

Rother District Council

Report to:	Community Infrastructure Levy Steering Group
Date:	5 October 2020
Title:	Government Future Review of Community Infrastructure Levy
Report of:	Head of Strategy and Planning
Ward(s):	All
Purpose of Report:	To update Members on the current Rother Community Infrastructure Levy (CIL) position, potential changes in national guidance and any future review of CIL in light of the pending new Local Plan.

Officer Recommendation(s): It be **RESOLVED:** That the Council delay any future review of Community Infrastructure Levy until the outcome of national consultation on the 'Planning for the future' – White Paper is known, and further detailed work has been undertaken to support the new Local Plan on future infrastructure needs to support development.

Current National Consultation on future changes to CIL

1. The Ministry of Housing Communities and Local Government (MHCLG) recently published (August 2020) its Planning White Paper (PWP) "[Planning for the Future](#)". The PWP sets out proposals for significant changes to the planning system, covering three 'Pillars':
 - a. Pillar 1 – Planning for development – which includes proposals to streamline the planning process with more democracy taking place more effectively at the plan-making stage; a digital-first approach to modernise the planning process and new binding housing requirements;
 - b. Pillar 2 – Planning for beautiful and sustainable places – placing a new focus on design and sustainability – including proposals to combat climate change, improve energy efficiency and place a greater focus on the creation of beautiful places in national policy, and;
 - c. Pillar 3 – improving infrastructure delivery and a reform of developer contributions.
2. This report concerns itself with Pillar 3. At present, there are two broad routes for local planning authorities to secure developer contributions, both of which are discretionary for authorities: planning obligations and the Community Infrastructure Levy (CIL). Planning obligations – through Section 106 agreements – are negotiated with developers. In contrast, the CIL is a fixed charge, levied on the area (floorspace) of new development, and secures infrastructure that addresses the cumulative impact of development in an area. The CIL is not mandatory for local planning authorities, and around half of authorities currently charge it.
3. The PWP proposes a number of draft proposals relating to Pillar 3, including:

- That CIL should be reformed to be charged as a fixed proportion of the development value above a threshold, with a mandatory nationally-set rate or rates and the current system of planning obligations abolished.
 - The scope of CIL could be extended to capture changes of use through permitted development rights.
 - The reformed CIL should deliver affordable housing provision.
 - More freedom could be given to local authorities over how they spend CIL.
4. The consultation on the PWP is open for 12 weeks from 6 August 2020 and officers have prepared a draft response to Pillar 3 only, for the CIL Steering Group to consider (Appendix 1). A response to Pillar's 1 and 2 will also be prepared in due course and be presented to Cabinet as the Council's response to the MHCLG.

A future of CIL

5. Given that the Planning Policy Guidance advocates that charging authorities should consider linking a review of their CIL Charging Schedule to any substantive review of evidence base for a Local Plan and that there is some uncertainty about the proposed national changes to CIL outlined above and in Appendix 1, it is recommended that a review of CIL should not take place until there is a clearer position on the legislation following the MHCLG consultation outcome. This will allow for proper consideration of the outcome of the proposed national changes to CIL and further advancement of the evidence base to support the new Local Plan, therefore having a much better understanding of the infrastructure needs to support the Plan.

Conclusion

6. Officers recommend that given the uncertainty around CIL relating to the proposals set out in the PWP, that subject to the outcome of the national consultation, any future review of the Council's CIL adopted Charging Schedule should be carried out when the evidence base supporting the new Local Plan is further developed and a better understanding of the infrastructure requirements to support development in that Plan, are understood.
7. Members of the CIL Steering Group are requested to endorse the consultation responses attached as Appendix 1, to be inserted with responses to Pillar's 1 and 2 in due course and signed off by the Executive Director and Lead Member for Strategic Planning as the Council's formal response back to MHCLG.

Financial Implications

8. Should Members want to carry out a review of the Council's Charging Schedule now then there will be a cost associated with carrying out a Viability Study, plus subsequent examination, circa £30,000-£40,000 minimum.

PLANNING WHITE PAPER

PILLAR 3 – PLANNING FOR INFRASTRUCTURE AND CONNECTED PLACES

Introduction

The Planning White Paper (PWP) was published by the Government on 6 August 2020 and is a policy document that sets out the proposals for future planning legislation. It provides the Government's planning reform proposals for England with the key aim of delivering a 'significantly simpler, faster and more predictable system' through changes to the local plan system and the improved use of digital technology to the planning process. The PWP provides opportunity for consultation and discussion with interested and affected groups and allows final changes to be made before a Planning Bill is formerly presented to Parliament. Consultation closes on the PWP on 29 October 2020.

Setting out three pillars for the future of planning, the PWP seeks to review how development is planned (Pillar 1 – Planning for Development), bring a new focus to design and sustainability (Pillar 2 – Planning for Beautiful and Sustainable Places) and reform how infrastructure associated with development is delivered (Pillar 3 – Planning for Infrastructure and Connected Places). It proposes long term structural changes to the planning system rather than more immediate amendments to the existing process.

Whilst Rother District Council (RDC) will be responding in full to the PWP, this report focuses on the proposed responses to Pillar 3, as they are directly associated with the Council's plans in relation to its existing Community Infrastructure Levy (CIL) arrangements.

The PWP intends to reform the system of planning contributions, including the abolition of the CIL and Section 106 (S106) Agreements as a means to accelerate the delivery of development whilst continuing to provide affordable housing. CIL and S106 will be morphed into a newly proposed nationally set Infrastructure Levy (IL). The principle of the IL is to capture the land value uplift created by planning approval and use this to enhance infrastructure delivery. Affordable homes delivered on-site are proposed to be off set against the proposed IL. The IL would be paid at the point of occupation, leaving councils to pay for and deliver any infrastructure needed up front. Local authorities will be allowed to borrow against future levy receipts to fund this.

At the same time as the PWP, the Government are undertaking consultation on a separate document which proposes more immediate changes to the current planning system, incorporating changes to the standard method for assessing local housing need, securing first homes through developer contributions in the short term, amending thresholds for affordable housing delivery, and extending the current Permission in Principle to include major development.

This report now moves on to summarise and discuss the main points raised in relation to planning for infrastructure and presents the Council's proposed responses to the specific consultation questions produced by the Government.

Perceived problems with the current system

The Government considers that current planning obligations are broadly uncertain and unclear, as they are subject to negotiation and renegotiation based in part on the developer's assessment of viability. This creates uncertainty for communities about the level of affordable housing and infrastructure that development will bring. In turn, this brings cost, delay and inconsistency into the planning process.

The current operation of CIL addresses many of these problems as it is a flat-rate and non-negotiable tariff, and developers and local authorities have, in general, welcomed the certainty it brings. However, as payment is set at the point planning permission is granted, and payment due once development commences, it is inflexible in the face of changing market conditions. The Government consider that payment before a single home has been built increases the developer's risk and cost of finance, creating cashflow challenges which are more acute for smaller developers. Despite early payment, the Government considers many local authorities have been slow to spend CIL revenue on early infrastructure delivery, reflecting factors including indecision, competing spending priorities, and uncertainty over other infrastructure funding streams.

In relation to affordable housing delivery, the current S106 system, means that developer contributions, whether on or off site, are vulnerable to challenge when a scheme is not viable. This creates risks for the local authority in meeting its affordable housing need as affordable housing is not currently secured as a fixed cost in the same way as CIL.

Pillar 3 – what does it cover?

Pillar 3 of the PWP is entitled 'Planning for infrastructure and connected places'. Securing necessary infrastructure and affordable housing alongside new development is central to the Government's vision for the planning system. Reforms are proposed to make sure that developer contributions are:

- responsive to local needs, to ensure a fairer contribution from developers for local communities so that the right infrastructure and affordable housing is delivered;
- transparent, so it is clear to existing and new residents what new infrastructure will accompany development;
- consistent and simplified, to remove unnecessary delay and support competition in the housebuilding industry;
- buoyant, so that when prices go up the benefits are shared fairly between developers and the local community, and when prices go down there is no need to re-negotiate agreements.

The Government has presented a series of consultation questions throughout the narrative of the PWP, and these are presented in the same way in this report.

Consultation Question

21. When new development happens in your area, what is your priority for what comes with it?

The Council prepares an Infrastructure Delivery Plan in support of its Local Plan which outlines the infrastructure requirements which are required to support

development across the District, along with their priority for delivery. If the site is allocated for development, it will have specific infrastructure on-site and potential off-site requirements listed in policy that will need to be delivered to make the development acceptable.

If liable, the Council always seek to secure on-site affordable housing from development as this is a key Council priority to meet local housing need. Transport infrastructure in support of the cumulative impact of major development is also a high priority where known junction and access improvements are required.

It is difficult to confirm the priorities generally for all forms of development, but high-quality design, the development of open space and suitable community facilities to support development, such as school places and health provision are also important.

A Consolidated Infrastructure Levy

The Government propose that S106 and CIL are replaced by a new consolidated IL under the following proposal, and alternative proposal.

Government Proposal

IL proposed to be reformed to be charged as a fixed proportion of the development value above a threshold, with a mandatory nationally set rate or rates (a single rate country wide or area specific rates) and the current system of planning obligations abolished. IL payments to be made on occupation of dwellings

The Council consider the following issues arise with this proposal:

- **The IL would be payable on occupation of dwellings** – This could lead to possible delays to the delivery of key infrastructure and affordable housing purchases. Whilst local authorities can borrow money against the levy, this is risky.
- **Creating a threshold by which low value developments do not pay the IL to prevent viability issues, and where the value of development is above the threshold then a proportional charge is required** – it is difficult for the Council to comment on this until the specific threshold information is consulted upon.
- **The Government consider that the proposal provides greater certainty for communities/developers about what contributions are expected alongside development** – The Council consider that existing CIL charges are published and clear and that the new proposal does not lead to greater certainty.
- **Aim to increase revenue when compared to the current system with the IL charge based all land use classes** – It is currently difficult for the Council to understand how the nationally defined IL would strike a balance on viability terms for all land uses.
- **The proposed IL would be more sensitive to economic downturns** – Whilst true, this would also mean that economic downturns will result in a longer timeframe to collect the levy as it would relate to the completions of development.
- **To allow for the timely delivery of infrastructure, would allow local authorities to borrow against revenue to forward fund infrastructure** – the Council consider this to be a high-risk strategy for local authorities. There will be additional borrowing costs and it is not clear if this can be easily recovered by the IL.

- **Uncertainty how other on-site facilities and off-site mitigation will be secured** - The Council are currently uncertain how other on-site facilities/services be secured through the proposed IL including play space, open space, community facilities and local employment opportunities. There is the same uncertainty regarding the means of delivering off-site mitigation such as Biodiversity Net Gain and Sustainable Drainage Systems.

The Government consider that there is an alternative proposal in maintaining a locally set IL which would address issues around transparency, responsiveness to local needs and consistency. The opportunity to capture land value considerations are however less strong under this proposal with levy rates being determined at the local level.

Government Alternative Proposal

As an alternative option, a levy could remain optional and would be set by individual local authorities. However, as planning obligations would be consolidated into the single IL, the Government anticipate that there would be a significantly greater uptake. The aim of the de minimis threshold would be to remove the viability risk, simplifying the rate setting process, as this would remove the need for multiple charging zones within an authority. It would be possible to simplify further – for instance, for the Government to set parameters. There would be a stronger incentive for local authorities to introduce the new IL, as they would not be able to use S106 planning obligations to secure infrastructure or affordable housing. In addition, some local authorities have chosen not to introduce the CIL out of concern for the impact on viability of development. Because the new IL would only be charged above a set threshold, these impacts would be mitigated.

Consultation Questions

22(a). Should the Government replace the CIL and S106 planning obligations with a new consolidated IL, which is charged as a fixed proportion of development value above a set threshold?

The Council is uncertain of the benefits of doing this as there is the potential that the opportunity to deliver some on-site and off-site mitigation through existing S106 arrangements would be lost. Clarification is required from government as to how all developer contributions will be able to be secured through the infrastructure levy and if not, what other mechanisms are available for their delivery. Such examples include existing arrangements for S106 contribution towards local labour agreements, and off-site mitigation for air pollution.

However, the Council do consider that a levy based on development value is an appropriate mechanism in principle subject to other comments raised. This will ensure that value can be more fairly apportioned between infrastructure and affordable housing, rather than affordable housing being left to negotiation on a case by case basis.

22(b). Should the IL rates be set nationally at a single rate, set nationally at an area-specific rate, or set locally?

The Council are uncertain of how nationally set rates can practically work as values

are very different spatially, and local circumstances cannot necessarily be reflected through these proposals. The term 'area-specific' will need to be defined as there is a greater deal of variation in viability across areas in a local authority.

The Council would support locally defined rates, but closely monitored against area and national specific rates to ensure there are no disproportionate benefits for buying land and developing in Rother District.

22(c). Should the IL aim to capture the same amount of value overall, or more value, to support greater investment in infrastructure, affordable housing and local communities?

There is concern that through including affordable housing delivery as part of the IL, then the opportunity to fund other important infrastructure will be significantly reduced. Therefore, the levy should aim to capture greater value than before to support investment in infrastructure. It is commonplace that through the development of existing local authority CIL charging schedules, the current CIL charge and resulting potential revenue will by no means meet the entire 'infrastructure gap' that exists between current ringfenced funding and the cost of delivering the infrastructure. The ability to capture greater value through the IL, subject to viability, is therefore supported in principle.

22(d). Should we allow local authorities to borrow against the IL, to support infrastructure delivery in their area?

Whilst it is considered that this will help developer cashflow, local authorities will be exposed to a significant level of risk, putting pressure on councils to consider borrowing money without the certainty of knowing when it will be paid back through the IL.

Extending the Scope of the Infrastructure Levy

Government Proposal

The scope of the IL could be extended to capture changes of use through permitted development rights

In making this change to developer contributions for new development, the scope of the IL would be extended to better capture changes of use which require planning permission, even where there is no additional floorspace, and for some permitted development rights including office to residential conversions and new demolition and rebuild permitted development rights. This approach would increase the levy base and would allow these developments to better contribute to infrastructure delivery and making development acceptable to the community. However, the Government propose to maintain the exemption of self and custom build development from the IL.

Consultation Question

23. Do you agree that the scope of the reformed IL should capture changes of use through permitted development rights?

Yes, as change of use and permitted development do not currently capture CIL payments or affordable housing provision but do contribute to development. The Government will need to be clear about how permitted development changes will be enforced and how the levy can be captured and monitored.

Affordable Housing Provision

Developer contributions currently deliver around half of all affordable housing across the country, most of which is delivered on-site. It is important that any reformed approach will continue to deliver on-site affordable housing at least at present levels. Affordable housing provision is currently required through robust and evidence based policies in Local Plans and is secured by the legal mechanism of S106 agreements. However, the CIL cannot currently be spent on delivering affordable housing. S106 agreements ensure the appropriate types of homes are delivered and stipulate how they will be managed in the future.

Government Proposal

The reformed IL should deliver affordable housing provision.

With S106 planning obligations removed, government propose that under the IL, authorities would be able to use funds raised through the levy to secure affordable housing. This could be secured through in-kind delivery on-site, which could be made mandatory where an authority has a requirement, capability and wishes to do so. Local authorities would have a means to specify the forms and tenures of the on-site provision, working with a nominated affordable housing provider.

Under this approach, a provider of affordable housing could purchase the dwelling at a discount from market rate, as is currently required. However, rather than the discount being secured through S106 planning obligations, it would instead be considered as in-kind delivery of the IL. In effect, the difference between the price at which the unit was sold to the provider and the market price would be offset from the final cash liability to the Levy. This would create an incentive for the developer to build on-site affordable housing where appropriate. First Homes, which are sold by the developer direct to the customer at a discount to market price, would offset the discount against the cash liability.

This approach transfers risks to the planning authority. The Government consider that this can be mitigated through policy design in order to maintain existing levels of on-site affordable housing delivery. In particular, in the event of a market fall, the policy could allow local planning authorities to 'flip' a proportion of units back to market units which the developer can sell, if Levy liabilities are insufficient to cover the value secured through in-kind contributions.

Alternatively, the Government could require that if the value secured through in-kind units is greater than the final levy liability, then the developer has no right to reclaim overpayments. The Government could provide standardised agreements, to codify how risk sharing would work in this way. The Government would also need to ensure the developer was incentivised to deliver high build and design quality for their in-kind affordable homes. Currently, if S106 homes are not of sufficient quality, developers may be unable to sell it to a provider or have to reduce the price. To

ensure developers are not rewarded for low-standard homes under the Levy, local authorities could have an option to revert back to cash contributions if no provider was willing to buy the homes due to their poor quality.

It is important that any approach taken maintains the quality of affordable housing provision as well as overarching volumes and incentivises early engagement between providers of affordable housing and developers. Local authorities could also accept IL payments in the form of land within or adjacent to a site. Through borrowing against further IL receipts, other sources of funding, or in partnership with affordable housing providers, they could then build affordable homes, enabling delivery at pace.

The Government consider that there is an alternative proposal for delivering affordable housing through the IL, by using funds received along with other funding streams to purchase a proportion of units on the site at development build costs.

Government Alternative Proposal

The Government could seek to introduce further requirements around the delivery of affordable housing. The proposal would create a 'first refusal' right for local authorities or any affordable housing provider acting on their behalf to buy up to a set proportion of on-site units (on a square metre basis) at a discounted price, broadly equivalent to build costs. The proportion would be set nationally, and the developer would have discretion over which units were sold in this way. A threshold would be set for smaller sites, below which on-site delivery was not required, and cash payment could be made in lieu. Where on-site units were purchased, these could be used for affordable housing, or sold on (or back to the developer) to raise money to purchase affordable housing elsewhere. The local authority could use IL funds, or other funds, in order to purchase units.

In answering the following specific consultation questions, initial thoughts have been gathered from the Housing Services team. It will be necessary for more detailed discussions to take place between the Housing Services and Planning Policy teams before these specific consultation questions are finalised.

Consultation Questions

24(a). Do you agree that we should aim to secure at least the same amount of affordable housing under the IL, and as much on-site affordable provision, as at present?

Yes. There is significant unmet need on the housing register and increasing housing need across Rother District for all forms of affordable tenure, especially affordable and social rent. Affordable housing remains a key corporate priority for this Council as it is for many local authorities. Minimum planning policy requirements cannot always be met due to the viability of development and resulting reduction in overall contributions. On-site delivery is critical on all sites in the District to ensure a continuous pipeline of new homes is available to meet growing demand.

The benefits and importance of the S106 system should not be forgotten by the Government, in that it provides a positive legal mechanism to secure a home to the land, protects future nomination rights, and ensures the delivery of the type of affordable local housing units required. Change in market conditions and values can

be accommodated through renegotiation with an open book approach. This provides certainty to the developer, rather than the uncertainty and complexity of in-kind/right to purchase.

24(b). Should affordable housing be secured as in-kind payment towards the IL, or as a 'right to purchase' at discounted rates for local authorities?

The Council consider that it is not sufficiently clear how the in-kind contributions and offsetting will work in practical terms. In principle, the unit would be sold to a registered provider at build cost and the difference between this and market price would be the in-kind payment offset against the total levy. This may result in a much lower contribution of affordable housing to that currently delivered, along with a possible reduction in on-site delivery where there is no robust legal mechanism requiring the completion and transfer of the affordable homes before the wider scheme is completed. The ability to use the IL to deliver/fund additional affordable housing could also limit the funding allocated to other infrastructure items.

A right to purchase approach is similar in its approach in that a unit will be bought at build cost and the proportion that could be bought will be determined nationally. However, the fact that the developer has control which of the units are sold in this way does not give scope for the local housing needs of the area to be addressed. The removal of negotiation through a S106 approach results in loss of influence by the local authority to ensure we are meeting local housing need and securing it in perpetuity. This approach is also likely to undermine other important planning policies such as the requirement of pepper-potting affordable and market homes to achieve sustainable and balanced communities.

24(c). If an in-kind delivery approach is taken, should we mitigate against local authority overpayment risk?

The PWP states that the Government could require that if the value secured through in-kind units is greater than the final levy liability, then the developer has no right to reclaim overpayments. Government could provide standardised agreements, to codify how risk sharing would work in this way.

The Council is not clear how this risk can be mitigated, and it is suggested by the Government that the developer shall have no right to reclaim overpayments.

24(d). If an in-kind delivery approach is taken, are there additional steps that would need to be taken to support affordable housing quality?

The Council is unsure why the approach taken would result in poor quality houses. Local plan policies (or replacement national policies) should be clear on what is expected from development and this should be considered at the planning application stage and secured by an appropriate legal agreement.

There should be a clear expectation from the Government for developers to meet design standards in planning policy. The Council do by no means accept financial contributions over quality of build and would not support any policy that allows a negative precedent to be set in this regard.

Increased Freedom in the Spending of the Infrastructure Levy

Government Proposal

More freedom could be given to local authorities over how they spend the IL.

It is important that there is a strong link between where development occurs and where funding is spent. Currently, the Neighbourhood Share of the CIL ensures that up to 25% of the levy is spent on priorities in the area that development occurred, with funding transferred to parish councils in parished areas. There are fewer restrictions on how this funding is spent, and we believe it provides an important incentive to local communities to allow development in their area. The Government propose that under this approach the Neighbourhood Share would be kept, and they are interested in ways to enhance community engagement around how these funds are used, with scope for digital innovation to promote engagement.

The Government is seeking views about whether to increase local authority flexibility, allowing them to spend receipts on their policy priorities, once core infrastructure obligations have been met. In addition to the provision of local infrastructure, including parks, open spaces, street trees and delivery or enhancement of community facilities, this could include improving services or reducing council tax.

The balance of affordable housing and infrastructure may vary depending on a local authority's circumstances, but under this approach it may be necessary to consider ring-fencing a certain amount of Levy funding for affordable housing to ensure that affordable housing continues to be delivered on-site at current levels (or higher). There would also be opportunities to enhance digital engagement with communities as part of decision making around spending priorities.

Alternatively, the permitted uses of the Levy could remain focused on infrastructure and affordable housing, as they are broadly are at present. Local authorities would continue to identify the right balance between these to meet local needs, as they do at present.

Consultation Questions

25. Should local authorities have fewer restrictions over how they spend the IL?

The Council generally supports the removal of restrictions regarding the spending of IL funds, notwithstanding comments regarding affordable housing. However, the Infrastructure Fund will not meet the whole infrastructure costs to support development, therefore we should not heighten the expectation to infrastructure providers that all infrastructure items will be met through the levy.

25(a). If yes, should an affordable housing 'ring-fence' be developed?

The Council believe that there should be an opportunity to ring fence a proportion of the IL for affordable housing, but flexibility may be required for changing circumstances over time and to protect other important planning policy requirements on a scheme by scheme basis (for instance market housing helping facilitate commercial development on a site). It is not clear how this ringfencing would be determined and how it would link to the strategy for either in-kind or discounted rate approaches to securing affordable housing advocated by the Government.

Conclusion

The PWP has proposed some significant changes to the way that developer contributions and infrastructure are delivered. The Council considers that many of the proposals require greater thought and detail regarding their implementation, specifically the impact of the proposed changes on securing affordable housing. It will therefore be necessary to engage further with departments within the Council, especially Housing Development Services, to consider wider strategic impacts.

The proposed responses to the consultation should be considered by the CIL Steering Group and any further thoughts or issues raised by the Group can be addressed and reflected in future amendments to these responses.

The Council will be replying to the complete set of consultation questions related to the entire PWP, including the other two pillars, and any issues of relevance brought up at this stage will be fed into these additional responses.