CIL setting process and Development Management viability assessments
- There should be a basic “de minimus” levy rate that can be easily adopted, set nationally on a zoned basis
- The basic levy rate applies to all developments that CIL currently applies to.
- If a LPA considered that there was scope for a greater Levy contribution, then they would set their own rate above the basic rate in a similar way as a CIL rate is set now.
- An Agreement would still apply to any mitigation or compensation that is directly necessary to enable a development to proceed but does not come within the statutory definition of Infrastructure, such as securing affordable housing or delivering local employment policies.
- On large strategic developments where need for Infrastructure is caused by a development or group of developments the LPA can seek to negotiate payments for this subject always to the Levy rate being the minimum payment.
- Flexibility between levy and agreements should be a standard feature of the system subject always to the levy amount being the minimum payable in any circumstances

1 Introduction

1.1 It is our experience that developers generally want the infrastructure that their development needs to be delivered, as it enhances that development. It is often the case that local objection to development is triggered by concerns that pressures will be placed on already stretched infrastructure. With continued cuts to public expenditure, funding infrastructure through the development process will remain important. It is part of the NPPF Soundness Test (para 182) that a Local Plan "should be prepared based on a strategy which seeks to meet objectively assessed development and infrastructure requirements". It is therefore vital that our infrastructure funding mechanisms are as effective as possible.

1.2 This paper is not about capturing development value uplift through taxation. However, the value of a piece of land created by planning permissions should properly reflect the costs of infrastructure necessary to enable its development. The focus is on how developments can contribute to the cost of infrastructure that is necessary because of development generally or because the need for it is caused by a particular development or group of developments. It is our view that the crux to producing a system that works effectively is to recognise the difference between these two drivers of the need for infrastructure.

1.3 Before considering how best to approach financing infrastructure and other mitigation through the planning system, it wise to reflect on how we got to where we are now.

2 The history of the problem

2.1 There is a long record of successive governments attempting to capture the increase in land value that results from a planning permission being given to develop land. The history of various compensation and betterment laws is not a happy one, as generally they have not been successful. The main milestones – or tombstones – have been:

- The Uthwatt Committee into compensation and betterment (1942)
- The 1947 Planning Act, introduced a development charge to capture planning gain – abolished by the 1954 Town and Country Planning Act
- Compulsory Purchase Act 1965 introduces compulsory purchase provisions
- Town and Country Planning Act 1971 – introduced S52 agreements (now S106 of 1990 Act)
- Community Land Act 1975 allowed for the taking into public control of development land
- Development Land Tax Act 1976 attempted to tax development value from land

2.2 The dominant response in recent times has been S106 agreements (formerly S52 agreements from the 1971 Act) that enable a local planning authority (LPA) to enter an agreement with a developer to regulate the development or use of land (including financial provisions) as considered necessary by the LPA. The extent of the use of S106 has generally grown from very site specific mitigations and controls to a more systematic approach to dealing with the overall impact of development on an area. This drove several authorities to move away from the use of formulae (such as estimating the cost of extra school provision or the HUDU model trialled in London to identify health care impacts) to developing a pooling approach where the range of infrastructure requirements were combined into a single charge per square meter or per unit. Examples of this are the City of London, London Thames Gateway Development Corporation and Milton Keynes.

2.3 The pooling approach was seen as being more efficient and government responded to this with a series of tentative attempts to introduce such an approach nationally. There was also mounting concerns as to whether the general use of tariffs met the Circular 5/05 tests for the use of planning obligations.

2.4 In early 2002, Stephen Byers, Secretary of State at the Department of Transport, Local Government and the Regions (now DCLG) published a consultation document proposing the replacement of S106 agreements with standardised tariffs set by local authorities. The proposals were heavily criticised and were dropped by the new Secretary of State, John Prescott in July 2002.

2.5 In autumn 2003 John Prescott’s Planning Minister, Keith Hill, announced that he was proposing to introduce an Optional Planning Charge (OPC) as a partial replacement for S106 agreements. OPC was modelled at least partly on the earlier Byers proposals. The Planning & Compulsory Purchase Act 2004 contained enabling legislation allowing OPC to be implemented.

2.6 While the OPC provisions were being debated in Parliament, a report for the Government by the economist Kate Barker on increasing housing supply was published in March 2004. Barker's report cast doubt on the future of OPC, as the report instead proposed a tax on planning gain, to be known as the Planning Gain Supplement (PGS). HM Treasury accepted Barker's recommendation and began consultations on detailed proposals for implementing PGS. Although the Planning Gain Supplement (Preparations) Act 2007 permitted preliminary preparations for the introduction of PGS, it was never implemented owing to fierce criticism of the design of PGS by developers, and a lack of support from local authorities, a significant concern being that the supplement would be administered by central government.

2.7 After extended debate on the merits of PGS, including a fresh consultation in July 2007 comparing PGS with alternative tariff-style options, the Government announced in October 2007 that a new Community Infrastructure Levy (CIL) was its preferred method of securing generalised contributions from developers. The Government legislated for CIL in the 2008 Planning Act. Implementing Regulations followed, and CIL came into force in England and Wales on 6 April 2010. However, by that stage its future was already in doubt because a Conservative Party Green Paper, Open Source Planning, in February 2010 indicated that were they to come to power after the May 2010 General Election they would scrap it in favour of a different mechanism (though many commentators indicated that they could not see much difference). The election was not far away, so few local authorities took steps to implement CIL until the new Government's intentions became clear.

2.8 There were 2 basic principles of CIL which make it fundamentally different from the previous S106 regime, these being:

1. Once the levy is in place there is a legal, non-negotiable, liability to pay.
2. It severs any direct link between the development and the provision of infrastructure. What infrastructure is provided through CIL, and when, is a matter for the LPA to decide.

2.9 On 18 November 2010, the new UK Coalition Government indicated that it would in fact be retaining CIL. However, the Government proposed several reforms to the instrument that they had inherited. Reforms have continued on an annual basis. Some amendments such as the neighbourhood contributions and the self-build exemption have been as a result of Government policy, others in response to concerns, perceived or actual, as to how the Levy would operate. For local authorities, the continual changes have resulted in diminishing income (and therefore diminishing ability to fund infrastructure) at the same time as increasing administrative costs.

3 What's wrong with the current system?

3.1 The fact is that CIL and S106 are good at different things, but the problem is that this has not been recognised sufficiently by successive governments' legislation. The two have been confused, with CIL being introduced as a solution to S106 with provisions in the legislation that sought to "put a spanner in the works" of S106 (ie the limits on pooling) without dealing with the issues head on. In terms of delivering infrastructure:

- CIL is an efficient up-front pooling mechanism for infrastructure that has a reasonably predictable relationship with the scale of development generally. It brings in more money to an LPA because nearly everyone pays something, rather than just a few paying; historically as little as 7% of developments contributed to infrastructure via S106. However, CIL does have a high set-up cost that can make it unattractive for many small local planning authorities to implement.
- S106 is a good, flexible tool to deal with those specific issues that are directly related to the actual development, rather than development generally. This not only includes infrastructure but other forms of mitigation or compensation that are necessary but fall outside of the legal definition of infrastructure, including

affordable housing. However, S106 does have high transaction costs (eg legal fees and negotiation time) that render it less attractive for small developments.

3.2 The way the legislation has been set up means that the systems operate independently of each other. CIL is fixed and compulsory. If there is a need for other infrastructure payments or mitigation then these must be negotiated, but legislation limits flexibility, particularly for larger strategic sites.

3.3 Where schemes are difficult in viability terms, flexibility has also been reduced once CIL rates are set. In many cases, it will be Affordable Housing that “takes the hit” as other aspects cannot be varied because they either are fixed and compulsory (ie CIL) or must be delivered to mitigate direct impacts, such as those identified in EIAs. This rigidity is unhelpful especially for larger strategic sites. POS believes the two tools should be complementary and work together.

3.4 The lack of a mechanism to coordinate between the two regimes is also resulting in an impression that developers are paying twice: often described as a ‘double whammy’. This is a perception rather than a reality, but doesn’t create the right scenario for sensible debates and negotiations. The reality is that developers can’t pay twice for the same thing – CIL is not hypothecated – so if they pay for say highway improvements through S106, any CIL they pay will fund something else on the authority’s S123 list.

3.5 POS recognises that on any given scheme there is a limit to the amount of ‘benefit’ which can be taken out of it. This ‘headroom’ is divided between CIL and S106. The cake can be split up in different ways, but the size of the development finance cake remains the same. However, it has been forgotten or overlooked that the strength of a CIL approach is that it should come out of the land value rather than the development finance elements – this was a key determinative factor in the Inspector’s report when considering the London Mayor’s CrossRail CIL. To achieve this, CIL needs to be widely adopted and experience a period of stability. This would ultimately be beneficial for all those involved in the development process who have a long-term interest in developments being properly supported by the necessary infrastructure.

3.6 We therefore need a system that has a levy approach for the predictable and regularly occurring infrastructure needs, but a flexible approach to deal with more specific requirements that result generally from larger scale strategic developments. But crucially these two approaches must be linked and operate in a complementary way.

4 How can we make the system work better?

4.1 POS believes that any solution should have the following characteristics:

- The intention for CIL to be funded via the land value rather than through development finance should be clearly stated by government and become a clear feature of the CIL setting process and Development Management viability assessments
- There should be a basic levy rate that can be easily adopted, set nationally on a zoned basis
- Authorities wishing to adopt their own local levy rates should broadly follow the current CIL setting process

- The special circumstances of larger strategic sites should be better recognised
- Flexibility between levy and agreements should be a standard feature of the system subject always to the levy amount being the minimum payable in any circumstances

4.2 Our recommended solution is therefore to combine the best of a levy approach with the best of a negotiated agreement approach but as part of the same process, not separate regimes operating independently. This should also help avoid the current impression that developers are paying twice.

4.3 A Levy should be used for the funding of infrastructure which has a direct relationship with the overall quantity of development coming forward. Levy monies can be used for any purposes that come within the statutory definition of Infrastructure. LPAs should continue to report annually on their collection and spending of their Levy income to give confidence that Infrastructure is being delivered. To ensure that the Levy becomes embedded in the land value, and not a feature of development finance viability debates, it is necessary to achieve widespread adoption. The best way to do this would be to have a basic fixed Levy rate which would either be universal or very easy to adopt. We suggest that this could be set at 1% of average house prices (an easily available statistic) and should be set nationally with a range of zones in (say) £10 increments. This would mean that in an area where the average house price was £270K (assuming a 90m2 average floor area) the national levy would be £30/m2. These national rates should receive an appropriate annual inflation increase.

4.4 Where a LPA wish to set alternative Levy rate(s), different to the national rate, this would follow the current CIL setting process. This would allow authorities to adopt differential rates which take account of local market conditions. Usually these would be above the national rate because the widespread setting of basic rates should ensure that land values are reduced commensurately. Very exceptional circumstances would need to be demonstrated to support a case that a development on a specific site cannot bear even the basic level of charge.

4.5 Additionally, we do not think that an up-to-date Local Plan is necessary to do this, as the process is one that tests whether a rate is viable and puts development at risk, not whether it fully funds the infrastructure needs in a plan. The reality is that levy income always constitutes a contribution towards the cost of necessary infrastructure and never fully funds it.

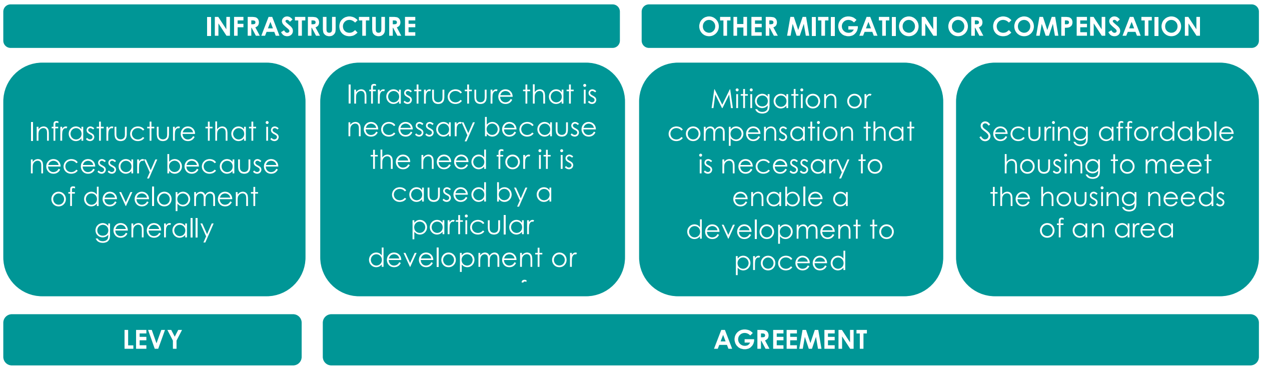
4.6 An Agreement should be used to deliver:

- Infrastructure that is necessary because the need for it is caused by a development or group of developments and not the incremental impact of development generally
- Other mitigation or compensation that is necessary to enable a development to proceed
- Securing affordable housing to meet the housing needs of an area

4.7 The Agreement will be negotiated like a current S106 agreement. If viability reasons justify it, the Levy amount can be brought into the overall equation, subject always to it being the minimum amount payable in any circumstances. Additionally, pooling can take place where necessary for non-levy funded infrastructure but will be subject to a test that it must be "necessary because the need for it is caused by a particular development or group of developments and not developments generally". This would replace the arbitrary "five agreements" rule in the current Regulations. If on larger strategic sites a more bespoke approach is needed (as is often the case), then, if the LPA and developer agree, an Agreement approach can be followed to address the needs of the development. This approach will also be subject to the Levy sum being the minimum contribution in all circumstances.

5 A revised model

5.1 Therefore, the new model will have the following features:



5.2 In summary, the way this would work would be as follows:

- The basic "de minimus" Levy rate applies to all developments that CIL currently applies to.
- This could apply universally as a default, but if not it must be very simple for a LPA to implement.
- If a LPA considered that there was scope for a greater Levy contribution, then they would set their own rate above the national "de minimus" rate in a similar way as a CIL rate is set now.
- An Agreement would still apply to any mitigation or compensation that is directly necessary to enable a development to proceed but does not come within the statutory definition of Infrastructure, such as securing affordable housing or delivering local employment policies.
- On large strategic developments where need for Infrastructure is caused by a development or group of developments the LPA can seek to negotiate payments for this subject always to the Levy rate being the minimum payment.

5.3 Finally, is worth considering whether we should give this new approach a new name to give it a fresh start and reinforce the complementary nature of the two components:

- CIL could be called the Development Management Levy (DML)
- S106 could be called a Development Management Agreement (DMA)

5.4 It is hoped that these changes will combine the best of both current regimes in an integrated way that provides a transparent but flexible system for the funding of infrastructure through developer contributions, but in a way that enables development to proceed. It is vital that any new system is given time to bed in, particularly as the levy element will be most effective when it becomes embedded and comes off the land value, as was always intended, and not off the development finance elements as is still usually the case now.