BCLP. Client Intelligent

Insights

LEVELLING UP BILL: THE NEW INFRASTRUCTURE LEVY – WHAT YOU NEED TO KNOW

May 31, 2022

SUMMARY

In the second Insight in our series on the planning changes in the Levelling Up and Regeneration Bill (the first was on the proposed changes to local plans), we examine the proposed new Infrastructure Levy that will eventually replace the Community Infrastructure Levy, how the two levies compare and how it is expected to work in practice.

The Infrastructure Levy (IL) will be introduced under provisions in the Levelling Up Bill (the Bill) as a new mandatory charge on development to replace CIL in England (except for Mayoral CIL in London). In many ways it is similar to CIL, but it is redesigned to capture more of the uplift in land value generated by development and they are some key differences.

What's new?

The Bill provides the legislative framework for the new IL but the detailed design will be set out in regulations. The framework and its operation is broadly similar to CIL, but with some key differences.

IL will be **mandatory** for charging authorities to charge (CIL is optional) and it will be based on a **percentage of the final gross development value** (GDV) (in contrast to CIL, which is based on the floorspace of a development when permission is granted) above a set threshold. It will apply to the development of new or existing buildings as well as to material changes of use, which means '**permitted development'** will be within scope.

When setting the rate and threshold, charging authorities must consider a much longer list of factors than is currently required under the CIL regime, that includes the **extent to which land value has increased** from various aspects of the planning and development process, the **viability of development** in an area (which may include the actual or potential economic effects of IL), **maintaining the supply of affordable housing**, levels of **IL revenues** in the area and the **infrastructure delivery strategy**.

In-kind payments will be possible which will allow the delivery of on-site affordable housing through s106 agreements and other infrastructure or through making land available. Although not set out in the Bill, a new 'right to require' is proposed to remove the role of negotiation in determining levels of onsite affordable housing to allow local authorities to determine the portion of the levy they receive in-kind.

In the same way as CIL, IL receipts will be used to fund the cost of infrastructure needed to support development of an area as set out in the local infrastructure delivery strategy, but it can be spent on a wider range of infrastructure than CIL that includes **affordable housing**, facilities for emergency services, improvements to the natural environment and mitigation against climate change.

How will IL work in practice?

IL charging authorities will generally be the local planning authority, but could be the Homes and Communities Agency and development corporations if designated, and will be responsible for setting rates and collecting the levy. Charging schedules will be prepared, consulted on and examined in a similar way to CIL, but there are more requirements around what evidence can be used to inform them and how evidence can be used.

Liability will be calculated by reference to the charging schedule in place when planning permission is granted. However, the exact point when IL is collected is less clear as this is deferred to regulations. In general it seems that collection will be on the sale of a development, but the regulations may allow for payments on account or by instalment, which would allow for payments to be made before completion of a development or a phase of development, repayments if IL is overpaid and payments in-kind.

Charging authorities may be required to provide estimates of the IL chargeable ahead of a developer receiving notice of final liability which will not, in most cases, be known until a development has been completed or sold.

In practice, it is expected that in-kind payments, especially for on-site affordable housing, will deliver a substantial portion of the value captured through IL.

What about s106 Agreements?

Despite rumours that s106 agreements would be abolished this is not the case. There will continue to be a more narrowly targeted role for s106 Agreements limited to:

- on-site delivery of affordable housing as payments in-kind, with developers unable to negotiate affordable housing levels;
- delivery of other planning gain obligations for larger sites;

- delivery of infrastructure 'integral to the operation and physical design of a site', eg play areas and flood risk mitigation measures.

What we don't know

We don't know when IL will come into force but it will be introduced in different areas at different times. This is because the Government is adopting a 'test and learn' approach, to allow tweaks and amendments if needed. Saving provisions will be made so that development already permitted under the existing system of developer contributions will continue to be subject to the current system rather than IL.

Many of the details will be set out in regulations and are currently unknown, for example around exemptions, reliefs and the retained role for section 106 agreements. Critically, for developers there is no indication of what the rates and thresholds might be.

What does IL mean for developers?

The proposed IL is closer to a development land tax than CIL. As such, and in addition to the other new charges developers have to absorb, in the form of the Building Safety Levy, the Residential Property Developer Tax and National Insurance increases, it is likely to be a concern.

For all its criticisms CIL, being based on floorspace, has a degree of certainty and the liability ascertained at the point of commencement of development is clear. However, because IL liability depends on GDV there is scope for disagreement especially if there are changes to the development costs during the development process, for example due to inflation.

There are many unanswered questions with the IL, especially where developments are sold on a piecemeal basis (for example the sale of individual residential units) or that are multi-phased, with a risk that delivery of later phases may be discouraged if projected returns do not compensate for the new tax liability. Clarity will be needed as to when liability crystallises and becomes due. The definition of 'sale' will also be critical, and clarity as to whether it will be triggered on company sales involving transfer of property and on BTR sales is needed.

One of the major hurdles for the IL will be its detailed design and how rates can be set locally that broadly equate to the cost of providing affordable housing. A generalised IL rate might not reflect the financial dynamics of individual schemes, so the impact on viability of development overall will be very uncertain.

However, the new IL has the potential to be more flexible and respond to market conditions so that IL payments will reflect actual increases (and decreases) in GDV and allow the value of contributions to be priced into the value of the land when sold.

However, some will recall the development gains tax and the development land tax of the 1970s and 1980s which were hugely complicated and expensive and ultimately repealed, and will feel nervous that the IL is their reincarnation.

The rationale for introduction of the IL is clear it could take years to roll-out as it has not been piloted or road tested yet and the fragmented way it will be introduced and many unanswered questions will create uncertainty and could undermine development delivery and specifically housing delivery. As things currently stand, developers should be alive to future consultations so that they can help shape the IL into a form that is acceptable to the industry.

RELATED PRACTICE AREAS

- Planning & Zoning

MEET THE TEAM

Clare Eccles

London

clare.eccles@bclplaw.com
+44 (0) 20 3400 4267

Tim Hellier

London

tim.hellier@bclplaw.com
+44 (0) 20 3400 4243