

**DERBYSHIRE COUNTY COUNCIL**

**MEETING OF CABINET MEMBER – HIGHWAYS, TRANSPORT AND  
INFRASTRUCTURE**

**28 February 2019**

Report of the Strategic Director – Economy, Transport and Environment

**GOVERNMENT RESPONSE TO CONSULTATION ON SUPPORTING  
HOUSING DELIVERY THROUGH DEVELOPER CONTRIBUTIONS**

(1) **Purpose of Report** To agree the County Council's formal response to a consultation by the Ministry of Housing, Communities and Local Government (MHCLG) on revisions to the Community Infrastructure Levy (CIL) Regulations entitled 'Reforming Developer Contributions: Technical Consultation on Draft Regulations'.

(2) **Information and Analysis** Following Government consultations on the Housing White Paper, 'Fixing Our Broken Housing Market' (February 2017) and 'Planning for the Right Homes in the Right Places' (September 2017), a further consultation was published by MHCLG on 5 March 2018 on a package of reforms for the planning system which included both revisions to the National Planning Policy Framework (NPPF) and reforms to the developer contributions system.

Government put forward its proposals to reform the existing system of developer contributions in order to address the complexity and uncertainty which affects the current system in its consultation entitled, [Supporting Housing Delivery through Developer Contributions](#). A detailed response to the consultation was approved at the Cabinet Member meeting on 28 June 2018 (Minute No. 67/18 refers).

Following this consultation, Government published its response in October 2018 outlining its intentions for reform with regard to developer contributions which was presented at the Cabinet Member meeting on 20 December 2018 (Minute No. 109/18 refers). The report outlined the main areas of change to the current system of developer contributions and where there would be potential implications for the County Council, particularly relating to negotiating, securing and monitoring developer contributions.

In line with their commitment, a consultation on the draft legislative changes to the CIL Regulations was published on 20 December 2018.

Derbyshire County Council's response to this consultation was developed in liaison with elected members and submitted to MHCLG in line with the 31 January 2019 deadline. It was noted that formal agreement to the response would be sought through the appropriate Cabinet Member meeting.

The Council's full response is set out in Appendix A but in summary, the regulatory changes being brought forward by Government relate to:

- ensuring that consultation is proportionate;
- removing the restriction which prevents local authorities from using more than five Section 106 obligations to fund a single infrastructure project (the pooling restriction);
- improvements to the operation of the CIL;
- a more proportionate approach to administering exemptions;
- extending abatement provisions to phased planning permissions secured before the introduction of the CIL;
- applying indexation where a planning permission is amended;
- indexing CIL rates to more closely track the value of development;
- removing Regulation 123 restrictions and introducing Infrastructure Funding Statements;
- clarifying that local planning authorities can seek a sum as part of a Section 106 planning obligation for monitoring planning obligations; and
- delivering starter homes.

The main focus of the County Council's response to Government is based around the policy changes with regard to Section 106 agreements as the County Council currently does not have the power to introduce a CIL, as such, not every question posed has required a response:

**Question 1:** Regulation 3 reduces the need for two statutory consultations when bringing in a CIL or consulting on a draft charging schedule. The County Council welcomes the more proportionate and flexible approach proposed with regard to consultation, along with the removal of the requirement for local advertisement notices.

**Question 2:** Regulation 12 deletes Regulation 123 which limits pooling of Section 106 agreements to five per project. The lifting of the pooling restrictions is fully supported by the County Council, and will assist local planning authorities and infrastructure providers to support Government aims for the delivery of new homes and supporting infrastructure. Clarification is requested as to whether the impact of the removal of Regulation 123 is retrospective, i.e. pooling can be applied to agreements signed prior to the proposed changes to the Regulations.

**Question 4:** Regulation 13 changes to the way CIL is calculated and apportioned across phased developments and how CIL is calculated with regard to Section 73 permissions. The County Council has highlighted a

potential scenario where the proposed changes may not deliver the intended outcome.

**Question 5:** Regulation 6 seeks to amend an inconsistency in the current regulations with regard to the indexation methodology where a planning permission is amended. The County Council has expressed support for this amendment.

**Questions 6 and 7:** The Regulation 5 amendment proposes to change the indexation used. Currently, all CIL chargeable development is indexed to Building Cost Information Service (BCIS) All in Tender Price Index. Government is proposing to index the CIL charge for residential development to a smoothed three year average of the local House Price Index (HPI) and all other CIL chargeable development to the Consumer Price Index. The County Council has expressed concern with this approach and would wish to retain the use of BCIS which is linked to construction prices. CIL is intended to fund infrastructure. Whilst house prices fall, the cost to deliver infrastructure generally does not, and any corresponding fall would reflect in the indexation and reduce contribution levels. This would therefore impact on the monies available for the delivery of infrastructure to support the development, and expose infrastructure providers to increased costs.

**Question 8:** Regulation 10 amendments require that having removed Regulation 123, authorities will need to produce Infrastructure Funding Statements (IFS), to demonstrate per financial year, what Section 106 funds have been collected and how the contributions have been spent. Concern is expressed regarding how an IFS would operate in a two tier system, how reporting with regard to the varied nature of Section 106 agreements would be addressed and highlights the difficulties and time consuming nature of predicting Section 106 income over a three year period across the numerous borough/districts within Derbyshire. Concern is also expressed whether the annual reporting of income and expenditure has any value given the potential extended timeframe between the collection and expenditure of Section 106 funds. It has also been highlighted that following the amount of data to be provided and the uncertain nature of the date, the draft CIL Regulations will be laid before parliament, it would be reasonable for the first IFS to be by 31 December 2020.

**Question 9:** Regulation 11 introduces into regulation, permission for authorities to seek a proportionate monitoring fee. Derbyshire County Council has welcomed this opportunity but seeks further guidance on what the Government considers is proportionate and especially in relation to two tier authority areas.

In the report considered by Cabinet on 22 February 2018, a commitment was made to the wholesale review of the County Council's Developer Contributions Protocol (DCP) to encompass all relevant County Council service areas and to ensure that the DCP would reflect the legislative changes

arising from MHCLG's consultation on developer contributions (Minute No. 59/18 refers). This work is due to commence spring 2019 with the intention it can be implemented as soon as practicable following the approval of the draft regulations. A further report will be presented to Cabinet at the appropriate time to agree the DCP review for publication.

(3) **Financial Considerations** There are no financial considerations directly associated with this report.

(4) **Legal Considerations** The recommendation in this report is made in the context of the County Council's responsibilities and services under the provisions of the Localism Act 2011 and the Planning and Compulsory Purchase Act 2004, Planning Act 2008 and CIL Regulations 2010 (as amended).

(5) **Social Value Considerations** The relevance of social value in terms of social, economic and environmental wellbeing has been considered in the preparation of this report. Meeting the current and future needs of communities and the management of scarce resources (i.e. sustainable development) is central to the role of local and county planning authorities in preparing and implementing their local plans and the provision of infrastructure to support those plans.

### **Other Considerations**

In preparing this report the relevance of the following factors has been considered: prevention of crime and disorder, equality and diversity, human resources, environmental, health, property and transport considerations.

(6) **Key Decision** No.

(7) **Call-In** Is it required that call-in be waived in respect of the decisions proposed in the report? No.

(8) **Background Papers** Held on file within the Economy, Transport and Environment Department. Officer contact details – Alison Richards, extension 39667.

(9) **OFFICER'S RECOMMENDATION** That the Cabinet Member delegates authority to the Strategic Director - Economy, Transport and Environment to send a formal response to the Ministry of Housing, Communities and Local Government on the Developer Contributions Reform: Technical Consultation, as set out in this report and Appendix A.

**Mike Ashworth**  
**Strategic Director – Economy, Transport and Environment**



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 Our Ref: Developer Contributions/AR  
 Your Ref:  
 Date: 31<sup>th</sup> January 2019

Dear Sir,

## **MINISTRY OF HOUSING, COMMUNITIES AND LOCAL GOVERNMENT CONSULTATION**

### **REFORMING DEVELOPER CONTRIBUTIONS: TECHNICAL CONSULTATION ON DRAFT REGULATIONS**

This response on behalf of Derbyshire County Council is with reference to the Government's consultation document on the reforming of developer contributions – technical consultation on draft regulations December 2018. The comments below relate to the proposed amendments to the Community Infrastructure Levy (CIL) Regulations 2010 (as amended) in respect of Section 106 agreements. The County Council is not a CIL Charging Authority and, as such the proposals relating to CIL have not been considered in detail.

A report on the reform to developer contributions, including the comments below, will be considered at a forthcoming meeting of the County Council's Cabinet Member for Highways, Transport and Infrastructure on 28 February 2019. In the meantime, in order to meet your statutory deadline, I should be grateful if you would accept these comments until I confirm the decision made on the report at the Cabinet Member Meeting following a five-day call-in period. I will, therefore, contact you again at that time to confirm DCC's formal comments.

#### **Question 1: Are there any elements in Regulation 3 which will prevent the Government achieving the policy intent?**

It is welcomed that a more proportionate and flexible approach is being proposed with regard to consultation along with the removal of the requirement for local advertisement notices.

However, with regard to the amendment proposed for Regulation 16 (2) in which there is the addition of sub paragraphs (a) to (d) to define the consultation bodies, it is assumed that the existing paragraph (2) sub paragraphs (a) to (d) will remain and be renumbered.



The amendments as proposed do not appear to obstruct the intention of the Government to expedite the introduction of a CIL or to amend a charging schedule. The reduction in the requirement for two consultations will also help to make the revisions to a CIL Charging Schedule more responsive to the market.

**Question 2: Are there any elements in Regulations 4 and 12 which will prevent the Government achieving the policy intent?**

The lifting of the pooling restrictions is fully supported by the County Council and will improve the flexibility of mitigation, and avoid developments being treated differently as a result of the timing of the submission and the number of previous applications submitted. The relaxation of the pooling restrictions will therefore assist Local Planning Authorities and infrastructure providers to support the Government aims for the delivery of new homes and supporting infrastructure more effectively, particularly in areas of high proposed housing growth.

It is noted that it is proposed to delete Regulation 123, however clarification is needed as to whether the lifting of pooling is retrospective.

**Question 4: Are there any elements in Regulations 13 which will prevent the Government achieving the policy intent?**

There appears to be no consideration for how an outline phased development would apply phased credit in the event that a CIL is withdrawn prior to the approval of the final reserved matters/pre-commencement condition for future phases as this is the date at which a planning permission first permits a phase of the development.

**Question 5: Are there any elements in Regulation 6 which will prevent the Government achieving the policy intent?**

It appears that the amendments to Regulation 9 and the formulae proposed for inclusion in the CIL Regulations as Regulations 40A and 40B address the issues arising around the application of indexation to Section 73 applications.

**Question 6: Are there any elements in Regulation 5 which will prevent the Government achieving the policy intent?**

Yes, the use of the Consumer Price Index (CPI) and Local House Price Index (HPI) are not linked to the cost of infrastructure. Please see response to Question 7 below.

**Question 7: Are there any further comments in relation to the Government's proposed approach to Community Infrastructure indexation, including for residential development, the approach of using a smoothed index using local house prices.**



The use of 2 separate indices for residential development and other development will complicate the calculations of indexation, for example, on mixed use sites where the application is phased and where there are numerous Section 73 applications.

As a crude methodology to capture the uplift in the value of development, the use of a three year smoothed average of annual local HPI has some justification, however CIL is meant to be about funding costed infrastructure. House price indices and CPI can fall as well as rise, whilst the construction cost of infrastructure generally rises. However, when house prices fall, a corresponding fall in indexation would reduce contribution levels, impact on the monies available for the delivery of infrastructure to support the development, and expose infrastructure providers to increased costs. This is particularly an issue for Unitary and County Councils which generally provide the larger items of infrastructure such as education and highways. The current Building Cost Information Service (BCIS) of the Royal Institution of Chartered Surveyors methodology (although this is a subscribed service) takes account of full construction costs and is recognised as the leading industry standard.

**Question 8: Are there any elements in Regulation 10 which will prevent the Government achieving the policy intent?**

Yes. It is noted that with regard to Section 106, reporting on annual income and expenditure is feasible, although onerous in such depth. The issues with the draft requirements for reporting are highlighted below:

- a) It is noted that Regulation 121A (1) is applicable to 'contribution receiving authorities', County Councils being included by virtue of the definition under the Town and County Planning Act Section 1 as identified in draft Regulation 121A 10 (b) . Section 106s are variable in form and operation. There are cases where, for example, a County Council is not a signatory, but is the authority which would deliver the infrastructure, i.e. highways and education. In these cases, the contributions would be collected by the District/Borough and provided to the County Council for project delivery. How is it intended that these anomalous Section 106s are recorded, particularly to avoid double counting in district/borough and County Council IFSSs?
- b) Concern is also expressed regarding the monitoring of expenditure, with the timescales for the retention and use of contributions often being prolonged and frequently directed at multiple projects which have to be incorporated into the Highway Authority's capital scheme programme. It is appreciated Government wishes to make the process more transparent, however, this highlights the disconnect between the two reports required, with the income and subsequent expenditure (depending on the terms of the Section 106) potentially being a number of years apart, a situation which may not be appreciated by the lay person.
- c) With regard to the requirements in Paragraph 121A (8) of the draft regulations, the value in forecasting a three year income from Section 106 agreements is questionable given the amount of valuable officer time it would take, and the





precision of the information produced. It would be possible to provide a provisional estimate regarding income for those developments which have commenced, however, predicting income on developments with permission but which have not yet commenced is impracticable, especially in the case of a County Council, which is not the determining authority, privy to this information, and has numerous District/Borough areas to cover. Collating this information would rely on each District/Borough having an up to date housing trajectory, although this would not cover smaller permissions for retail and employment, for example, where contributions through Section 106 or Section 278s are required. How is it proposed that this information is captured? The County Council is therefore unconvinced who will benefit from this flawed information given the additional administrative burden it would take to produce.

- d) As is recognised by the National Planning Policy Framework (2018), there is a wide array of joint working across local government and, to this end, the introduction of standardised regulations and monitoring requirements may not fit within these new structures.
- e) With regard to the monitoring requirements in Paragraph 121A (5) to (8), given the quantity and nature of the information required, and the uncertain date during 2019 when the draft regulations will be laid before parliament, it would be reasonable that the first requirement to publish the Infrastructure Funding Statement would not be before 31 December 2020.

**Question 9: Are there any elements in Regulation 11 which will prevent the Government achieving the policy intent?**

The County Council welcomes the opportunity for seeking developer funding towards the monitoring of Section 106 agreements. However, further guidance on what level of monitoring fee would be proportionate would be beneficial, especially in relation to two tier authority areas.

I trust the above comments will be of assistance and will be considered in the reform of the CIL Regulations.

Yours faithfully

Mike Ashworth  
Strategic Director Economy Transport and Environment

