JONES DAY

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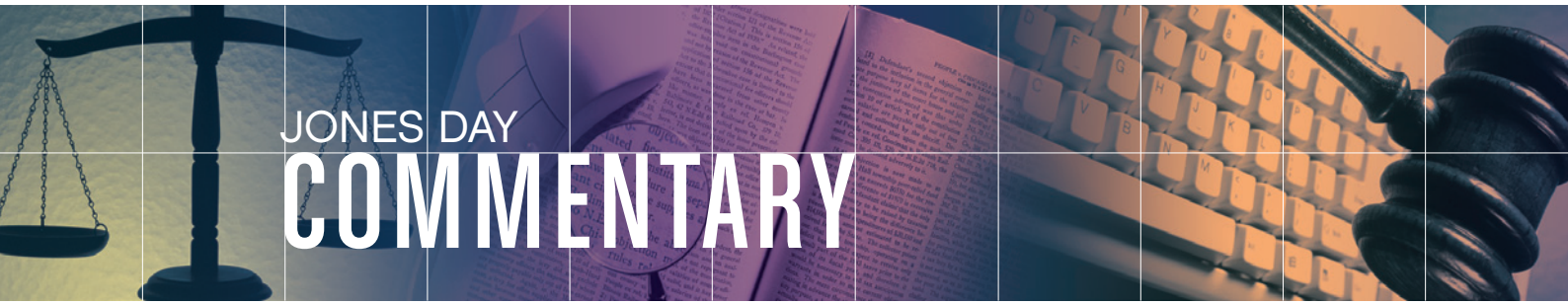


# THE COMMUNITY INFRASTRUCTURE LEVY

On 23 October 2009 the Department of Communities and Local Government's consultation exercise in respect of the Community Infrastructure Levy ("CIL") closed.

CIL is a proposed new tariff which local planning authorities ("LPAs") may use to charge on most forms of development. The Government believes there is a need for developers to contribute further to the provision of infrastructure and that the current means of doing so through planning obligations (under Section 106 of the Town & Country Planning Act) provides only a partial means of claiming the necessary contributions required for infrastructure growth.

The Government intends to bring the finalised CIL regulations into force on 6 April 2010. This *Commentary* explores the current proposals and some of the controversies relating to the draft regulations.

## THE LEVY

CIL is effectively a tariff to be levied by LPAs at their option. Before an LPA can choose to charge CIL it must:

- have an up-to-date development plan for its area which shows broadly the quantum, type and location of development which will be needed in the LPA's area for the duration of the plan; and
- adopt a charging schedule which will set out the amount of CIL which will be payable in respect of development. This will be based on a formula which is set out in the draft regulations. The charging schedule will be subject to a consultation and examination in public process similar to Development Plan documents. Once it has been adopted by the LPA it will become part of their Local Development Framework.

## HOW MUCH CIL WILL BE PAYABLE?

The Government will allow LPAs to introduce their own rates for their own areas. In setting these rates, LPAs will be required to consider various factors, including the potential effect of CIL upon the economic viability of development as a whole across their areas.

LPAs will also have the flexibility to set different CIL rates for different types of development or for development in different geographical zones.

There will, however, be some standardisation nationally:

- the rate will be set in pounds per square metre gross internal area floorspace; and
- the LPAs will have to apply indexation from the date of the adoption of their charging schedule until the grant of the relevant planning permission (the indexation will be set nationally).

## WHICH DEVELOPMENTS WILL BE SUBJECT TO CIL?

CIL will be chargeable on most forms of development, although there are some exceptions. Some of the most notable of these exceptions are:

- household development by home owners (but not so as to increase the number of dwellings);
- for non-residential development, there will be a *de minimis* threshold of a 100 sq.m. GIA increase;
- changes of use within the same use class under the Town & Country Planning (Use Classes) Order;
- permitted changes of use between use classes pursuant to the General Permitted Development Order; and
- a total exemption for developments by charities for charitable purposes.

The Government's apparent intention is that CIL will only be chargeable on developments which are the subject of planning permissions granted after a charging schedule has come into effect in the relevant area. However, the draft regulations would allow for some types of development granted permission prior to the adoption of a charging schedule to be caught by the CIL regime. We can advise clients further on this. We have also sent representations to the Department of Communities and Local Government to point out this flaw.

## WHO PAYS CIL?

Anybody can assume liability for CIL for a given development.

However, if no one assumes liability before the commencement of a development, or if a party who has assumed liability defaults, the owners of the land will be liable.

An assumption of liability may be withdrawn or transferred before the commencement of development.

## WHEN WILL CIL BE PAYABLE?

Payment will be due on commencement of development under the planning permission. However, if the correct procedures are followed, there will be a 28-day payment window after commencement of development. We can advise clients further on the likely procedures required by the regulations.

## ENFORCEMENT

The Government proposes to give various new powers to LPAs to deal with breaches of the CIL regulations. For example, LPAs will be empowered to add interest and surcharges to late and unpaid CIL. Moreover, a CIL Stop Notice could require a development to stop if CIL has not been paid. Failure to comply with such a notice would be a criminal offence.

## WHAT WILL HAPPEN TO SECTION 106?

The Government is proposing to scale back the applicability of planning obligations under Section 106 to allow them only to be used for mitigation of impacts which arise directly and solely from the proposed development. The

Government proposes that this scaling back will occur regardless of whether an LPA has adopted CIL in its area. Accordingly, there will be an incentive for LPAs to adopt CIL, otherwise they will not be able to recover contributions from developers for indirect or incremental impacts. The Government proposes a two-year transitional period from 6 April 2010 to allow LPAs to prepare for this change.

It is proposed that affordable housing obligations will still be covered by Section 106.

## COMMENT

The draft regulations have attracted some controversy. In particular:

- the scaling back of Section 106 obligations has proven controversial for some LPAs, who effectively feel that they are being forced to adopt CIL, which was always stated by the Government to be an optional levy. Furthermore, the proposed two-year transitional period for scaling back Section 106 obligations means that LPAs will in practice need to begin their work on CIL sooner rather than later.
- the Government does not wish to allow developers to offset any contributions made or works done under Section 106 planning obligations against their CIL liability. The British Property Federation (amongst others) is lobbying for a change in this regard.
- the CIL regime will essentially rely upon local authorities and statutory agencies to undertake certain local and sub-regional infrastructure works, rather than developers. If the need for works arises because of several developments, and so falls within the CIL regime rather than Section 106, the question arises as to whether the authorities will be able to deliver the infrastructure on time and how—in the absence of a legal agreement—developers will have any control on this issue.

## LAWYER CONTACTS

For further details on CIL, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact us" form, which can be found at www.jonesday.com.

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