



**Environment & Transport Select Committee  
23<sup>rd</sup> April 2015**

**Community Infrastructure Levy & S106 Update**

**Purpose of the report:** Policy Development and Review

This report provides an overview of the implementation of the Community Infrastructure Levy (CIL) across the eleven planning authorities in Surrey and an update in relation to the changes to the s106 regime, including the impact upon the ability to seek developer contributions from new development.

**Introduction:**

1. The Community Infrastructure Levy (CIL) is the Government's preferred policy approach to the collection of developer contributions to fund the provision of infrastructure in support of new development in each area.
2. CIL was introduced in 2010 with the intention that from April 2014 (extended to April 2015) the majority of planning authorities would have adopted the Levy.
3. As at the date of this report some 15% of authorities (57) across the country have now adopted CIL with a further 39% of authorities (137) anticipating adopting CIL by April 2016, 27% of authorities (95) still being in the early stages of preparation and 18% of authorities (63) having decided not to pursue the adoption of CIL.
4. CIL is effectively a tax on new development which is levied and collected by planning authorities in respect of the majority of new floorspace granted planning permission once the CIL regime has been adopted; it being an important additional funding stream which it is intended will help provide new and improved infrastructure required to support the growth identified in the respective Local Plans.
5. CIL and its collection and spending is controlled and managed by the planning authorities in accordance with the government's CIL regulations, which have become very complex as a result of the range of changes introduced by the government since 2010; a fifth raft of regulatory changes anticipated shortly.

6. At the outset a figure of over £20M was suggested as potential total annual CIL income for all planning authorities in Surrey but there were perceived risks that the authorities would not adopt CIL (it not being mandatory) and CIL monies might not be released for projects promoted by the County Council.
7. This report identifies a range of issues and consequences arising as a result of
  - 7.1 CIL being adopted by a number of Surrey authorities,
  - 7.2 the challenges arising in those areas where CIL has not been adopted and
  - 7.3 the government changes to the s106 regime, including the current legal challenge to recent changes to government planning policy.

#### Implementation of CIL in Surrey

8. The current situation in relation to the adoption of CIL in Surrey is shown in the table at **Annexe 1**
9. Since April 2013 four authorities have adopted the CIL regime, namely Elmbridge, Epsom & Ewell, Surrey Heath and Tandridge, two authorities anticipate adopting in April 2015, namely Woking and Spelthorne, two authorities anticipate adopting by April 2016, namely Mole Valley and Reigate & Banstead, the remaining authorities hoping to adopt at a later date dependent upon the progress in adoption of their Local Plans.
10. Clearly the adoption and introduction of the CIL regime are very much dependent upon whether a particular planning authority has an up to date and adopted Local Plan as CIL is unlikely to be introduced unless an up to date plan is in place, hence the likely extensive delay in the introduction of CIL in areas such as Runnymede, Waverley and Guildford.

#### CIL governance in Surrey

11. **Elmbridge** were the first authority to both adopt and commence collection of CIL, in April 2013, and governance arrangements were put in place in relation to how CIL would be allocated and spent.
12. For the strategic CIL monies a Strategic Spending Board made up of Borough Members has been established by Elmbridge and the first meeting took place on 29<sup>th</sup> September 2014.
13. All County Council projects have to be initially approved by the Elmbridge Local Committee before they are submitted as bids to the Strategic Spending Board and all decisions of the Strategic Spending Board are then taken forward as recommendations to Elmbridge's Cabinet for final decision.
14. The County Council has been allocated CIL monies from the first round of bidding in 2014 and is currently preparing a second set of bids for the 2015 bidding round.

15. **Annexe 2** gives an overview of the successful bids to Elmbridge's Spending Board including the proposed and future bids although the the one project that was not found to be acceptable was the Terrace Road cycle path scheme, at £330,000, which was considered too expensive and was felt by Members not to meet the needs of the local population.
16. Of particular note is that none of the successful highways schemes were to mitigate traffic impact arising from new development, even though the funding itself was derived from such development.
17. With regard to the spending of the 'meaningful proportion' of CIL (up to 25%) which has to be handed down to local communities, settlement-specific Spending Boards have been created for the designated settlement areas, the release of such funds being contingent on having a clear delivery plan in place.
18. A slide showing how the "meaningful proportion" is allocated, the amount dependent upon the existence of a Parish Council and/or a Neighbourhood Plan, is to be found at **Annexe 3**.
19. Although **Epsom & Ewell, Surrey Heath, Spelthorne and Tandridge** have commenced the collection of CIL detailed discussions have yet to take place as regards how the governance arrangements will work going forward and whether the Local Committee will have a role in the process.
20. With regard to **Woking**, who have also recently commenced the collection of CIL, detailed discussions have taken place as regards how governance will operate in their area and a report was taken to the newly constituted Joint Local Committee on 3<sup>rd</sup> December, which introduced a process whereby the Joint Local Committee will determine the spending of CIL once the CIL regime is in operation.
21. Clearly there are a number of different models for the governance of CIL that could be introduced by each of the authorities but at present it is considered that the Woking model is one that appears to offer the most open and transparent collaborative process for deciding which schemes the CIL monies should be used to support.
22. Indeed in Elmbridge's report to their Cabinet in June 2013 they stated that "the potential to use Surrey Local Area Committees for such purposes was examined and while there would be obvious resource benefits in utilising an existing committee, a number of potential barriers have been identified in doing so".
23. "These local committees are constituted by Surrey County Council and voting restrictions apply to district/borough members". "At present, district/borough functions could only be voted on by local committees if the function was delegated to the County Council, who in turn would delegate to the local committees". "In terms of CIL, this would require the transfer of powers currently held by Elmbridge, as the designated charging authority, to the County Council".

24. The Joint Local Committee model now operating in Woking could allay some of the concerns and procedural difficulties expressed in the report so it will be dependent on how this new “joint” committee works in Woking as to whether Elmbridge, or any other authority, considers the model to be something they could adopt in their areas in the future.
25. Over the coming months it is anticipated that detailed discussions will begin as regards the governance arrangements in those areas where the CIL regime has or is to be adopted.

### **Impact of the CIL regime in Surrey**

26. The current CIL regime in Surrey is highlighting a number of concerns which have consequences for the planning and provision of infrastructure provided by the County Council, (predominantly transportation, highways and education), whether in relation to the provision of mitigation for new development or addressing the cumulative impact of the growth across Surrey.
27. Some of these concerns are summarised as follows -
  - 27.1 In local authority areas that have yet to adopt CIL there will be limited opportunities for securing funding until such time as CIL is adopted, from when it is likely to be a further twelve to eighteen months before the local authority are in a position to actually allocate the monies collected;
  - 27.2 For all except very large developments CIL removes the link between the development and the mitigation of the development’s specific impacts;
  - 27.3 In the West of the County the inclusion of SANGS (suitable alternative natural green spaces) as part of the CIL regime will materially reduce the monies available for other infrastructure due to the high cost of SANGS provision;
  - 27.4 The decisions on allocation of CIL funds will be made in the main by the local authorities (excepting Woking where decisions will be made by the Joint Local Committee), there being no guarantee as to the level of funding that will be made available for County Council infrastructure;
  - 27.5 CIL places the onus for delivery of infrastructure on the collecting authority (local planning authority), who are not, in the main, the delivery authority, which could result in crucial infrastructure either being delayed, not being provided or having to be funded solely by the County Council; and

- 27.6 There will be minimal scope for officers to negotiate mitigation for medium-sized developments, as has been the case until recently, where a developer is paying CIL.
28. The ability to seek the s106 Planning Infrastructure Contribution tariff (PIC) or the Horley Small Sites tariff, for new planning applications received, or decisions made, post 6th April 2015, will cease and in those areas where CIL has been adopted new applications will begin being charged CIL.
  29. In areas where CIL has not been adopted no CIL charge or s106 tariff monies will be sought and new development (unless a major application where onsite s106 mitigation can be sought) will no longer be required to mitigate its specific impact upon local infrastructure.
  30. This situation will continue until CIL is adopted by the local authority when a CIL payment will then be sought for area wide infrastructure projects, albeit these will not necessarily be in the locality of the development the monies were secured from.
  31. This unsatisfactory situation is compounded by the CIL Regulations (Reg 122) which restricts the number of s106 obligations to no more than five for a particular project of scheme which has previously secured s106 or tariff contributions, the number of obligations being counted back to April 2010.
  32. As a result if particular infrastructure requires a contribution from a development to mitigate its impact and if that infrastructure has already benefited from five previous s106 obligations, then the County Council are unable to seek a s106 contribution towards that infrastructure.
  33. Whilst this will be detrimental to the majority of authority areas it will prove particularly challenging in the areas where tariffs have been collected since 2008 (Waverley, Surrey Heath, Runnymede, Elmbridge, Epsom & Ewell, Mole Valley and Reigate & Banstead) as a result of the historic number of obligations secured for the majority of new development in those areas.
  34. The County Council's ability to secure infrastructure contributions has therefore been further restricted and any resulting deficit will have to be funded in the future by the County Council itself or by alternative funding mechanisms.
  35. This situation is highlighted by a recent decision of Runnymede BC wherein they have decided that in the light of the delay in adoption of CIL in their area the County Council will be required to fund the delivery of any necessary education and highways/transport Infrastructure during the period from April 2015 until they adopt CIL.
  36. In addition as a result of the allocation of a 'meaningful proportion' of CIL receipts, these having to be spent in the local community, it leaves only 75% of the CIL receipts to be distributed for strategic infrastructure; the

local planning authorities in the West of Surrey being likely to allocate a large proportion of the strategic receipts for SANGS mitigation, leaving significantly less CIL monies available for other infrastructure.

37. Whilst CIL will be able to be utilised for more strategic or major schemes it is the smaller local or medium sized schemes, that were previously funded in part by s106 and tariffs, which will find it much more difficult to secure funding under a CIL regime.
38. As a result officers who previously negotiated developer contributions in connection with planning applications have concerns that they will no longer be able to successfully mitigate the impact of new development upon local infrastructure as a result of the change in regime which will, over time, inevitably lead to a cumulative deficit of infrastructure throughout Surrey.
39. Developments are likely to occur which will impact on highways, public transport and education infrastructure but the County Council will not be able to secure s106 contributions to mitigate those developments because it is the government's intention that the necessary infrastructure should be funded, in the main, by CIL and not s106.
40. In relation to major applications officers will continue to work with their local planning authority colleagues in an effort to secure infrastructure, or funding for infrastructure through s106, on an application by application basis where it is both reasonable and compliant with the CIL statutory tests, which state that the request must be –
  - 40.1 directly related to the development
  - 40.2 necessary to make the development acceptable in planning terms, and
  - 40.3 fairly and reasonably related in scale and kind to the development
 and where the planning authority are supportive of the approach taken.
41. In the absence of any other mitigation the projects being prioritised for area wide CIL funding will no longer need to address the site impacts of specific development as had previously been required under the s106 regime.
42. Consideration is being given to setting up a monitoring and reporting regime to identify where development has taken place and if particular local infrastructure schemes were felt necessary to provide mitigation, and that mitigation has not been provided, the schemes will be recorded over time and monitored.
43. As the number of developments increase over time any scheme that becomes a priority could then be promoted to the local authorities for inclusion in the Regulation 123 List, a List which determines what schemes or projects are considered suitable for the receipt of CIL funding.

44. This regime would integrate with other strategic schemes and projects which are considered corporate funding priorities and which are proposed to be promoted as bids for CIL funding.

#### **Application for Judicial Review of Government policy changes**

45. In November 2014 the Government announced changes to the planning policy in relation to the size of schemes that should provide affordable housing, removing the majority of tariff style contributions and introduced a "credit" to be given for vacant buildings when calculating the obligations to be secured.
46. The policy was announced in Parliament and was reflected in changes to the NPPG, the stated aim being to make development easier and less expensive for small developers.
47. The policy changes have been challenged through the High Court by West Berkshire, Reading and Islington LB, with the support of Surrey County Council and other local authorities and public interest organisations.
48. One of the issues that the Court will have to consider is the effect that the exemption of small sites from affordable housing contributions will have in terms of the number of affordable homes that are secured and the level of planning contributions that are achieved.
49. Unfortunately the government do not appear to have carried out any analysis of the numbers of affordable homes or the level of contributions likely to be lost, before promoting the policy; surprisingly there appears there was no regulatory impact assessment or any environmental analysis exploring this issue.
50. Whilst there may well be good public policy justifications for the changes, promoting new policy without at least some public understanding of the likely consequences is not considered a reasonable or responsible approach.
51. Similar issues arise in relation to vacant building credit as again there is no evidence of the levels of affordable housing/planning contributions that will be lost as a consequence of the changes and perhaps more importantly, at least in terms of the operation of the planning system, there is no clarity about how the vacant building credit is proposed to actually work in practice; different planning authorities already interpreting the changes using different formula.
52. The principle behind the credit is simply that affordable housing contributions and planning contributions should now be based on the net increase in floorspace which is meant to mirror CIL. However, unlike the CIL process, CIL charging rates are set taking into account development viability and include assumptions about the likely level of net increase in floorspace.

53. In the light of the perceived financial impacts the three local authorities are challenging the policy changes by applying for a judicial review and the hearing of the applications are due to take place in the High Court on 29<sup>th</sup> April 2015.
54. The impact of the changes are already beginning to be felt in Surrey in that a number of small and viable developments, that had previously agreed to pay the tariff, have now applied to have the obligations discharged so reducing the costs of their development but in turn no longer mitigating the impact of their development on the local infrastructure, which officers estimate could mean up to £3m in developer contributions being at risk.
55. In Reigate & Banstead's area the Horley Small Sites tariff is at risk of losing £500k from viable development which has not yet been implemented where unilateral undertakings have already been executed; Horley being the subject of a comprehensive and co-ordinated Masterplan strategy to deliver 2,600 new homes supported by an extensive package of infrastructure and service improvements.
56. As part of its commitment to the Horley Masterplan the County Council has already defrayed considerable expenditure to deliver a number of key infrastructure and service improvements in advance of developer contributions being received that are necessary to ameliorate the impact of the development and to ensure it is integrated with the existing urban areas; any loss of anticipated developer contributions requiring additional funding to be provided at a time of financial restraint.
57. The extension of the changes to include affordable housing contributions will lead to significant losses for local planning authorities, Reigate & Banstead having estimated that the anticipated loss to affordable housing in their area will be £1.9m per annum, which would have supported or enabled the delivery of over 50 new affordable housing units in the Borough.
58. Reigate & Banstead consider that the changes will detrimentally affect their ability to deliver the levels of affordable housing required in their area in the light of the market failure to deliver such housing.
59. The Borough's affordable housing provision, which form part of their up to date and recently adopted Core Strategy, is a key part of the Council's strategy to meet their high affordable housing needs and was in line with the NPPF; the provisions being subject to a site specific viability requirement.
60. It seem the government has taken a decision to introduce a threshold for developer contributions to reduce the financial impacts upon developers of less than 10 units, rather than considering the introduction, as they did when introducing the CIL Regulations, a viability requirement which would have allowed development on small sites to proceed in areas where the requirement for developer contributions does not affect viability, due to the high value of housing and the resulting higher profit margins.

61. As a result the broad brush approach of the policy changes has resulted in development which is viable, and which can afford to pay developer contributions, being allowed to avoid them which, had a targeted approach based on viability criteria been introduced, would not have occurred.
62. Inspectors are already determining that the changes trump up to date statutory development plan policies, as in the case of Reigate & Banstead's Local Plan, and whilst that is clearly the effect of the Government's policy changes one does wonder if it was their intention.
63. Indeed even where a developer has continued to offer the required contributions, as occurred at a recent appeal, the Inspectorate have determined that the contributions should not be secured in the light of the recent policy changes.
64. In addition a number of planning authorities in Surrey consider that the financial credit, introduced by the policy changes, will further reduce their ability to secure the necessary infrastructure to support the new development particularly in respect of previous large industrial or Ministry of Defence type sites, where infrastructure including affordable housing provision are very important components of such sites impact mitigation; the stated aim being to speed up the development of brown-field sites by making it easier and less expensive for developers.
65. The impact of the financial credit continues to be evaluated by local planning authorities but what is clear is that very large sites with large areas of vacant buildings will no longer have to make a level of contribution towards infrastructure and affordable housing which they would previously have been required to make, thereby reducing the amount of funding for affordable housing and increasing the impact upon the existing infrastructure.

<b>Conclusions:</b>
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66. There has been a significant amount of collaboration with local authority colleagues in the run up to their adoption and collection of CIL, but there remains a considerable amount of work still to be undertaken before the remaining authorities are in a position to take forward their CIL regime.
67. There is still a large amount of detailed technical work to be undertaken by County Council colleagues with each of the authorities who are still to adopt Local Plans, Infrastructure Delivery Plans, CIL Charging Schedules and Regulation 123 Lists, the documentation that generally needs to be in place before CIL can be collected.
68. The Levy is very much a planning authority regime and as such a high level of collaborative working is required at both officer and more importantly at a political level, to ensure that the provision of strategic infrastructure to support the development in each of the areas is able to be secured and provided at the required time, utilising CIL as one of the funding streams.

69. As the report highlights the authorities in Surrey are at different stages in their preparations for CIL and as a result the adoption and collection of CIL will be subject to a variety of timescales and could, as a result, affect the ability of the County Council to support development in different areas by securing and providing infrastructure within the required timeframes.
70. As a result careful monitoring of the future impacts of the different timescales upon the delivery of local and strategic infrastructure will be required.

<b>Recommendations:</b>
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71. It is recommended that the Select Committee endorse:
- a) Officers continued collaboration with Borough and District colleagues in their preparation of Local Plan policies, Infrastructure Delivery Plans, CIL Charging Schedules and Regulation 123 Lists to ensure the County Council is able to support development in each of the areas by securing and providing strategic infrastructure at the required time,
  - b) Officers continuing to seek mitigation of infrastructure impacts from developers, on an application by application basis, in those LPA areas where CIL is not adopted post 6<sup>th</sup> April 2015, unless restricted by the 5 obligation restriction; details of any infrastructure mitigation that has not been achieved being recorded as part of the proposed monitoring regime,
  - c) Establishing a reporting back regime to establish the level of 'infrastructure deficit' arising from new development which is not being mitigated by the allocation of CIL or site specific s106 or s278 agreements,
  - d) Continued close working with the planning authorities operating CIL, and where possible negotiate changes to the governance arrangements and the Regulation 123 Lists in an attempt to ensure that any infrastructure deficits are kept to a minimum.
  - e) Officers continuing to seek agreement as to how the governance regime for CIL will operate in each of the areas by way of a memorandum of understanding or other suitable agreement, and
  - f) The further work required to secure a suitable governance regime in each of the areas, in the light of the possible different models for governance, given that the Woking model is one that appears to offer the most open and transparent collaborative process for deciding which projects CIL monies should support.

## Next steps:

72. The next steps are:

- Officers continue to monitor the progress of CIL adoption across Surrey
- The County Council continues to collaborate with Borough and Districts as regards the preparation of their CIL documentation, including any necessary agreements as to how the CIL governance and allocation process will work in each of the areas, and
- Officers bring back progress reports on the outcomes, particularly the success or otherwise of securing CIL monies towards necessary infrastructure.

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**Sources/background papers:**

Community Infrastructure Regulations 2010 (as amended)

CIL Members Update – April 2013

CIL Report - Environment & Transport Select Committee – 23<sup>rd</sup> January 2014

CIL Report - Environment & Transport Select Committee – 15<sup>th</sup> December 2014

**Consultees:**

Trevor Pugh – Strategic Director Environment & Infrastructure

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Cllr John Furey – Cabinet Member for Highways, Transport & Flooding

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