Central Bedfordshire Council

10 April 2025

Sustainable Communities Overview and Scrutiny

Developer Contributions – update report

Report of:

Cllr Adam Zerny, Leader of the Council, adam.zerny@centralbedfordshire.gov.uk

Responsible Director:

Lorna Carver, Deputy Chief Executive and Director of Place and Communities, lorna.carver@centralbedfordshire.gov.uk

Purpose of this report

For Overview and Scrutiny Committee to receive a report to the Council's approach to securing and utilising Section 106 and CIL and an update on any reforms to developer contributions received through the Planning and Infrastructure Bill. This was requested by an Overview and Scrutiny Member.

RECOMMENDATION(S)

The Committee is asked to:

1. Note the current approach to securing developer contributions
2. Note that at an appropriate point in the plan-making process, the Council will want to consider the implementation of CIL (or any replacement that might come through new legislation).

Executive Summary

1. This report summarises the key differences between Section 106 (S106) and the Community Infrastructure Levy (CIL). The Council has not currently implemented CIL, so solely uses S106 for the purposes of collected developer contributions.
2. The report sets out the processes that would be required to implement CIL, if a decision was taken to proceed with it. Evidence is required, including an Infrastructure Delivery Plan (IDP) and Viability Study. These must be up-to-date, as they will form the basis for the CIL charge and must be examined by an independent Inspector.

3. As such, the report notes the most appropriate timing to consider whether or not we implement CIL is at the latter stages of the current plan-making process, when this evidence will be ready and CIL can be considered in the context of a new Local Plan.
4. The report also provides an update on the legislative status of a proposed alternative to S106 and CIL that has been enabled through the Levelling Up and Regeneration Act (2023). Secondary legislation is required to enact this part of the Act. There is currently a lack of certainty over if and when this will come forward, and whether its implementation will be mandatory.

Main body of the report

Introduction

5. There are currently two ways Local Planning Authorities can secure contributions from developers to mitigate the impact of new development on local infrastructure and to deliver affordable housing. However, both come with legal caveats, and both must be used to fund infrastructure that a new development creates a need for. Therefore, they must be linked directly and evidentially to an identified impact created by a new development and can't be used to rectify a legacy or long-standing issue that is not impacted by the new development.
6. The Council has not implemented CIL, so S106 is used as the means to secure developer contributions. The use of S106 is supported by the Planning Obligations Strategy adopted by the Council in June 2024 and this sets out how the infrastructure for the development proposed in the current Plan, and any windfall sites, will be secured. The amounts that have been secured and the infrastructure that has been delivered is set out in the annual Infrastructure Funding Statement.
7. This report sets out:
    - The differences between Section 106 (S106) & Community Infrastructure Levy (CIL)
    - Update on any new legislation that may have been produced by the Planning & Infrastructure Bill relating to developer contributions
    - How the Council will react to any new legislation and through the development of the new Local Plan identify the most appropriate method/s of securing developer contributions be it S106, CIL or a combination of both.

Section 106 Agreements

8. A S106 agreement is a legally enforceable agreement made under S106 of the Town and Country Planning Act 1990. A local planning authority (LPA) can negotiate a S106 agreement with a developer to secure the delivery of affordable housing or to mitigate concerns that it may have about the impact of a proposed development on local infrastructure.
9. A S106 agreement requires a developer to deliver certain 'planning obligations' if they are granted planning permission for their development. Which planning obligations a developer must deliver will be set out in the S106 agreement.

10. However, they must meet three legal tests set out in regulation 122 of the CIL Regulations 2010 and should be supported by a policy base in a Local Plan and supporting Guidance to carry the maximum amount of weight in decision making. The Council adopted the Planning Obligations Strategy in June 2024 which sets out the basis the Council will seek contributions for delivering infrastructure required to support the delivery of growth in the adopted Local Plan.
11. The three main purposes for which planning obligations are used in practice:
    - to prescribe the nature of development (for example, requiring a certain proportion of housing to be affordable).
    - to compensate for loss or damage created by a development (for example, loss of open space).
    - to mitigate a development's impact (for example, through increased public transport provision).
12. Planning obligations can take the form of financial payments, which the LPA can use to fund compensatory measures to mitigate the impact of a proposed development (for example, to fund more school places or a new GP surgery). Alternatively, a developer may agree to deliver the compensatory measures themselves. For example, a developer may agree to deliver affordable homes onsite or agree to build a new road for a housing estate.
13. Restrictions on the use of S106 agreements set out in Government guidance on planning obligations states that they are intended to "assist in mitigating the impact of unacceptable development to make it acceptable in planning terms".
14. They can therefore only be used for certain purposes and in certain circumstances. Regulation 122 of the CIL Regulations 2010 sets out which three tests that planning obligations must meet. Planning obligations must be:
    - necessary to make the development acceptable in planning terms.
    - directly related to the development.
    - fairly and reasonably related in scale and kind to the development.
15. Developers may also submit a separate viability assessment alongside their planning application. Developers may use these assessments to demonstrate that affordable housing contributions they may be expected to deliver are not financially viable and to negotiate contributions they have to deliver on these grounds. Government guidance states that it is up to the applicant to show that "particular circumstances justify the need for a viability assessment at the application stage.
16. We have secured over £7.4m through S106 for community facilities for Town and Parish Council's.

Community Infrastructure Levy

17. In addition to using S106 agreements to mitigate the impact of new developments on local infrastructure, LPAs can also choose to implement a CIL.
18. In areas where a CIL is in force, developers must pay the charge (subject to certain exemptions). LPAs can use the CIL to fund infrastructure that supports development in

their area, but not to fund affordable housing. Central Bedfordshire has not currently adopted CIL.

19. In areas where LPAs have adopted the CIL, most new development that results in the creation of an additional floorspace of at least 100 square metres or the creation of a new dwelling (a house or flat) is potentially subject to the CIL. However, some development is exempt from the CIL for example:

    - Residential annexes and extensions.
    - Houses and flats built by 'self-builders' (which are people who extend their own home or build residential annexes on the grounds of their own home).
    - Affordable housing provided by local authorities or registered providers of social housing (housing associations).

20. CIL can provide more certainty, as the rates are not negotiable (but are still subject to viability). You can also more easily collect contributions from sites under 10 dwellings. However, any benefits must be considered alongside the level of income CIL is expected to achieve. In some cases, CIL can achieve higher infrastructure contributions, whereas in others, it may be that S106 will be more viable. Further work will be required to determine this for CBC.

21. The CIL Regulations 2010 states that LPAs must use the CIL to fund "the provision, improvement, replacement, operation or maintenance of infrastructure" that supports the development of their area such as:

    - Roads and other transport facilities.
    - Schools and other educational facilities.
    - Medical facilities.
    - Sporting and recreational facilities.
    - Flood defences.
    - Open spaces.

22. Government guidance on the CIL states that while the CIL "can be used to fund a wide range of infrastructure", it cannot be used to fund affordable housing. Affordable homes would continue to be delivered outside of the levy.

23. Some of the CIL receipts would be passed onto the local community in accordance with the details set out in the table below.

Table 2: Amount of CIL receipts that are passed onto local community		
Parish or town council?	Neighbourhood plan?	CIL receipts
✓	✓	25% of CIL receipts, which are paid to the parish or town council every year
✓	×	15% of CIL receipts, capped at £100 per dwelling. They are paid to the parish or town council every year.
×	✓	25% of CIL receipts (no cap). The local authority will consult the community how the funds can be used (in line with the neighbourhood plan).
×	×	15% of CIL receipts, capped at £100 per dwelling. The local authority will consult the community how to spend the funds.

Source: DLUCH and MHCLG, last updated April 2024

24. The table below sets out the main differences between S106 and CIL.

Table 3: Differences between section 106 agreements and the CIL	
Section 106 agreements	Community infrastructure levy (CIL)
Can be used to deliver or fund affordable housing and infrastructure	Can only be used to fund infrastructure, not for affordable housing
Intended to make an individual application acceptable in planning terms	Intended to provide infrastructure to support the development of an area
Negotiated on a case-by-case basis	Charged per square metre of floorspace, according to rates set by LPAs

Source: DLUCH and MHCLG, last updated September 2019

Potential changes to legislation

25. The Levelling-up and Regeneration Act 2023 (LURA) sets out the legislative framework for a new way of collecting developer contributions, the Infrastructure Levy (IL). It is intended that IL would replace the Community Infrastructure Levy (except in London) and potentially accommodate all financial contributions currently dealt with by way of Section 106 agreements as well. The provisions relating to IL require secondary legislation to bring them into force, alongside guidance on how a new system would work. As such, if proceeded with, it will likely be at least a few years before it is implemented.
26. This Act was delivered under the Conservative administration, so there is continued uncertainty around the implementation of IL and no timescales for such a change.

Implementation of CIL – the process

27. Before a Council can adopt a CIL and a charging schedule for their area, LPAs develop a draft charging schedule identifying the total cost of infrastructure they wish to fund wholly or partly through the levy. In doing so, they must consider what additional infrastructure is needed in their area to support development, and what other sources of funding are available, based on appropriate evidence.

28. Information on the charging authority area's infrastructure needs should be drawn from the infrastructure assessment that will be undertaken when preparing the Local Plan and their CIL charging schedules. This is because the plan identifies the scale and type of infrastructure needed to deliver the area's local development and growth.

29. As the Plan develops, and sites are identified to deliver the growth required, the infrastructure to support this will also need to be identified through the creation of an Infrastructure Delivery Plan (IDP). The IDP will form the evidence base to demonstrate that a CIL is required, and will form a key part of the evidence base for examination. The other key evidence base is a viability study, which will identify how much development in this area can afford to pay without preventing it from coming forward i.e. the CIL rates that should be charged.

30. The Council must consult on its draft charging schedule and subject it to examination by an independent examiner, in line with processes set out below in the table below. This is a lengthy process requiring input from viability consultants and consultation.

Step	Further information
Preparation	LPAs must identify what infrastructure is needed to support development in their area and what other sources of funding are available. They must then prepare a viability assessment (see box 2 in section 1.1) and a draft charging schedule.
Consultation	LPAs must consult neighbouring LPAs and, where relevant, county councils in two-tier areas, parish and town councils in its area and the Mayor of London. LPAs must also publish the draft charging schedule and supporting evidence for consultation. The Community Infrastructure Levy Regulations 2010 do not specify how long the consultation period should last, but government guidance on the CIL advises LPAs that they should consult for a minimum of four weeks if they introduce the IL for the first time.[29]
Examination	LPAs must submit their draft charging schedule to an independent examiner (usually an inspector working for the Planning Inspectorate) for examination. Anyone who made representations on the draft charging schedule during the consultation period has a right to be heard by the examiner.
Recommendation	The inspector can recommend that the draft schedule is approved, rejected or recommend certain changes. If an inspector determines that a charging schedule cannot be adopted without certain changes, LPAs must make these changes to adopt the schedule. However, LPAs are not required to adopt the final charging schedule.
Adoption	The charging schedule is approved by a resolution of the full council of the LPA.

Source: DLUCH and MHCLG, last updated April 2024

31. LPAs must submit their draft charging schedule to an independent examiner (usually an inspector working for the Planning Inspectorate) for examination. Anyone who made representations on the draft charging schedule during the consultation period has a right to be heard by the examiner.

32. The inspector can recommend that the draft schedule is approved, rejected or recommend certain changes. If an inspector determines that a charging schedule cannot be adopted without certain changes, LPAs must make these changes to adopt the schedule. However, LPAs are not required to adopt the final charging schedule. The charging schedule would need to be approved by a resolution of the full council of the LPA

Implementation of CIL – timings and key considerations

33. As the new Local Plan develops there will be a moment when the Council will need to decide the most appropriate approach to securing the infrastructure for the new Plan and this could well be utilising a combination of S106 and the CIL (for example, you might implement CIL for non-strategic sites, but continue to use S106 for large, strategic sites).

34. A explained in para 28, above, there are two key pieces of evidence required to implement CIL, an IDP and viability assessment. Both must be up-to-date and robust, as they will be subject ot independent examination.

35. Both of these pieces of evidence are prepared towards the end of the plan-making process (prior to the Regulation 19 consultation on the final draft of the plan), once site allocations have been decided. As such, work on CIL to align with the emerging plan, should not progress until that time.

36. Bearing in mind the processes involved in implementing CIL as set out in para's 26 to 31, (identifying the charge, consultation, examination and systems and process for its implementation), it is also important to ensure there is officer resource to support this key piece of work.

Options for consideration

37. Speeding up the process – whilst progressing with CIL aligned to the adopted Local Plan (so ahead of the evidence associated with the new Local Plan being prepared) is an option, in theory, the viability evidence associated with the adopted Local Plan would not be up-to-date enough to be used to justify the level of charge being proposed. As such, new viability evidence for the adopted plan would be required. It is not considered this would be a good use of money, as it could not be used for the emerging plan. All resource is also currently being used to progress the new Local Plan, so progressing now would involve a delay to the Local Plan process, or require additional resource to be brought in.

38. Not progressing with CIL – there will be an option not to progress with CIL and to continue to collect contributions solely through S106. We need to undertake the evidence before any decisions can be made on the viability of CIL for CBC.

Reason/s for decision

This is a paper for noting only. No decision is being taken.

Council priorities

39. This report is for noting only and does not recommend a decision that will impact upon the Council's priorities. Any future decision on the implementation of CIL will be required to further consider its impacts in this regard.

Legal Implications

40. The Levelling-up and Regeneration Act 2023 (LURA) sets out the legislative framework for a new way of collecting developer contributions, the Infrastructure Levy (IL). It is intended that IL would replace the Community Infrastructure Levy (except in London) and potentially accommodate all financial contributions currently dealt with by way of Section 106 agreements as well. The provisions relating to IL require secondary legislation to bring them into force, alongside guidance on how a new system would work. As such, if proceeded with, it will likely be at least a few years before it is implemented.

41. This Act was delivered under the Conservative administration, so there is continued uncertainty around the implementation of IL and no timescales for such a change.

42. The Council also needs to comply with the requirements of the Community Infrastructure Levy Regulations 2010 and associated planning guidance and legislation in the event it decides to implement CIL. The process for implementing CIL is set out elsewhere in this report.

Financial and Risk Implications

43. As discussed in the report, further work is required to understand the potential financial pros and cons of implementing CIL before any decision can be made on its implementation for CBC.

44. Seeking to implement CIL now, ahead of the emerging Local Plan evidence being prepared, would create an additional financial impact, as additional evidence would be required.

Equalities and Fairness Implications

45. Central Bedfordshire Council has a statutory duty to promote equality of opportunity, eliminate unlawful discrimination, harassment and victimisation and foster good relations in respect of nine protected characteristics: age disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

46. This report is for noting only and does not recommend a decision that will impact upon equalities and/or fairness. Any future decision on the implementation of CIL will be required to further consider its impacts in this regard.

Biodiversity and Sustainability Implications

47. This report is for noting only and does not recommend a decision that will impact upon biodiversity and/or sustainability. Any future decision on the implementation of CIL will be required to further consider its impacts in this regard.

Other Corporate Implications

Conclusion and next steps

48. The potential implementation of CIL will be considered alongside the plan-making process, at such a time when the evidence required to determine the CIL charge and the potential viability of CIL is available.

49. At this point, a further report will be brought to OSC, which will present a recommendation on whether or not to proceed with CIL.

50. If further legislation relating to the implementation of IL is progressed, this will feed into the consideration of CIL as part of the plan-making process.

Appendices

None

Background Papers

- None

Report author(s): Caroline Danby, Head of Strategic Growth, caroline.danby@centralbedfordshire.gov.uk and Andrew Davie, Service Director Development and Economy, andrew.davie@centralbedfordshire.gov.uk