Community Infrastructure Levy and the Ten key legal issues you need to know about regeneration schemes – from theory to practice

Held at offices of Freeths, Nottingham
Speakers with you this morning:

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CIL and Regeneration: timings

9.45am   Welcome and introduction
9.50am   Seminar Session 1
11.00am  Questions and Answers on Session 1
11.15am  Refreshment break
11.30am  Seminar Session 2
12.30pm  Case Study
1.00pm   Conclusion and Lunch
Topics to be covered

Seminar 1
- Review of CIL provisions
- General approaches to and problems with funding infrastructure for new development
- New Limitations on the use of Section 106 Agreements
- CIL – The future

Seminar 2
- Procurement + vires
- Title
- Overage
- Control of Development
- Remediation
Review of CIL: The ‘knight in shining armour’?

“The community infrastructure levy is a new levy that local authorities in England and Wales can choose to charge on new developments in their area....The levy is designed to be fairer, faster and more transparent than the previous system of agreeing planning obligations between local councils and developers under section 106 of the Town and Country Planning Act 1990.” The Rt Hon Eric Pickles MP, Minister of State for Housing and Neighbourhood planning team, DCLG, November 2012
Review of CIL

• Introduced under CIL Regulations 2010, amendments every year since then
• Tool to help LAs deliver infrastructure to support development in their areas
• Initially optional
• Delivers – if you are a LA who has geared up for it (adoption of new local plan and/or charging schedule)!
Review of CIL: The Planning Practice Guidance

• Contains comprehensive guidance
• Previous guidance replaced (including the May 2011 overview)
• Development liable if creates net additional floor space and GIA of new build exceeds 100 sqm
• Limit does not apply to new houses or flats
• Various exemptions
Review of CIL: Exemptions

- Minor (less than 100 sqm)
- Selfbuilders’ houses, flats, extensions
- Social housing with Reg. 49 relief
- Charities (subject to Reg. 43-48)
- Buildings to which people don’t normally go/only for inspections etc
- Pylons and wind turbines
- Zero rated in charging schedule
- Vacant buildings brought back into same use
- Mezzanines less than 200 sqm unless wider p.p. with other works
Review of CIL: Charge, collection, liability

- Charging authority collects
- County collects for district if County gives consent
- Landowner liable
- Relates to planning permission, or local planning orders or neighbourhood development orders
- Phased developments - each phase a separate chargeable development
Review of CIL: Charging schedule

- Sets out rates
- £/sqm-applied to GIA of net additional development liable for CIL
- Rates should not threaten site viability
- Use evidence base to set appropriate balance
- Reg. 14(1) (as amended in 2014) - how does CIL rate contribute to development plan implementation?
- NPPF para. 175
Review of CIL: Stages

• Prepare evidence base
• Collaborate with neighbouring/overlapping authorities (including County)
• Publish and consult on preliminary draft schedule
• Prepare draft schedule and allow further reps
• Examination
• Recommendations of examiner
• Consider/approve
Review of CIL: Infrastructure planning

- I.d. total cost of infrastructure via CIL
- Use infrastructure assessment from plan prep.
- Consider other sources of funding
- Draft list of projects/infrastructure to be funded from CIL
- Set out site specific matters covered by s 106
- Summarise economic viability evidence
- Information on amount of funding collected through s 106 in recent years (see later slide on totting up) - include on how affordable housing and other targets have been met
Review of CIL: Evidence

- Area-based approach with broad test of viability
- Valuation models and methodologies
- Existing data/samples
- Take development costs into account—can include policies on s106 and affordable housing
- Differential rates may be applied—geographical zones/types and/or scales of development
Review of CIL: Preliminary and draft charging schedules

• Prelim.draft c.s- Initial proposals
• Take account of comments
• Prepare draft c.s for examination
• Good practice to publish draft infrastructure lists and proposed policy on scaling back s 106’s
• This list is part of ‘appropriate available evidence’
• Consult per Reg.15
• Also consult others who responded to the prelim.draft c.s.
Review of CIL: Examination in public

- Examiner determines procedures and time limits for those wishing to be heard
- Reg. 21(8) notification
- May hold pre-hearing meeting
- NPPG suggests informal hearing usually most appropriate
- Examiner decides whether to allow cross-examination
Review of CIL: 
Examiner’s report

• May recommend approve (with or without modifications) or refusal
• Must recommend approval if: complies with legislative requirements/supported by appropriate evidence/rates are consistent with evidence on economic viability/evidence that rates would not threaten plan delivery
• Examiner recommends mods. to comply with legislative requirements (if applicable)
• Lpa must address non-compliance (but does not have to make specific recommended mods)
Review of CIL: Examiner’s report

- Rejection - if can’t remedy non-compliance
- Binding – lpa must make mods. before adoption
- Can’t adopt c.s. in original form
- But can submit a revised c.s for fresh examination
Review of CIL: Approval and implementation

- Resolution of full Council
- Commencement date specified
- Planning permissions which first permit development when CIL is in effect will be liable for CIL
- Outline p.p - each phase subject to the C.S.
- Review and revision
Review of CIL: Teething Problems-Mandatory or not?

• Starting point wrong – discretionary or mandatory?
  
  – “The community infrastructure levy is a new levy that local authorities in England and Wales can” (our emphasis) “choose to charge on new developments in their area” DCLG, 7 November 2012

  – Effect on new restrictions on the use of Section 106 contributions for infrastructure – forces LPAs to adopt CIL

    “the levy regulations restrict the use of generic section 106 tariffs for items that are capable of being funded by the levy.”
Teething Problems-Mandatory or not?

Question: Would authorities be more geared up if starting point was mandatory rather than optional?
Review of CIL: Teething Problems - amendments to regulations

• Implementation, rocky start – no clarity on various issues
  – Feb 2011 CIL Regs amendment included:
    • flexible payment deadlines
    • payment of CIL by instalments
    • removal of £50k minimum
Review of CIL: Teething Problems - amendments to regulations

- Nov 2012 CIL Regs amends:
  - clarity on relationship between CIL and s73
  - correction of errors in calculation of CIL liability formula and application of social housing relief
  - CIL to be charged on dev consents by NDO and CRBO
- April 2013 CIL Regs amends:
  - proportion of CIL to be passed to parish or community councils
  - MDCs to have ability to cease and become charging auth for area
Review of CIL: Teething Problems-amendments to regulations

– Feb 2014
  • extension of pooling restriction – April 2015
  • mandatory exemption for self builds
  • payments in kind
  • vacancy test: blg must be in continuous lawful use for 6 months out of last three years to apply net addn of f/sp.
  • req on CA to strike appropriate balance btwn need for funding infrastructure from levy and effects on econ viability.
Review of CIL: Teething Problems-amendments to regulations

- June 2014 – new stat guidance (NPPG) and minor changes
  - clarification on Reg 128A and transitional situation – where orgin pp granted prior to CIL adoption and s73 permission after CIL – liability will only apply for any addn liability introduced to dev.
  - consideration to settling differential rates for altn models of SH provision
  - how payments by instalments can assist viability and delivery of dev within BTL sector
  - clarification around pooling restriction relates to staged s106 contributions
Review of CIL:
Teething problems – amendments to regulations

• March 2015 – response to 2013 consultation
  – housing relief to include charitable bodies (not LHAs or RPs) providing AH at max 80% of market rent

• General issues
  – Complex to understand and operate
  – Reforms provide level of uncertainty
  – Inability or unwillingness of LAs to adopt their CIL schedules (mainly due to constraints on costs)
  – Examinations – adding to problems?
CIL: Approaches and problems with funding infrastructure for new development

- Savills report – “The Countdown to April 2015”
  July 2014
  - Forecasted 68% LPAs will not have CIL in place by April 2015
  - 2 years for implementation of a CS +
  - 6 months to collate the supporting evidence
  - 58 LPAs through CIL process – 50% seen reduction in max resid or retail rates
  - On review examiners play important role in CIL process & inverse relationship between stronger markets and reduction in CIL rates
  - Majority of LPAs will rely on s106 to fund infrastructure = they face substantial problem with April 2015 pooling restriction
CIL: Approaches and Problems - does it deliver?

  - CAs have seen 49% fall in new resid consents granted in 12 months following CIL implementation
  - Primary concern for dev industry – delivery of CIL-infrastructure (except for Mayoral CIL)
  - No CAs who reported on CIL receipts spent any money on funding/procuring infrastructure items on Reg 123 lists
  - Only 2 CAs in operation for over 12 months = CIL rates on all devs
  - Lack of funding biggest problem, CIL does **not** make up infras shortfall
  - Conclusion: CIL is not meeting obj of making plg system fairer, faster, more certain or transparent
R on application of Fox Strategic Land and Property Limited v Chorley BC & ors [2014] EWHC 1179 (Admin)

- Fox Strategic Land and Property Limited (“Fox”) sought by way of judicial review to quash the charging schedule.
- The schedule imposed a charge of £65 per square metre on Fox, a developer which owned a large amount of land in the north-west of England. Fox challenged the lawfulness of the manner in which this figure had been reached.
- The challenge was brought on three grounds:
  - Irrationality – that the examiner had failed to identify shortcomings in the evidence upon which the £65 per square metre figure was based;
  - Immaterial consideration – that the examiner incorrectly applied the council’s evidence relating to assumptions about the size of dwellings, density of development and cost.
  - Duration – that the examiner ought either to have required for the councils’ evidence to justify the £65 charge continuing beyond January 2016 or, in the absence of such evidence, to have recommended the rejection of the charging schedule.
R on application of Fox Strategic Land and Property Limited v Chorley BC & ors [2014] EWHC 1179 (Admin) continued

• Fox was unsuccessful on all three grounds
• Irrationality - Lindblom J described the irrationality challenge as “particularly ambitious”. His Lordship was at pains to stress that the CIL Regulations placed a wide range of matters within the judgement of the charging authority. Those matters about which Fox complained fell within that judgement afforded and so it was not open to the court to interfere with the examiner’s conclusions.
• Immaterial consideration - This ground failed for similar reasons. His Lordship was satisfied that the examiner had acknowledged Fox’s submissions in his report. He had simply rejected them.
• Duration – His Lordship was satisfied that there was no requirement in the CIL Regulations or the accompanying guidance that the councils should show that a CIL charge of £65 per square metre would not prejudice the viability of housing development after January 2016. Accordingly, the examiner did not err in law by failing to ask for such evidence.
R on the application of Oxted Residential Limited v SoS for CLG [2015] EWHC 793 (Admin)

• Dove J, giving judgment in the Administrative Court on 20 February 2015, held that a charging schedule was valid, even though the core plan on which it was based was out of date.

• The Claimant raised an objection to the charging schedule at a consultation stage on the basis that it was based on an out of date plan. The inspector who considered the schedule was unconcerned:
  – “Whilst it is a desirable objective, it would be unreasonable in the current circumstances, to expect all the planning documents of the Council to provide a seamless comprehensive and continuously up-to-date palette of planning policies and proposals.”
Dove J agreed with the approach adopted by the inspector. He interpreted the legislation relating to the imposition of CILs as contemplating a development plan constructed from a series of documents produced at different times. He considered that the plan at issue in this case was limited in its scope and, therefore, despite being out of date, it remained useful and applicable for the purposes for which it was used.
A developer applied for judicial review of a council’s decision not to reduce Community Infrastructure Levy (CIL) payments.

Planning permission had been granted to demolish a pub and erect residential units.

The Council imposed a CIL liability on the developer of £40,705.

The developer sought to reduce this liability on the basis of CIL Regulation 40(7), which provides for a reduction where premises to be demolished or redeveloped have been in lawful use for a continuous period of at least six months in the three year period ending on the day permission is granted.

HHJ Cooke in the Administrative Court was required to interpret the meaning of ‘lawful use’ for these purposes.
• The developer was unable to demonstrate that the pub had continuously traded for any six month period within the previous three years. Nevertheless, the developer pointed to the fact that fixtures had remained in the premises during that time such that it could throughout have been used as a pub.

• The court rejected this argument. It was not enough merely to demonstrate a hypothetical use to which the premises may have been put. Actual use had to be demonstrated by the developer.
CIL: New limitations on use of S106 Agreements

- 6th April 2015
- Restrictions on use of planning obligations requiring pooled contributions
- Limit – 5 or more planning obligations
- What does this mean in practice?
  - No longer able to require payments for generic infrastructure provisions eg ‘open space, educational improvements
  - Needs to meet Reg 122 CIL tests
CIL: New limitations on use of S106 Agreements

- No infrastructure provision through s106 if CS not adopted
- Limited infrastructure provision if CS adopted
- **Unlawful** for LAs to take into consideration obligations if 5 or more entered into for same infrastructure (pooled contributions)
- Need to count back from 6th April 2010
CIL: Consequences of restriction

- Real problem for LA if CS not adopted or inadequately prepared (list too generic)
- Inability to deliver infrastructure = planning permissions at risk
- Possible challenge from rival developer
- Risk to ability to deliver affordable housing
- Developments will go ahead without much needed infrastructure
CIL: How to address the infrastructure problem?

- Conditions?
- Contracts outside S106?
- Delivery in kind?
- Ensure charging schedule is specific on type of infrastructure sought (improvements to Tynehall School rather than generic education improvements)
- Can still use s106 for site specific mitigation
- Direct payments (to CC or Highways Authority)?
- Other funding sources?
CIL: The Future

• Here to stay!
• Whoever is next in Govt is unlikely to abolish it
  – Labour led policy, supported by Conservatives which appears to have cross party endorsement;

BUT

– CIL relies on delivery of dev to raise funds, but dev sometimes cannot commence until infrastructure (planned or committed) is in place;
– CIL makes up a small proportion of what is required for infrastructure, as such LPAs will need to find other ways of funding shortfall;
CIL: The Future

What will it look like?

– Further reforms on the way – guidance required on how LPAs are to operate in a world post pooling restriction & pre CIL adoption
– Savills found LPAs are adopting developer-led approach, zero CIL rate and site specific s106 mitigation.
– Provided all LAs adopt CS and can understand provisions, may work well.
– There will be raft of developments without much needed infrastructure in meanwhile.

LAs need to adapt quickly, look for altn funding streams and learn to ride the very big storm ahead
10 Key Legal Issues

Regeneration Schemes
LEGALITY
- Procurement (1)
- Vires Issues (2)
- Title (3)

COMMERCIAL ISSUES
- CPO (4)
- Overage (5)
- Control of Development (6)
- Default (7)
- Remediation and Site Review (8)
- Planning (9)
- Structure (10)

CASE STUDY
1. PROCUREMENT

“Avoiding an EU procurement process doesn’t necessarily save time or make things easier”
1. PROCUREMENT

- Characteristics of an EU procurement process
- Characteristics of a Sale and Buy Back approach
1. PROCUREMENT

Benefits and disadvantages of an EU procurement process

– You can prescribe exactly what you want to be built
– Avoids any suggestion of giving preferential treatment to a single developer
– Assists any state aid issues
– You can regain control of the site more easily if things go wrong
– Usually a slower process to appoint a developer (but not necessarily slower to get a spade in the ground)
1. PROCUREMENT

Benefits and disadvantages of a Sale and Buy back approach
- Avoids potentially complex and resource hungry EU procurement process
- Developer can be appointed quite quickly potentially
- You can’t require the developer to build anything – need to rely on planning process
- It’s difficult to regain control of the site if things go wrong
- Market testing should avoid S123 issues
- Negotiating with a single developer raises probity and challenge issues
2. VIRES

“It’s not always what you can do, but rather what you should do”
2. VIRES

Distinguishing between (a) having a power and (b) exercising that power appropriately

- The importance of Wednesbury
- Audit trails
- Perception -v- reality
2. VIRES

Firm A acts for a Local Authority which owns 30% of a regeneration site. Developer X owns 25%. The Local Authority instructs Firm A that it has agreed to transfer its 30% to Developer X for nil consideration and if necessary will use CPO powers to acquire the remainder. Firm A is told that the Local Authority had got a valuation last year which gave the 30% a nil value based on its current use and the contaminated nature of the land.
2. VIRES

Potential issues

- S123
- Undervalue exemption
- Sole developer negotiation
- Fiduciary duties
- State Aid
- Reputational risk
“Early preparation is key”
3. TITLE

1. Registered Title Issues
2. Unregistered Title issues
3. TITLE – Registered Title Issues

- Restrictive Covenants
- Historical rights reserved – manorial, drainage, rights to light
- Restrictions
- Options and Pre-emption Rights
- Registered Leases
3. TITLE - Unregistered title encumbrances

- Undocumented occupiers
- Wayleaves, licences
- Planning agreements
- Public footpaths
4. CPO

“If you’re exercising CPO powers to enable development, making sure the Local Authority isn’t out of pocket is absolutely essential”
4. CPO

- Why is it needed?
- When is it used?
- Viability
- Need for negotiation
- Costs and money flow
- Appropriation
5. OVERAGE

“Even the simplest overage needs to be checked and double checked”
5. OVERAGE

• Types of overage
• Protecting overage
  - charge
  - positive covenant + restriction
  - long lease
  - restrictive covenant
• Worked examples
6. CONTROL OF DEVELOPMENT

“Beware the viability test”
6. CONTROL OF DEVELOPMENT

- Control of Planning
- Control of Phasing
- Control of Unit delivery
7. DEFAULT

“Breach of contract and ones remedy are two quite different things”
7. DEFAULT

- What constitutes default?
- Pre and post land transfer
- Contractor default
- Funder step in
- What remedies might you have?
- Buy back provisions
8. REMEDIATION AND SITE REVIEW

“Know the physical site as bespoke arrangements may be needed on active sites”
8. REMEDIATION AND SITE REVIEW

- Ground condition surveys
- Inspection – occupiers, unregistered areas, boundaries
- Land to be retained
- Access
“Beware of conditions that may affect your retained land”
9. PLANNING CONSIDERATIONS

- Conditional Sale
- Planning Permission
  - Type
  - Appeal
  - Unacceptable conditions
- CIL
- S106
“Avoid leasehold if at all possible”
10. STRUCTURE

- Freehold
- Leasehold Issues
- Timing of lease
  - Forfeiture
  - Repair
  - Maintenance of common parts