Report of	Meeting	Date
Director of Development, Preston City Council	Central Lancashire Strategic Planning Joint Advisory Committee	28 July 2015

REVIEW OF THE COMMUNITY INFRASTRUCTURE LEVY

PURPOSE OF REPORT

1. To advise members of the Joint Advisory Committee on a review of the Community Infrastructure Levy.

RECOMMENDATION(S)

2. The Joint Advisory Committee is recommended to note the current position with regard to the timing of a review of the Community Infrastructure Levy and to agree that a review of CIL is not appropriate currently.

EXECUTIVE SUMMARY OF REPORT

3. There has previously been an intention expressed by the Central Lancashire CIL charging authorities that a review of the CIL charges relating to residential development would be carried out in 2015 prior to the introduction of Code for Sustainable Homes Level 6 from January 2016.

4. For the reasons set out both below and in a separate report to this Committee, Code Level 6 will no longer be introduced. This removes the immediate necessity to carry out a review of the relevant CIL charges.

5. Officers consider that there would still be benefits from a review of CIL both with regard to the extent of charging and with regard to potential changes to the Regulation 123 list, which indicates those types of infrastructure that can no longer be funded through either S106 of the Town and Country Planning Act 1990 or S278 of the Highways Act 1980 and, consequently, can only be funded through CIL.

6. Nevertheless, for the reasons set out in this report, officers consider that any review of CIL is delayed until there is further clarity on both the timing of replacement requirements for the Code for Sustainable Homes and on a review of CIL operation to be carried out by DCLG later in 2015.

REASONS FOR RECOMMENDATION(S)

7. For Members of the JAC to be aware of the current position.

ALTERNATIVE OPTIONS CONSIDERED AND REJECTED

8. N/A. The local planning authorities will have to comply with legislation.

BACKGROUND

9. The Community Infrastructure Levy for the three Central Lancashire authorities was adopted at various dates in July and August 2013 following an examination held in April 2013. The levy came into effect on 1st September 2013 in Chorley and South Ribble and on 30th September 2013 in Preston.

10. The National Planning Practice Guidance indicates that charging authorities must keep their charging schedules under review and should ensure that levy charges remain appropriate over time. For example charging schedules should take account of changes in market conditions, and remain relevant to the funding gap for the infrastructure needed to support the development of the area.

11. The guidance goes on to say that when reviewing their charging schedule, charging authorities should take account of the impact of revised levy rates on approved phased developments, as well as future planned development.

12. Charging authorities may revise their charging schedule in whole or in part. Any revisions must follow the same processes as the preparation, examination, approval and publication of a charging schedule (as specified under the Planning Act 2008, particularly sections 211-214 as amended by the Localism Act 2011, and the Levy Regulations).

13. Government does not prescribe when reviews should take place. However, in addition to taking account of market conditions and infrastructure needs, the guidance advises that charging authorities should also consider linking a review of their charging schedule to any substantive review of the evidence base for the relevant Local Plan. The Government suggests that even if the original charging schedule was not examined together with the relevant Plan, there may be advantages in coordinating the review of both.

14. The issue of increasing costs arising from increasing Levels of Code for Sustainable Homes requirements in housing was an issue before the Inspector who conducted the examination of the CIL charges in April 2013 and was also the subject of the Judicial Review brought by Fox Strategic Land and Property Limited, part of the Gladman group of companies.

15. The Inspector commented as follows in his report:

"19. Policy 27 of the CS requires all new dwellings to meet Level 4 of the Code for Sustainable Homes from January 2013. The appraisals are based on the assumption that the BCIS data includes schemes built to Code Level 4. The appraisals also add a little over £150 psm to the BCIS derived base build costs. This lends confidence that the costs of meeting CS Policy 27 have been adequately accounted for. The degree to which the appraisals reflect this policy requirement should be regarded as appropriate, for the time being at least.

20. From January 2016, CS Policy 27 will demand that all new dwellings meet Code Level 6. This has not been included in the viability assessments, and the Councils intend to review the CIL charge in 2015, ahead of this requirement 'kicking in'. It is clear to me that a review will be essential at that time. If it is not, the Councils will risk either development not being delivered or the Code Levels sought by CS Policy 27 not being met. While it is beyond the

scope of this examination and the recommendations I am able to make, there is no reason to suppose that the Councils, as responsible public authorities, will not undertake such a review in a timely fashion."

16. Clearly the Inspector's expectation was that a review of CIL would be carried out to reflect the increasing costs to development arising from the introduction of Code level 6 from January 2016, and that review would be carried out in 2015.

17. Following the adoption of the CIL charging schedule by the three authorities Fox Strategic Land and Property Limited sought and was granted permission to pursue a judicial review of the CIL charge for residential use on a number of grounds, the relevant one in this case being:

'Whether it was unlawful to adopt the charging schedule for dwelling-houses without allowing for the potential effects of a requirement in development plan policy, due to come into effect in January 2016, that new housing must meet Level 6 of the Code for Sustainable Homes (ground 4).'

18. The hearing was held on 10th March 2014 and the judge, Lindblom J., issued his judgment on 17th April 2014.

19. In dealing with the issue of whether the Councils should have taken into account the potential effects of increasing costs in setting charges the judge made the following comments:

'180. The first answer to Mr Tucker's argument on this issue, and a powerful one, lies in the core strategy itself. Policy 7, "Affordable and Special Needs Housing", qualifies the general requirement for affordable housing in "market housing schemes" by making it subject to considerations such as "financial viability and contributions to community services" (see paragraph 36 above). In a similar way the text supporting Policy 27, in paragraph 12.7, makes the requirements of that policy subject to the viability of the development proposed (see paragraph 37 above).

182. When Policy 27 of the core strategy reaches its full effect in January 2016 the cost of building new housing will go up – assuming that the effect of any other changes in the meantime is not to outweigh that increase. Whether the increase in cost will affect the viability of development, and how, remains to be seen.

183. The examiner did not fail to address the argument that the CIL charge would automatically become more difficult for housing development to bear once the cost of meeting the heightened requirement in Policy 27 comes into force, and that the councils ought to have anticipated this in the current process rather than waiting for their promised review in 2015. He dealt with that argument in the four conclusions he expressed in paragraphs 19 and 20 of his report.

184. First, in paragraph 19, he concluded that the councils had taken an appropriate course in setting their CIL charge at a level corresponding to current market conditions and current policy requirements. The particular requirement of Policy 27 current at the time of the examination, in April 2013, was for new dwellings to meet Level 4 of the Code for Sustainable Homes, which had come into effect in January 2013 and would remain in effect for three years until January 2016.

185. Secondly, the examiner was satisfied that the councils' viability appraisals had accounted for the current requirements of Policy 27 "adequately". This was because the appraisals had not simply been based on assumptions for building costs obtained from the R.I.C.S. Building Costs Information Service data for developments including schemes that had had to comply with Level 4, but had been raised by about £150 per square metre. The examiner was therefore able to conclude that "for the time being at least" the appraisals were compatible with Policy 27. This conclusion does not seem to be in dispute. It is supported in

the evidence of Mr Whiteley. In paragraph 70 of his witness statement he says that, in accordance with "good practice", market conditions at the time of the councils' assessment of viability were reflected in the assumptions for building costs and "sustainability standards", that "the build cost data on which [the] CIL viability assessments were based covers at least the requirements of [Level 3] and at least some proportion of the additional costs of meeting [Level 4]", and that "an uplift over basic build costs to take account of the potential additional costs of the Code for Sustainable Homes was also applied.

186. Thirdly, although the full requirements of Policy 27 had not been included in the viability assessments, the examiner did not see this as a reason to seek further evidence, or to recommend any change to the charging schedule. The councils' intention to review the CIL charge in 2015, before the relevant requirement in Policy 27 rose to Level 6, was enough. The examiner knew he could not formally recommend this. But he went as far as he reasonably could in saying that it would be "essential". He did not say "essential now". He said "essential at that time". It would be essential because, as he could see, the councils might then be facing a dilemma – the choice between development not being delivered and Level 6 not being met. He did not describe it as a dilemma. He used the word "risk". But it comes to same thing. It was a risk because a developer may escape the requirements of Policy 27 if he can show that complying with them would leave his proposal unviable. Liability to CIL would be one element of the "open book accounting" by which the developer might demonstrate that his "development would not be economically viable if the policy were to be implemented". It would therefore be prudent for the councils to review their CIL charge before the risk became a reality. The examiner was satisfied that if the review was carried out when the councils said it would be, they would be able to avoid the danger of new housing not being built and the danger of the requirements of Policy 27 not being met. Both could be avoided, so long as the councils got on with the review in 2015.

187. Fourthly, the examiner also concluded that there was no reason to expect the councils, "as responsible public authorities", not to carry out a timely review of the charge. It was in the councils' own interest to do it. A CIL rate too high to be borne by proposals complying with development plan policy for sustainable housing would be counterproductive. The councils knew this. So did the examiner.'

CONCLUSIONS

20. There are a number of points raised by Lindblom J. Firstly he reiterates the points made by the Inspector that there is an intention by the Councils to review the charging schedules before the code level 6 comes into effect in January 2016; he describes this as something that would be prudent for the Councils to do in order to avoid facing a dilemma of, on the one hand, development not taking place because the CIL charge was too high and, on the other, code level 6 required in adopted policy not being achieved because of lack of viability.

21. He also refers to the viability clause already set out in the supporting text to Policy 27 in paragraph 12.7, which qualifies the requirement by making it subject to individual site circumstances such that development would not be economically viable if the policy were to be implemented.

22. The other comment, which is significant, is the comment on any other changes not having the effect of outweighing the increase in costs arising from the adoption of Code 6.

23. While the need for a review of the CIL charge has been cast in terms of an assumption that Code Level 6 will come into effect in January 2016, Government Policy in relation to the Code for Sustainable Homes is itself changing as indicated in the report on Policy 27 of the Central Lancashire Core Strategy.

24. What this means for a review of CIL is that any review is going to have to be carried out in the context of a Code requirement on site of level 4 plus off-site allowable solutions, the mix of which could vary from one developer to another, rather than an on-site requirement of

level 6. Clearly the situation has changed since the point was raised in the CIL examination and at the judicial review. Developers are providing Code level 4 energy efficiency measures and contributing the CIL charge so the implication is that development is viable at Code level 4 and the current CIL charge. The additional cost, therefore, is the cost of the allowable solutions measures that will be required to bridge the gap between the energy saving on-site and the zero carbon position. In view of the timescale for the introduction of the zero carbon home policy it is possible that there will not be much clarity on that until later in 2015 or early 2016.

25. While the Councils have committed to a review of CIL both the inspector and judge indicated that there was nothing statutorily to compel the Councils to carry out a review. Rather any review would be based on the Councils being responsible public bodies whose interests would not be well served by creating a situation in which they would be faced with a dilemma of either not accepting the Code level that existing policy would require from January 2016 or not seeing development come forward that would deliver CIL to contribute to infrastructure needs.

26. Lindblom J anticipated that future policy changes might affect the need for a review in paragraph 182 of his judgment set out above. Given the Government's policy changes it is unlikely now that there will be a significant increase in costs arising from a requirement for Code level 6 from January 2016 and, therefore, that pressing need for a review of CIL is removed. Assuming that the Government's requirements are included in due course in National Planning Practice Guidance advice from Preston City Council's legal section in relation to recent national guidance on affordable housing would seem to apply i.e. neither the policy in the Core Strategy, nor the Core Strategy itself on this point, would be unlawful. It would, however, not be considered up to date in terms of compliance with national Government policy as contained in the National Planning Practice Guidance, which is to be given the same weight as the National Planning Policy Framework.

27. Whilst a case can still be made for a review of the CIL charging schedules, that review is now probably better carried out when the Government's policy on achieving zero carbon homes is set out and when the timetable for that policy coming into effect later in 2016 is clearer.

28. The issue is complicated further by the expectation that the government will itself carry out a review of how the Community Infrastructure Levy is operating later in 2015. Although there has been no announcement as such to date reference was made to a review during 2015 in the explanatory memorandum to the 2015 CIL Amendment Regulations that came into force on 1st April 2015. Officers are also aware that DCLG has commissioned research into the operation of CIL to inform that review. There may be some merit in waiting until the government's review is clearer before commencing a review of the Central Lancashire CIL charges.

29. A review of the Central Lancashire CIL charges would also be an opportunity to take into account a review of the Regulation 123 list of infrastructure that is not be funded through planning obligations and also to review the nominal charge for all other uses. That charge, of £10 per square metre, was dismissed by the Inspector at examination on the grounds of lack of viability evidence for all other uses. Other Inspectors at other CIL examinations have, however, accepted a nominal charge with limited viability evidence.

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