East Northamptonshire Council

Scrutiny Committee - 15 December 2010

Review of Section 106 Agreement Arrangements

Summary

At the last meeting of the Committee, Members requested an update in relation to the current position on Section 106 agreements and related monitoring arrangments. This report provides the required update.

Attachment(s)

Appendix A: Scrutiny Committee Review Recommendations to Council 7 April 2004.

Appendix B: Scrutiny Committee Report 15 April 2009.

Appendix C: Reforms to the Community Infrastructure Levy November 2010

1.0 Background

1.1 Section 106 of the Town and Country Planning Act 1990 makes provision for authorities to seek contributions to the provision of infrastructure when granting planning permission for development. In order to be secured it must be shown that the development gives rise to such requirements and that without its provision the development would not be acceptable. Whilst in the past there was some degree of flexibility that could be applied when seeking contributions, as from April of this year these tests were put onto a statutory footing through the Community Infrastructure Levy (CIL) Regulations 2010.

1.2 The previous scrutiny review in 2004 stemmed from concerns over the robustness of the council's monitoring arrangements, together with the nature of accounting and collection arrangements. The review team reported in April 2004, with 21 recommendations that were approved by full Council the same month. A copy of these recommendations is attached as Appendix A to this report. An update report was presented to Scrutiny Committee in February 2006 and at that time all recommendations other than 20 and 21 had been completed.

1.3 A further report was provided to the Scrutiny Committee in June 2007 resulting in the creation of a dedicated post for the monitoring of agreements on a temporary basis. This post's term was subsequently extended. However due to budgetary considerations, at the July 2009 Policy and Resources Committee meeting (Minute 81 refers) the post was deleted and a new post created on reduced hours, (14 hours a week instead of 25). It was further agreed that the post's term would be limited to 18 months i.e. from October 2009 – March 2011 with a review at October 2010. The new post was filled initially but due to a change in personal circumstances the post holder left in December 2009. Due to budgetary constraints the post has been kept vacant, and as noted the funding expires in March next year.

1.4 The latest report provided to the Scrutiny Committee was in April 2009. This report noted further improvements to processes since the review and also made comment on the remaining two original review recommendations. A copy of the report is attached at Appendix B. At that time Members noted the current position and the improvements made since the review and the opportunities for changes in the future, (Minute 457 refers).

2.0 Main Changes Since the 2009 Report

2.1 There have been three main changes since the April 2009 report. These relate to

1. the placing of the planning obligation tests onto a statutory footing,
2. changes to the Section 106 monitoring post arrangements
3. the level of contributions that the Council is able to secure due to the impact of the recession on development viability.

2.2 Dealing with each of these in turn, as set out in paragraph 1.1 of this report, from April 2010 the basis upon which authorities can seek section 106 contributions (planning obligations) was placed upon a statutory footing through the CIL regulations. This means that for a contribution to be justified it now needs to be shown that it is a clear requirement (that arises from the scheme), that it relates directly to the development in question, and that the need for it is evidence based. Whilst the same tests were in place in the past there was the opportunity for the local authority to negotiate with the developer to secure enhanced benefits: This is no longer the case.

2.3 The current Government had not previously made its position clear as to whether it intended to pursue the CIL approach. However, on 18 November it published a paper setting out its approach. Further details of this are set out in section 3 of the report.

2.4 The second issue relates to staffing and paragraph 1.3 details the specific staffing arrangements and the current position. As noted the current 14 hours a week post is vacant and has been since December 2009. Since that time the work has been covered partly by the Land Charges and Administration team leader (in addition to a range of other duties). The Enforcement Compliance Officer has also dealt with matters as they have come to light as part of his condition monitoring work but there has been limited monitoring of agreement trigger points due to the continued vacancy. It has also prevented any proactive work being carried out in relation to the potential for generating future funding for monitoring arrangements as part of new S106 agreements, and also means that no further work has been carried out on exploring the potential for using the Uniform system to monitor agreements as opposed the current Excel database arrangement.

2.5 The July 2009, the Policy and Resources report set out quite clearly the reasons why it would not be practical to subsume the work of the Planning Obligations Support Officer post within existing resources, and hence a further, albeit more restricted hours post, was put into place. Since that time the Land Charges and Administration team leader has also left (May 2010) and the post remains vacant, pending the splitting of the team and the moving of Land Charges function to Customer and Community Services (as part of the most recent council restructure). This has clearly further impacted on resource levels.

2.6 The third main change relates to the impact of the recession on the viability of developments and the ability of developers to pay. Due to the increasing tightness of development margins, officers are finding it increasingly difficult to secure contributions from developers on the full range of items set out within the council's Supplementary Planning Document (SPD) on Developer Contributions. This has resulted in a number of applications being accompanied by viability assessments often in relation to the issue of affordable housing but more recently in relation to a range of contributions. These assessments in most cases require independent assessment and in certain cases have led to applications being refused due to perceived lack of overall contributions. The most significant one of these was the proposed development to the north of Raunds (Northdale End) which is now the subject of a planning appeal.

2.7 Despite the more limited resources available there have been some key recent successes in terms of monitoring. The most notable of these was securing £30,000 from developers in Higham towards the provision of off site open space where previously no contributions had been forthcoming. Whilst it is accepted that this was

from a Grampian condition as opposed to a section 106 agreement, it shows the importance of having effective monitoring resources in place.

3.0 Additional Issues

3.1 As noted, proposals were put forward under the previous government for the introduction of a Community Infrastructure Levy, (CIL) as an alternative method for funding infrastructure provision. These proposals were not progressed to a conclusion during its term of office. The Coalition Government had previously indicated that it intended to bring such proposals forward and on 18 November published a paper in this regard.

3.2 The paper gives the opportunity for authorities to introduce a CIL, which will enable a meaningful proportion of the levy to be provided back to the neighbourhood within which it is raised. The arrangements for the scaling back of S106 obligations will be retained. Planning obligations will continue to be used to mitigate the direct impacts of development and to fund affordable housing. However, their use to collect standardised tariff- style contributions will be phased out in favour of the levy by 2014. A copy of the Government's latest proposals is attached as Appendix C.

3.3 In the mean time the Joint Planning Unit has been working to bring forward a new North Northamptonshire-wide Developer Contributions SPD. This document has been the subject of recent consultation; the details were reported to the Planning Policy Committee at its meeting on the 15 November. At this meeting a decision was taken to make initial comments on the document and to set up a Member working group to consider the implications in more detail and determine whether the Council may wish to adopt the document in due course.

4.0 Concluding Comments

4.1 The lack of a dedicated resource has clearly impacted on the ability of officers to move monitoring arrangements forward since the previous post holder left in December 2009. The placing of the planning obligation tests on a statutory footing has also had some degree of impact on the ability to secure contributions. More significantly, the impact of the recession on the ability for developers to make the required contributions has been particularly noticeable. Finally the Government's recent confirmation of its commitment to CIL means that the authority will need to consider its future approach to planning obligations in due course.

5.0 Recommendation

5.1 Members are recommended to note the current position in relation to Section 106 agreement monitoring arrangements and related issues.

Implications:			
Corporate Outcomes or Other Policy/Priority/Strategy			
Good Quality of Life	☐	Good Reputation	☐
Good Value for Money	☐	High Quality Service Delivery	☒
Effective Partnership Working	☒	Strong Community Leadership	☐
Effective Management	☐	Knowledge of our Customers and Communities	☐
Employees and Members with the Right Knowledge, Skills and Behaviours			☐
Other:			☐
Decision(s) would be outside the budget or policy framework and require full Council approval			☐
Financial	There are no financial implications at this stage		☒
	There will be financial implications – see paragraph		☐
	There is provision within existing budget		☐
	Decisions may give rise to additional expenditure at a later date		☐

	Decisions may have potential for income generation	☐
Risk Management	An assessment has been carried out and there are no material risks	☐
	Material risks exist and these are recorded at Risk Register Reference - 221 inherent risk score - residual risk score -	☒
Staff	There are no additional staffing implications	☒
	Additional staff will be required – see paragraph	☐
Equalities and Human Rights	There will be no impact on equality (race, age, gender, disability, religion/belief, sexual orientation) or human rights implications	☒
	There will be an impact on equality (see categories above) or human rights implications – see paragraph	☐
Legal	Power: Planning and Compulsory Purchase Act 2004, Community Infrastructure Regulations 2010	
	Other considerations:	

Background Papers:	Previous Reports to the Scrutiny and Policy and Resources Committee
Person Originating Report:	Trevor G Watson, Head of Planning Services, tgwatson@east-northamptonshire.gov.uk
Date: 24 November 2010	

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(Committee Report Normal Rev. 21)

Appendix A

SCRUTINY COMMITTEE: SECTION 106 REVIEW

Recommendations for action :-

Within one month

1 Identify one person to be responsible for securing implementation of all the following actions and ensuring the proper management of the S106 process until such time as the "Fit for Purpose" review indicates otherwise.

Stability

2 Ensure that adequate resources are in place, in time, to accelerate progress to clear the backlog of queries by September 2004.

Within two months

3 Establish a "quality team" of staff to inform actions 4 and 5 below.

4 Commence development control process mapping and the production of procedure notes.

5 Determine and implement an appropriate electronic system, preferably linked to UNIFORM, to manage the S106 process.

Development

6 Develop a timetable for the policy development and priority setting necessary to support wider use of planning obligations, consistent with the agreed programme for the Community Strategy and the Local Development Framework.

7 Identify the resources necessary to implement action 6.

8 In the context of the above, commence a dialogue with partner councils and organisations to establish the potential for joint working.

9 Commence policy development in accordance with the agreed timetable.

Stability

Also within two months

10 Accelerate the process of standardising legal agreements.

11 Standardise calculations for matters such as maintenance payments and index linking

Development

12 Examine the feasibility of using either "Grampian" conditions, or negatively worded section 106 agreements, as appropriate.

All the following actions will then be developments of the process

13 Advance the drafting of agreements to the point where an approval recommendation is identified.

14 Develop a code of practice for planning obligations based on 4 above, including advice to developers, and place on ENC website.

When 13 above is in place:-

15 Allow Development Control Managers to lead agreement negotiations to reduce the burden on case officers

16 Where relevant, bring Town and Parish Councils into negotiations at the earliest opportunity

17 Where appropriate, establish standard provision and approved supplier lists for community facilities.

18 Consider the use of mediators for resolving disputes over satisfactory completion of agreements and, if acceptable establish an approved list of mediators.

19 Make third party beneficiaries signatories to agreements.

As and when resources permit the following should be put in place: -

20 A risk assessment process for enforcement.

21 A “contract” procedure option for major applications.

(s.106 Review Recommendations 8 April 2004; Minute 421)

East Northamptonshire Council

Scrutiny Committee - 15 April 2009

Section 106 Agreement arrangements

Summary

This report provides an update to Members at the request of the Chairman of the Committee in respect of the current position in relation to Section 106 agreements having regard to the previous Scrutiny review in 2003/04 and developments since that time.

Attachment(s)

Appendix A: Scrutiny Committee Review Recommendations to Council 7 April 2004.
Appendix B: Payment record spreadsheet

1.0 Background

1.1 Section 106 of the Town and Country Planning Act 1990 makes provision for authorities to seek contributions to the provision of infrastructure when granting planning permission for development. In order for this to be secured it must be shown that the development gives rise to such requirements and that without its provision the development would not be acceptable.

1.2 Contributions are normally secured by way of a legal agreement, the most common elements being on site affordable housing, education, off site highway contributions and play and recreation facilities, including a sum to cover future maintenance costs.

1.3 The previous Scrutiny Committee review stemmed from concerns over the robustness of the Council's processes, together with the nature of accounting and collection arrangements. The review team reported in April 2004, with 21 recommendations which were approved by the full Council the same month. A copy of these is attached at Appendix A to this report. With two exceptions (recommendations 20 and 21) these actions have now been completed, an update report being submitted to the Scrutiny Committee in February 2006.

1.4 The implementation of the previous actions has resulted in a considerable improvement to processes and procedures, including more robust accounting arrangements. Standard agreements are now in place, and a new Supplementary Planning Document in respect of developer contributions was adopted at the June 2006 Strategy Committee meeting (Minute 33 refers).

1.5 A further report to the Scrutiny Committee was provided in June 2007, resulting in the creation of a dedicated post for the monitoring of agreements on a temporary basis. As Members will be aware, this post has been the subject of recent budgetary consideration and the post's term has now been extended for a period of 6 months.

2.0 The Current Position

2.1 As noted above, 19 of the original recommendations were completed. The two remaining relate to the implementation of a risk assessment process for enforcement and a contract procedure option for major applications.

2.2 The creation of the dedicated monitoring post and the enforcement compliance officer post within Development Control (both in 2007) have already led to much greater resilience in respect of the monitoring and enforcement of agreement

timescales/trigger points.

2.3 A contract procedure option for major applications was very much linked to emerging Government proposals and the action was somewhat aspirational. There is now the potential for Local Planning Authorities (LPAs) to enter into what are known as 'Planning Performance Agreements' (PPAs) with developers. These agreements set out a timetable for the delivery of an application. Their use is not particularly widespread and they would appear to be more suited to significant applications e.g., large town expansion schemes rather than the smaller scale applications which are dealt with on a regular basis here at East Northamptonshire Council.

2.4 Officers are in the process of putting in place a major applications protocol which will set out the approach and timetable that developers will be expected to follow when submitting applications where a Section 106 agreement is required. In the circumstances it is considered that no further action is required in respect of the recommendations from the original review.

3.0 Further improvements post the review

3.1 Members were last updated in 2006, both in respect of previous actions and also in response to feedback from Town Councils as to the effectiveness of engagement and monitoring arrangements.

3.2 In response to that, Officers have now developed much more effective working relationships with Town and Parish Ccouncils. The improvements include:-

- Early engagement in negotiations in particular in respect of open space issues.

- A greater understanding of their aspirations through the provision and regular updating of their 'wish lists'.

- The provision of a spreadsheet on a quarterly basis to each of the Town Councils listing the current obligations within their areas.

- Bi-annual liaison meetings with the Town Councils.

And in terms of internal system improvements:-

- Bi annual meetings between the Planning Obligations Officer and the County Council in respect of Education obligations

- A diary system for all outstanding S106 agreements, so that trigger and payment points are monitored and action taken accordingly.

- Regular updating of finance spreadsheets so it is clear that both obligations and payments are being coded correctly.

3.3 Attached as appendix B is a spreadsheet showing the income and expenditure by Town for the period from 2004 to date. This clearly demonstrates much greater activity in the last year or so, confirming that effective monitoring arrangements are now in place.

4.0 Future Issues

4.1 Proposals for a new approach to Planning Obligations have already been tabled by Central Government. Initially they were looking at possible proposals for a roof tax; they are now looking at introducing what is referred to as a Community Infrastructure Levy (CIL). This approach would be optional for LPAs (the current S106 process would be retained) and would enable them to put in place a 'tariff' type approach which would have the potential for greater value capture from developments. This

would enable contributions to be gathered on a 'per house' basis rather than from only the larger developments, as is the case at the present time.

4.2 In order to progress with such an approach, LPAs would need to have costed their local infrastructure requirements and have a transparent delivery plan in place with service providers. CIL Regulations are due to be issued this summer when more details will be known.

4.3 In terms of other emerging issues, Officers have more recently been supporting the work of the Joint Planning Unit in looking at the potential for developing a tariff-based approach across North Northamptonshire, and Members of the Joint Planning Committee recently attended a seminar in this respect. This work cannot progress much further though until the new regulations are introduced.

5.0 Recommendation

5.1 That Members note the current position in relation to the handling of section 106 agreements, the improvements made since the review, and the opportunities for changes to the approach in the future.

Implications:			
Corporate Outcomes or Other Policy/Priority/Strategy			
Good Quality of Life	☐	Good Reputation	☐
Good Value for Money	☐	High Quality Service Delivery	☒
Effective Partnership Working	☒	Strong Community Leadership	☐
Effective Management	☐	Knowledge of our Customers and Communities	☐
Employees and Members with the Right Knowledge, Skills and Behaviours			☐
Other:			☐
Decision(s) would be outside the budget or policy framework and require full Council approval			☐
Financial	There are no financial implications at this stage		☒
	There will be financial implications – see paragraph		☐
	There is provision within existing budget		☐
	Decisions may give rise to additional expenditure at a later date		☐
	Decisions may have potential for income generation		☐
Risk Management	An assessment has been carried out and there are no material risks		☒
	Material risks exist and these are recorded at Risk Register Reference - inherent risk score - residual risk score -		☐
Staff	There are no additional staffing implications		☒
	Additional staff will be required – see paragraph		☐
Equalities and Human Rights	There will be no impact on equality (race, age, gender, disability, religion/belief, sexual orientation) or human rights implications		☒
	There will be an impact on equality (see categories above) or human rights implications – see paragraph		☐
Legal	Power: Planning and Compulsory Purchase Act 2004		
	Other considerations:		
Background Papers: Previous reports to Scrutiny Committee			
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Date: 25 March 2009			

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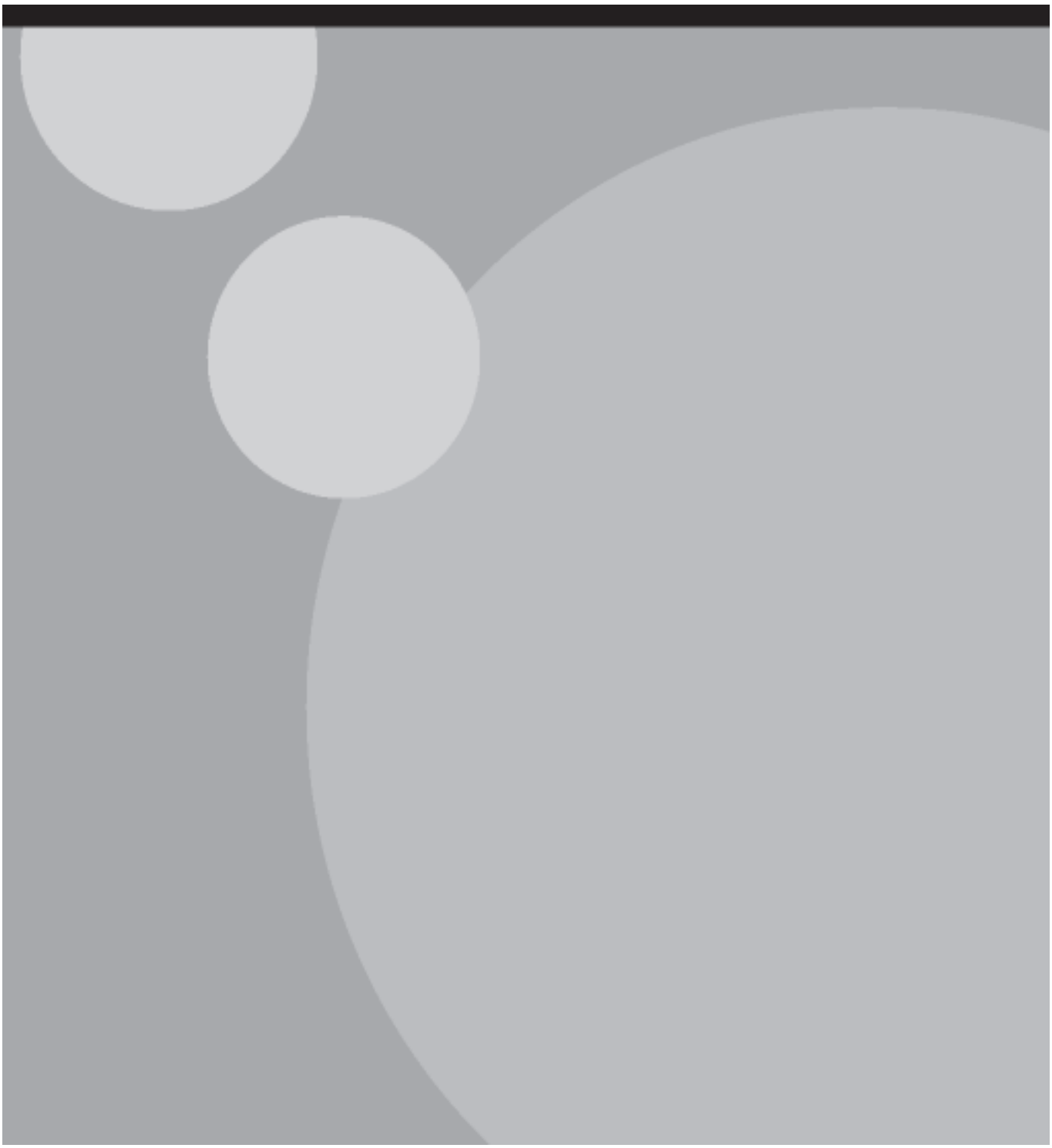
Communities and Local Government

The Community Infrastructure Levy

An overview



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Contents

This overview document replaces the previous overview document published March 2010

Introduction

1. This document provides an overview of the Community Infrastructure Levy, a new planning charge that came into force on 6 April 2010 through the Community Infrastructure Levy Regulations 2010. It is not guidance issued by the Secretary of State, but explains the key features of the new charge, its rationale, purpose and how it will work in practice. The document is designed to inform all those who have an interest in the levy and who might be involved in its operation. The Government will issue guidance on specific aspects of establishing and running a Community Infrastructure Levy regime.

What is the Community Infrastructure Levy?

2. The Community Infrastructure Levy (the levy) came into force in April 2010. It allows local authorities in England and Wales to raise funds from developers undertaking new building projects in their area. The money can be used to fund a wide range of infrastructure that is needed as a result of development. This includes transport schemes, flood defences, schools, hospitals and other health and social care facilities, parks, green spaces and leisure centres.

Who may charge the levy?

3. The Community Infrastructure Levy charging authorities (charging authorities) in England will be district and metropolitan district councils, London borough councils, unitary authorities, national park authorities, The Broads Authority and the Mayor of London. In Wales, the county and county borough councils and the national park authorities will have the power to charge the levy. These bodies all prepare development plans for their areas, which are informed by assessments of the infrastructure needs for which the levy may be collected.

The benefits of the levy

4. The Government has decided that this tariff-based approach provides the best framework to fund new infrastructure to unlock land for growth. The Community Infrastructure Levy is fairer, faster and more certain and transparent than the system of planning obligations which causes delay as a result of lengthy negotiations. Levy rates will be set in consultation with local communities and developers and will provide developers with much more certainty ‘up front’ about how much money they will be expected to contribute.

Under the system of planning obligations only six per cent of all planning permissions brought any contribution to the cost of supporting infrastructure[1],

[1] The Incidence, Value and Delivery of Planning Obligations in England in 2007-08, University of Sheffield, 2010.
www.communities.gov.uk/publications/planningandbuilding/planningobligationsreport

when even small developments can create a need for new services. The levy creates a fairer system, with all but the smallest building projects making a contribution towards additional infrastructure that is needed as a result of their development.

5. The Community Infrastructure Levy also has far greater legal certainty. It provides the basis for a charge in a manner that the planning obligations system alone could not easily achieve; enabling, for example, the mitigation of cumulative impacts from development.

Why should development pay for infrastructure?

6. Almost all development has some impact on the need for infrastructure, services and amenities - or benefits from it - so it is only fair that such development pays a share of the cost. It is also right that those who benefit financially when planning permission is given should share some of that gain with the community which granted it to help fund the infrastructure that is needed to make development acceptable and sustainable.

7. However, developers should have more certainty as to what they will be expected to contribute, thus speeding up the development process, and that the money raised from developer contributions should be spent in a way that developers will feel worthwhile; namely, on infrastructure to support development and the creation of sustainable communities set out in the Local Development Framework. This is what the levy will do.

How much will the levy raise?

8. The introduction of the levy has the potential to raise an estimated additional £700 million pounds a year of funding for local infrastructure by 2016 (the Impact Assessment on the Community Infrastructure Levy published on 10 February 2010 sets out further details).The levy will make a significant contribution to infrastructure provision. The levy is intended to fill the funding gaps that remain once existing sources (to the extent that they are known) have been taken into account. Local authorities will be able to look across their full range of funding streams and decide how best to deliver their infrastructure priorities, including how to utilise revenue from the levy. This flexibility to mix funding sources at a local level will enable local authorities to be more efficient in delivering the outcomes that local communities want.

How will the levy be spent?

9. Local authorities are required to spend the levy's revenue on the infrastructure needed to support the development of their area and they will decide what infrastructure is needed. The levy is intended to focus on the provision of new infrastructure and should not be used to remedy pre-existing deficiencies in infrastructure provision unless those deficiencies will be made more severe by new development. The levy can be used to increase the capacity of existing infrastructure or to repair failing existing infrastructure, if that is necessary to support development.

> The Government will require charging authorities to allocate a meaningful proportion of levy revenues raised in each neighbourhood back to that neighbourhood. This will ensure that where a neighbourhood bears the brunt of a new development, it receives sufficient money to help it manage those impacts. It complements the introduction of other powerful new incentives for local authorities that will ensure that local areas benefit from development they welcome.
>
> Local authorities will need to work closely with neighbourhoods to decide what infrastructure they require, and balance neighbourhood funding with wider infrastructure funding that supports growth. They will retain the ability to use the levy income to address the cumulative impact on infrastructure that may occur further away from the development.

10. Charging authorities will be able to use revenue from the levy to recover the costs of administering the levy, with the regulations permitting them to use up to 5 per cent of their total revenue on administrative expenses to ensure that the overwhelming majority of revenue from the levy is directed towards infrastructure provision. Where a collecting authority has been appointed to collect a charging authority's levy, as will be the case in London where the boroughs will collect the Mayor's levy, the collecting authority may keep up to 4 per cent of the revenue from the levy to fund their administrative costs, with the remainder available to the charging authority up to the 5 per cent ceiling.

What is infrastructure?

11. The Planning Act 2008 provides a wide definition of the infrastructure which can be funded by the levy, including transport, flood defences, schools, hospitals, and other health and social care facilities. This definition allows the levy to be used to fund a very broad range of facilities such as play areas, parks and green spaces, cultural and sports facilities, district heating schemes and police stations and other community safety facilities. This gives local communities flexibility to choose what infrastructure they need to deliver their development plan.

12. The regulations rule out the application of the levy for providing affordable housing because the Government considers that planning obligations remain the best way of delivering affordable housing. Planning obligations enable

affordable housing contributions to be tailored to the particular circumstances of the site and crucially, enable affordable housing to be delivered on-site.

13. In London, the regulations restrict spending by the Mayor to funding roads or other transport facilities, including Crossrail to ensure a balance between the spending priorities of the boroughs and the Mayor.

Infrastructure spending outside a charging area

14. Charging authorities may pass money to bodies outside their area to deliver infrastructure which will benefit the development of their area, such as the Environment Agency for flood defence or, in two tier areas, the county council, for education infrastructure.

15. If they wish, charging authorities will also be able to collaborate and pool their revenue from their respective levies to support the delivery of 'sub-regional infrastructure', for example, a larger transport project where they are satisfied that this would support the development of their own area.

Timely delivery of infrastructure

16. It is important that the infrastructure needed by local communities is delivered when the need arises. Therefore, the regulations allow authorities to use the levy to support the timely provision of infrastructure, for example, by using the levy to backfill early funding provided by another funding body.

17. The regulations also include provision to enable the Secretary of State to direct that authorities may 'prudentially' borrow against future income from the levy, should the Government conclude that, subject to the overall fiscal position, there is scope for local authorities to use revenue from the levy to repay loans used to support infrastructure.

Monitoring and reporting spending of the levy

18. To ensure that the levy is open and transparent, charging authorities must prepare short reports on the levy for the previous financial year which must be placed on their websites by 31 December each year. They may prepare a bespoke report or utilise an existing reporting mechanism, such as the Annual Monitoring Report which reports on their development plan.

19. These reports will ensure accountability and enable the local community to see what infrastructure is being funded from the levy. Charging authorities must report how much revenue from the levy they received in the last financial year and how much revenue was unspent at the end of the financial year. They must also report total expenditure from the levy in the preceding financial year, with summary details of what infrastructure the levy funded and how much of the levy was 'spent' on each item of infrastructure.

Setting the Community Infrastructure Levy charge

Charging schedules

20. Charging authorities should normally implement the levy on the basis of an up-to-date development plan or the London Plan for the Mayor's levy. A charging authority may use a draft plan if they are planning a joint examination of their core strategy or Local Development Plan and their Community Infrastructure Levy charging schedule.

21. Charging authorities wishing to charge the levy must produce a charging schedule setting out the levy's rates in their area. Charging schedules will be a new type of document within the folder of documents making up the local authority's Local Development Framework in England, sitting alongside the Local Development Plan in Wales and the London Plan in the case of the Mayor's levy. In each case, charging schedules will not be part of the statutory development plan.

Deciding the levy's rate

22. Charging authorities wishing to introduce the levy should propose a rate which does not put at serious risk the overall development of their area. They will need to draw on the infrastructure planning that underpins the development strategy for their area. Charging authorities will use that evidence to strike an appropriate balance between the desirability of funding infrastructure from the levy and the potential effects of the levy upon the economic viability of development across their area.

23. In setting their proposed rates for the levy, charging authorities should identify the total infrastructure funding gap that the levy is intended to support, having taken account of the other sources of available funding. They should use the infrastructure planning that underpinned their development plan to identify a selection of indicative infrastructure projects or types of infrastructure that are likely to be funded by the levy. If a charging authority considers that the infrastructure planning underpinning its development plan is weak, it may undertake some additional bespoke infrastructure planning to identify its infrastructure funding gap. In order to provide flexibility for charging authorities to respond to changing local circumstances over time, charging authorities may spend their revenue from the levy on different projects from those identified during the rate setting process.

Evidence of economic viability

24. Charging authorities will need to strike an appropriate balance between the desirability of funding infrastructure from the levy and the potential effects of the imposition of the levy upon the economic viability of development across their area. Charging authorities should prepare evidence about the effect of the levy on economic viability in their area to demonstrate to an independent examiner that their proposed rates, for the levy, strike an appropriate balance.

25. In practice, charging authorities may need to sample a limited number of sites in their areas and in England, they may want to build on work undertaken to inform their Strategic Housing Land Availability Assessments. Charging authorities that decide to set differential rates may need to undertake more fine-grained sampling to help them to estimate the boundaries for their differential rates.

Charge setting in London

26. A London borough setting their levy must take into account any levy rates that have been set by the Mayor of London. Allowing both the Mayor and the boroughs to charge the levy will enable the levy to support the provision of both local and strategic infrastructure in London.

Differential rates

27. Charging schedules may include differential rates, where they can be justified either on the basis of the economic viability of development in different parts of the authority's area or by reference to the economic viability of different types of development within their area. The ability to set differential rates gives charging authorities more flexibility to deal with the varying circumstances within their area, for example where an authority's land values vary between an urban and a rural area.

Procedure for setting the charge

Preparing the charging schedule

28. The process for preparing a charging schedule is similar to that which applies to development plan documents in England and Local Development Plans in Wales. Charging authorities are also able to work together when preparing their charging schedules.

Public consultation

29. Charging authorities must consult local communities and stakeholders on their proposed rates for the levy in a preliminary draft of the charging schedule. Then, before being examined, a draft charging schedule must be formally published for representations for a period of at least four weeks. During this period any person may request to be heard by the examiner. If a charging authority makes any further changes to the draft charging schedule after it has been published for representations, any person may request to be heard by the examiner, but only on those changes, during a further four-week period.

The examination of the charging schedule

30. A charging schedule must be examined in public by an independent person appointed by the charging authority. Any person requesting to be heard

before the examiner at the examination, must be heard in public. The format for the levy's examination hearings will be similar to those for development plan documents and the independent examiner may determine the examination procedures and set time limits for those wishing to be heard to ensure that the examination is conducted in an efficient and effective manner.

31. Where a charging authority has chosen to work collaboratively with other charging authorities, they may opt for a joint examination of their charging schedule with those of the other charging authorities. In addition, an examination of one or more charging schedules may be conducted as an integrated examination with a draft development plan document.

Outcome of the levy's examination

32. The independent examiner will be able to recommend that the draft charging schedule should be approved, rejected, or approved with specified modifications and must give reasons for those recommendations. A charging schedule may be approved subject to modifications if the charging authority has complied with the legislative requirements, but for example, the proposed rate for the levy does not strike an appropriate balance given the evidence.

33. The independent examiner should reject a charging schedule if the charging authority has not complied with an aspect of the legislation (and this cannot be addressed by modifications), or if it is not based on appropriate available evidence. The examiner's recommendations will be binding on the charging authority, which means that the charging authority must make any modifications recommended if they intend to adopt the charging schedule and cannot adopt a schedule if the examiner rejects it. However, the charging authority is not under an obligation to adopt the final charging schedule, but can, if it prefers, submit a revised charging schedule to a fresh examination.

> The Government will include provisions in the Localism Bill to limit the binding nature of the examiners' reports on levy rates. Currently, an examiner scrutinises a council's levy rates, and all changes that they request are binding, including the rates set for specific areas or types of development.
>
> Under the new provisions examiners will only be able to ensure councils do not set unreasonable charges. Councils will be required to correct charges that examiners consider to be unreasonable, but they will have more discretion on how this is done – for example, they could depart from the detail of the examiner's recommendations on the mix of charges to be applied to different classes of development or the rates to be applied in different parts of their area.

Procedure after the levy's examination

34. To ensure democratic accountability, the charging schedule must be formally approved by a resolution of the full council of the charging authority. In

London, the Mayor must make a formal decision to approve his or her charging schedule.

35. In order to ensure that the correct rate for a levy is charged, certain errors in the charging schedule may be corrected for a period of up to six months after the charging schedule has been approved. If the charging authority corrects errors it must republish the charging schedule.

Ceasing to charge the levy

36. Charging authorities should keep their charging schedules under review (although there is no fixed end date). Charging authorities may formally resolve to cease charging the levy at any time through a resolution of the full council.

How will the Community Infrastructure Levy be applied?

What development is liable to pay the levy?

37. Most buildings that people normally use will be liable to pay the levy. But buildings into which people do not normally go, and buildings into which people go only intermittently for the purpose of inspecting or maintaining fixed plant or machinery, will not be liable to pay the levy. Structures which are not buildings, such as pylons and wind turbines, will not be liable to pay the levy. The levy will not be charged on changes of use that do not involve an increase in floorspace.

How will the levy be charged?

38. The levy must be charged in pounds per square metre on the net additional increase in floorspace of any given development. This will ensure that charging the levy does not discourage the redevelopment of sites.

39. Any new build – that is a new building or an extension – is only liable to pay the levy if it has 100 square metres, or more, of gross internal floorspace or involves the creation of one dwelling even when that is below 100 square metres. While any new build over this size will be subject to the levy, the gross floorspace of any existing buildings on the site that have been recently in use and are going to be demolished will be deducted from the final liability. To ensure the levy is cost effective to collect, any final net charge less than £50 must not be pursued by the charging authority.

40. In calculating individual charges for the levy, charging authorities will be required to apply an annually updated index of inflation to keep the levy responsive to market conditions. The index will be the national All-In Tender Price Index of construction costs published by the Building Cost Information Service of The Royal Institution of Chartered Surveyors.

How does the levy relate to planning permission?

41. The levy will be charged on new builds permitted through some form of planning permission. Examples are planning permissions granted by a local planning authority or a consent granted by the Independent Planning Commission. However, some new builds rely on permitted development rights under the General Permitted Development Order 1995. There are also local planning orders that grant planning permission, for example Simplified Planning Zones and Local Development Orders. Finally, some Acts of Parliament grant planning permission for new builds: the Crossrail Act 2008 is one such Act. The levy will apply to all these types of planning consent.

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42. The planning permission identifies the buildings that will be liable for a Community Infrastructure Levy charge: the 'chargeable development'. The planning permission also defines the land on which the chargeable buildings will stand, the 'relevant land'.

Who collects the levy?

43. Collection of the levy will be carried out by the 'Community Infrastructure Levy collecting authority'. In most cases this will be the charging authority but, in London, the boroughs will collect the levy on behalf of the Mayor. County councils will collect the levy charged by districts on developments for which the county gives consent. The Homes and Communities Agency, Urban Development Corporations and Enterprise Zone Authorities can also be collecting authorities for development where they grant permission, if the relevant charging authority agrees.

How is the levy collected?

44. The levy's charges will become due from the date that a chargeable development is commenced in accordance with the terms of the relevant planning permission. The definition of commencement of development for the levy's purposes is the same as that used in planning legislation, unless planning permission has been granted after commencement.

45. When planning permission is granted, the collecting authority will issue a liability notice setting out the amount of the levy that will be due for payment when the development is commenced, the payment procedure and the possible consequences of not following this procedure. The payment procedure encourages someone to assume liability to pay the levy before development commences. Where liability has been assumed, and the collecting authority has been notified of commencement, parties liable to pay the levy will benefit from a 60 day window in which they can make payment.

46. Where the charge is over £10,000, the liable parties will be able to pay the levy within a series of instalment periods from the commencement date. The number of instalments will vary, depending on the size of the amount due. If the payment procedure is not followed, payment will become due in full.

The Government will introduce changes to the Community Infrastructure Levy Regulations to free up payment arrangements. Local authorities will be able to decide their own levy payment deadlines and whether to offer the option of paying by instalments.

Who is liable to pay the levy?

47. The responsibility to pay the levy runs with the ownership of land on which the liable development will be situated. This is in keeping with the principle that those who benefit financially when planning permission is given should share some of that gain with the community. That benefit is transferred when the land is sold with planning permission, which also runs with the land. The regulations define landowner as a person who owns a 'material interest' in the relevant land. 'Material interests' are owners of freeholds and leaseholds that run for more than seven years after the day on which the planning permission first permits development.

48. Although ultimate liability rests with the landowner, the regulations recognise that others involved in a development may wish to pay. To allow this, anyone can come forward and assume liability for the development. In order to benefit from payment windows and instalments, someone must assume liability in this way. Where no one has assumed liability to pay the levy, the liability will automatically default to the landowners of the relevant land and payment becomes due immediately upon commencement of development. Liability to pay the levy can also default to the landowners where the collecting authority, despite making all reasonable efforts, has been unable to recover the levy from the party that assumed liability for the levy.

Charity and Social Housing Relief

49. The regulations give relief from the levy in two specific instances. First, a charity landowner will benefit from full relief from their portion of the liability where the chargeable development will be used wholly, or mainly, for charitable purposes. A charging authority can also choose to offer discretionary relief to a charity landowner where the greater part of the chargeable development will be held as an investment, from which the profits are applied for charitable purposes. The charging authority must publish its policy for giving relief in such circumstances. Secondly, the regulations provide 100% relief from the levy on those parts of a chargeable development which are intended to be used as social housing.

50. To ensure that relief from the levy is not used to avoid proper liability for the levy, the regulations require that any relief must be repaid, a process known as 'clawback', if the development no longer qualifies for the relief granted within a period of seven years from commencement of the chargeable development.

Exceptional circumstances

51. Given the importance of ensuring that the levy does not prevent otherwise desirable development, the regulations provide that charging authorities have the option to offer a process for giving relief from the levy in exceptional circumstances where a specific scheme cannot afford to pay the levy. A charging authority wishing to offer exceptional circumstances relief in its area must first give notice publicly of its intention to do so. A charging authority can then consider claims for relief on chargeable developments from landowners on a case by case basis, provided the following conditions are met. Firstly, a section 106 agreement must exist on the planning permission permitting the chargeable development. Secondly, the charging authority must consider that the cost of complying with the section 106 agreement is greater than the levy's charge on the development and that paying the full charge would have an unacceptable impact on the development's economic viability. Finally, relief must not constitute a notifiable state aid.

In-kind payments

52. There may be circumstances where it will be more desirable for a charging authority to receive land instead of monies to satisfy a charge arising from the levy, for example where the most suitable land for infrastructure is within the ownership of the party liable for payment of the levy. Therefore, the regulations provide for charging authorities to accept transfers of land as a payment 'in kind' for the whole or a part of a the levy, but only if this is done with the intention of using the land to provide, or facilitate the provision of, infrastructure to support the development of the charging authority's area.

53. To ensure that 'in-kind' payments are used appropriately, such payments may only be accepted where the amount of the levy payable is over £50,000 and where an agreement to make the in-kind payment has been entered into before commencement of development. Land that is to be paid 'in kind' may contain existing buildings and structures and must be valued by an independent valuer who will ascertain its 'open market value', which will determine how much liability the 'in-kind' payment will off-set. Payments in kind must be provided to the same timescales as cash payments.

> The Government will introduce changes to the Community Infrastructure Levy Regulations to remove the £50,000 minimum threshold so authorities can accept a payment in-kind for any level of contribution.

How will payment of the levy be enforced?

54. The vast majority of parties liable to pay the levy are likely to pay their liabilities without problem or delay, guided by the information sent by the collecting authority in the liability notice. In contrast to negotiated planning obligations which can cause delay, confusion, and litigation over liability, the levy's charges are intended to be easily understood and easy to comply with. However, where there are problems in collecting the levy, it is important that

collecting authorities have the means to penalise late payment and deter future non-compliance. To ensure payment, the regulations provide for a range of proportionate enforcement measures, such as surcharges on late payments.

55. In most cases, these measures should be sufficient. However, in cases of persistent non-compliance, the regulations also enable collecting authorities to take more direct action to recover the amount due. One such measure is the Community Infrastructure Levy Stop Notice, which prohibits development from continuing until payment is made. Another is the ability to seek a court's consent to seize and sell assets of the liable party. In the very small number of cases where a collecting authority can demonstrate that recovery measures have been unsuccessful, a court may be asked to commit the liable party to a short prison sentence.

56. The payment and enforcement provisions of the regulations add substantial protection for both charging authorities and liable parties compared with the existing system of planning obligations, particularly for small businesses which may not have easy access to legal advice.

The relationship between the Community Infrastructure Levy and planning obligations

57. The levy is intended to provide infrastructure to support the development of an area rather than to make individual planning applications acceptable in planning terms. As a result, there may still be some site specific impact mitigation requirements without which a development should not be granted planning permission. Some of these needs may be provided for through the levy but others may not, particularly if they are very local in their impact. Therefore, the Government considers there is still a legitimate role for development specific planning obligations to enable a local planning authority to be confident that the specific consequences of development can be mitigated.

58. However, in order to ensure that planning obligations and the levy can operate in a complementary way and the purposes of the two instruments are clarified, the regulations scale back the way planning obligations operate. Limitations are placed on the use of planning obligations in three respects:

    I. Putting the Government's policy tests on the use of planning obligations set out in Circular 5/05 on a statutory basis for developments which are capable of being charged the Levy

    II. Ensuring the local use of the levy and planning obligations does not overlap; and

    III. Limiting pooled contributions from planning obligations towards infrastructure which may be funded by the levy.

Making the Circular 5/05 tests statutory for development capable of being charged the levy

59. The regulations place into law for the first time the Government's policy tests on the use of planning obligations. The statutory tests are intended to clarify the purpose of planning obligations in light of the levy and provide a stronger basis to dispute planning obligations policies, or practice, that breach these criteria. This seeks to reinforce the purpose of planning obligations in seeking only essential contributions to allow the granting of planning permission, rather than more general contributions which are better suited to use of the levy.

60. From 6 April 2010 it has been unlawful for a planning obligation to be taken into account when determining a planning application for a development, or any part of a development, that is capable of being charged the levy, whether there is a local levy in operation or not, if the obligation does not meet all of the following tests:

    (a) necessary to make the development acceptable in planning terms

    (b) directly related to the development; and

    (c) fairly and reasonably related in scale and kind to the development.

61. For all other developments (i.e. those not capable of being charged the levy), the policy in Circular 5/05 will continue to apply until the new policy document on planning obligations is adopted.

Ensuring the local use of the levy and planning obligations does not overlap

62. On the local adoption of the levy, the regulations restrict the local use of planning obligations to ensure that individual developments are not charged for the same items through both planning obligations and the levy. Where a charging authority sets out that it intends to fund an item of infrastructure via the levy then that authority cannot seek a planning obligation contribution towards the same item of infrastructure.

63. A charging authority should set out its intentions for how revenue raised from the levy will be spent on it's website. If a charging authority does not set out its intentions for use of the levy's revenue then this would be taken to mean that the authority was intending to use the levy's revenue for any type of infrastructure capable of being funded by the levy, and consequently that authority could not seek a planning obligation contribution towards any such infrastructure.

Limiting pooled s106 contributions towards infrastructure capable of being funded by the levy

64. On the local adoption of the levy or nationally after a transitional period of four years (6 April 2014), the regulations restrict the local use of planning obligations for pooled contributions towards items that may be funded via the levy. The levy is the government's preferred vehicle for the collection of pooled contributions.

65. However, where an item of infrastructure is not locally intended to be funded by the levy, pooled planning obligation contributions may be sought from no more than five developments to maintain the flexibility of planning obligations to mitigate the cumulative impacts of a small number of developments.

66. For provision that is not capable of being funded by the levy, such as affordable housing or maintenance payments, local planning authorities are not restricted in terms of the numbers of obligations that may be pooled, but they must have regard to the wider policies set out in Circular 5/05.

67. Crossrail will bring benefits to communities across London and beyond and its funding will be met by a range of sources, including contributions from the levy and planning obligations. To effectively maintain the ability of planning obligations to raise revenue for Crossrail, this restriction will not apply to planning obligations that relate to or are connected with the funding of Crossrail.