TONBRIDGE & MALLING BOROUGH COUNCIL

COMMUNITY INFRASTRUCTURE LEVY PANEL

19 December 2011

Report of the Director of Planning, Transport & Leisure

Part 1- Public

Matters for Recommendation to Cabinet - Non Key Decision

1 COMMUNITY INFRASTRUCTURE LEVY – REFORM CONSULTATION

Summary
The Government is consulting on reforms to the Community Infrastructure Levy (CIL). This report sets out the consultation matters and proposes responses to the consultation questions.

1.1 Background

1.1.1 The Planning Act 2008 established powers to create CIL in England and Wales. Regulations on how to implement CIL came into force in 2010. These were amended in 2011. The Regulations allow a charging authority to levy a charge on the owners or developers of land that is developed so that they contribute to the costs of providing the infrastructure needed to support the development of the area. For more details on CIL and how it operates, please refer to the other report on the Agenda.

1.1.2 The Government set out proposals to reform CIL in the Localism Bill (which has since received Royal Assent and is now an Act, although it has yet to come into force). The changes would require local authorities to pass a meaningful proportion of receipts to the neighbourhoods where the development that gave rise to them took place, clarifies that receipts may be spent on the ongoing costs of providing infrastructure to support the development of the area and provides more local choice over how to implement the charge.

1.1.3 The purpose of the current consultation is to seek views directly on the Government's detailed proposals for the reform of CIL, including draft Regulations. The deadline for comments is 30 December 2011 and so it will be necessary for the Council's response to be sent in advance of the Cabinet Meeting.

1.2 Consultation Matters: Neighbourhood Funds

1.2.1 Clause 115 (6) of the Localism Act places a duty on charging authorities, i.e. the Borough Council, to pass a proportion of the funds they raise through the levy to other persons. To implement this duty, Regulation 16 in the draft CIL Regs (2012) proposes that a charging authority must pass to every local council within its area "x per cent" of the CIL receipts.

1.2.2 The Government's objective of this clause and draft Regulation is to strengthen the role and financial autonomy of neighbourhoods. The intention is to pass a meaningful proportion of the revenue generated from the levy to the locally elected council for the area where the development and growth take place and for this proportion to be spent on local infrastructure projects.

Q.1. Should the duty to pass on a meaningful proportion of levy receipts only apply where there is a parish or community council for the area where those receipts were raised? *[DPTL note this reference to parish councils also embraces any town council];*

1.2.3 ***Issues*** – The consultation document recognises that the geographical coverage of parish and town councils in England is not universal. This is evident in Tonbridge and Malling where there is no parish council for Tonbridge. In response the Government proposes that the charging authority, i.e. the Borough Council, will retain the funds and should engage with their communities in determining how to spend those receipts in non-parished areas. For information, community councils are the equivalent of parish councils in Wales.

1.2.4 ***Recommended Response*** – Yes. However, the response to this question should not preclude the appropriate funding of local projects from the CIL in local areas not currently covered by Parish Councils.

Q.2. Do you agree that, for areas not covered by a parish or community council, statutory guidance should set out that charging authorities should engage with their residents and businesses in determining how to spend a meaningful proportion of the funds?

1.2.5 ***Issues*** – These are partly outlined in response to question 1. The Government considers that the best way of ensuring that the charging authority retains the funds and engages with their communities is through statutory guidance rather than regulations. The reason given is that this approach will allow for charging authorities to determine the appropriate approach for their area. This flexibility would allow the Council to determine, for example, the areas where receipts will be applied and how they engage with their residents, businesses and other interested parties in determining how they will be spent in the non-parished areas.

1.2.6 ***Recommended Response*** – Agree that charging authorities should be given flexibility to decide on the best approach for those areas not covered by parish or community councils for determining how to engage with local residents and businesses on how to spend a meaningful proportion of the funds. However, disagree that statutory guidance is needed. Charging authorities, as is in the case of Tonbridge and Malling Borough Council, have considerable experience of engaging with local residents and businesses and have established channels and systems in place for doing so. There is therefore no need to formalise how this should be done in the shape of statutory guidance. It should be left to individual charging authorities to decide the most effective way of engaging with local organisations, residents and businesses on this matter because this may vary from one charging authority to the next depending on local circumstances and communities. It is important not to forget that charging authorities comprise elected members who are representatives of local communities and therefore they are a useful resource when it comes to deciding on how best to spend a meaningful proportion of the CIL receipts locally.

Q.3. What proportion of receipts should be passed to parish or community councils?

1.2.7 ***Issues*** – The draft CIL Regs (2012) does not specify a specific % of receipts that should be passed to local councils. The Government believes that the actual level must be sufficient to give neighbourhoods a meaningful contribution to meeting the impacts of development in their area. It is important to appreciate that this does not relate to all impacts of development as infrastructure necessary to directly support new development should continue to be met by the development through S.106 Planning Obligations.

1.2.8 ***Recommended Response*** – Firstly, it would be very difficult to come up with a specific % figure without evidence to base the calculation upon. Ideally, a pilot study should be undertaken to determine a sound and robust % that would deliver a meaningful proportion, without compromising the delivery at the wider borough level of infrastructure to support the development of an area.

1.2.9 Secondly, concern is expressed that the focus of the Reform Consultation and draft Regulation 59(A) is on the hosting local council and the proportion of development that each parish council accommodates. A critical issue that is not addressed is the impacts of development and where these are felt the most. There is the potential for development to take place within one parish but for the significant impacts to be felt in an adjoining parish, i.e. deficiencies in one parish are aggravated by development in a neighbouring local council. Most likely this would occur where the development is close to a common boundary between local council areas. This is not just an immediate local council issue but an issue that could potentially arise at the governance level between neighbouring planning authorities – where, for instance, development in one council area created traffic impacts in another council area that required/justified works to the highways network in that second council area. As the draft Regulations are currently

worded, only those local councils *hosting* development would receive a meaningful proportion of the CIL receipts even if significant impacts on certain infrastructure eg education provision would be more significant in the neighbouring parish. More consideration needs to be given to this matter in the draft regulations and in CIL guidance.

1.2.10 In the absence of evidence pilot study, it is suggested that draft Regulation 16 (new Regulation 59) is re-worded with a change of emphasis. It is considered that the 'x per cent' in 59(A)(1) should relate to the % of the total receipts collected annually by the charging authority which should be passed to local councils (as a total share) where development is taking place. The Regulation should not specify a % figure. The total figure and its distribution amongst the local councils should be at the discretion of the charging authority but it should be informed - through engagement with the local councils and others where appropriate - by the level of development each local area is accommodating and, more importantly, the infrastructure necessary to support the development of the area. This approach would provide flexibility which would allow the effective expenditure of CIL receipts on needed infrastructure. This local discretion would be in the spirit of localism because it would provide flexibility for local authorities to respond appropriately and therefore effectively to local circumstances and priorities.

1.2.11 In light of the aforementioned response, it is suggested that draft Regulation 59A(1)-(3) should be re-written to read:

(1) A proportion of the total annual CIL receipts, to be determined by the charging authority, must be passed to the local councils that are accommodating development as described in paragraph (2) (or in the absence of local councils set aside by the charging authority)

(2) The level of contribution each local council receives (or in the absence of a local council set aside by the charging authority for the appropriate area) will be at the discretion of the charging authority but will be informed, through consultation, by the level of development accommodated in each local area and, specifically, the infrastructure necessary to support the development each local council hosts.

Q.4. At what level should the cap be set, per council tax dwelling?

1.2.12 ***Issues*** – The Government is concerned about CIL receipts being unspent or wasted and wants to make sure that the receipts are directed to where a contribution to the costs of hosting development is needed. The Government does not want a situation arising whereby significant funding is generated from a major development in a sparsely populated area. What is proposed in the consultation document is to place a per household cap (based on the number of council tax dwellings) on the amount of money that must be passed to a parish or community council each year to prevent inappropriate amounts being passed on where there

is no reason to do so. This is reflected in Regulation 16 in the draft CIL Regs (2012) (see proposed clause 59A(4)).

1.2.13 ***Recommended Response*** – As with the response to question 3, it is very difficult to come up with a specific cap without further evidence to base it upon. Ideally, a pilot study, possibly with one of the front-runners, should be undertaken to determine a sound and robust level that would ensure that funds are effectively directed to those areas where the costs of hosting development arise.

Q. 5. Do you agree that the proposed reporting requirements on parish or community councils strike the right balance between transparency and administrative burden?

1.2.14 ***Issues*** – There are restrictions on what CIL can be spent on, for example it can not be spent on remedying pre-existing deficiencies in infrastructure provision, except to the extent that they will be aggravated by new development. The purpose of the funds is to contribute to the costs of hosting development, not for the money to be substituted for general spending. To ensure compliance with the CIL requirements, the Government has therefore proposed, in the draft CIL Regs (2012) in clause 19, a reporting procedure that local councils must follow. This involves the preparation of an annual financial report which should document: total CIL receipts; total CIL expenditure; items of infrastructure to which CIL has applied; the amount of CIL expenditure on each item; and the total amount of CIL receipts retained at the end of the reported year. This report must be published on the local council's website and sent to the charging authority. The Government is not proposing to impose a restriction on the specific infrastructure that the local councils receive, i.e. they can spend it on what they want and can choose whether or not they contribute to larger projects funded by other bodies such as the borough or county council.

1.2.15 ***Recommended Response*** – The reporting requirements set out in draft Regulation 19 appear sensible and logical and should provide sufficient transparency over the expenditure of the CIL receipts.

Q.6. Draft regulation 19 (new regulation 62A(3)(a)) requires that the report is to be published on the councils website, however we recognise that not all parish or community councils will have a website and we would welcome views on appropriate alternatives

1.2.16 ***Issues*** – These are highlighted in the question, i.e. not all local councils will necessary have the resources available to have their own website where the report could be published in order to comply with draft Regulation 19 (new 62(A)(3)(a)).

1.2.17 ***Recommended Response*** – All of the parish and town councils in Tonbridge and Malling Borough have their own website so this is not an issue locally and therefore no appropriate alternatives are suggested.

Q. 7. Do you agree with our proposals to exclude parish or community councils' expenditure from limiting the matters that may be funded through planning obligations?

1.2.18 ***Issues*** – The Government considers that there is still a legitimate role for Planning Obligations in making acceptable development which would otherwise be unacceptable in planning terms. In order for Planning Obligations and CIL to operate in a complementary way, the Government has included Regulations in the CIL Regs 2010 that, for example, prevent developers from being charged twice for the same piece of infrastructure. Essentially, the charging authority is required to produce a list (known as the Reg 123 list) of the infrastructure that CIL will be spent on and publish this on their website after a charging schedule has been approved. Inclusion on a Regulation 123 List means that a Planning Obligation can not be used to secure infrastructure that features on the list. If the list is not produced, then no infrastructure can be funded through Planning Obligations. The Government is proposing that these limitations should not be extended to local councils, i.e. parish and community councils should not be restricted to spending receipts on the infrastructure that features on the charging authority's 123 list. Furthermore, local councils would not be required to produce such a list. The Government argues that this would provide flexibility to both the charging authority and the local council.

1.2.19 ***Recommended Response*** – Yes. It makes sense that a charging authority's ability to secure Planning Obligations should not be hampered by a local council's spending decisions. Planning Obligations will still have a role to play in securing supporting infrastructure, particularly on larger development sites, and the opportunities for using this tool should not be unnecessarily limited by decisions taken by local councils on the expenditure of funds allocated to them. The proposal of allowing local councils flexibility to spend their allocated funds as they see fit – and not confining this to infrastructure listed on the charging authority's Regulation 123 list – is welcomed providing this is still in accordance with the levy's purpose and the other regulations, in particular Regulation 59 which indicates that should only be used to fund infrastructure to support the development of its area and should not be used to remedy pre-existing deficiencies in infrastructure provision unless such deficiencies are aggravated by new development.

Q.8. Do you agree with our proposals to remove the cap on the amount of levy funding that charging authorities may apply to administrative expenses?

1.2.20 ***Issues*** – The current CIL Regulations (2010) cap spending on administrative expenses to 5% of receipts for charging authorities who collect CIL. The Government considers that this cap should be removed to provide charging authorities flexibility to respond to local circumstances including engaging with residents and businesses in delivering neighbourhood funds (spending the

meaningful proportion – see above) where there is no locally elected council in place. In response, charging authorities will be required to report regularly on their levy income and expenditure and set out how much funding has been applied to administrative costs.

1.2.21 ***Recommended Response*** – Yes, agree with the proposals to remove the cap on the amount of levy funding that charging authorities may apply to administrative expenses because this will provide flexibility for each charging authority to respond to local circumstances and priorities.

1.3 Consultation Matters: Affordable Housing

Q.9. Do you consider that local authorities should be given the choice to be able if they wish to use levy receipts for affordable housing?

Q.10. Do you consider that local authorities should be given the choice to be able if they wish to use both the levy and planning obligations to deliver local affordable housing priorities?

Q.11. If local authorities are to be permitted to use both instruments, what should they be required to do to ensure that the choices being made are transparent and fair?

1.3.1 ***Issues*** - According to the current CIL Regulations, levy receipts can not be spent on affordable housing. To date, S.106 Planning Obligations have proved to be the principal mechanism for delivering affordable housing. This is a well established practice and has supported the Government's objective of creating mixed communities. However, the Government recognises that there are circumstances where on-site provision may not be the most effective or efficient means to deliver local policies for affordable housing. The purpose of this proposal is to consider whether allowing local authorities flexibility would allow for more efficient provision of affordable housing, including for any off-site provision. The Government suggests that one outcome could involve a combination of Section 106 Obligations and CIL receipts for delivering affordable housing, e.g. local authorities could collect affordable housing contributions from Planning Obligations for key sites and secure affordable housing for the remainder of the area with levy contributions.

1.3.2 ***Q.9: Recommended Response*** – Yes, local authorities should be given the choice to be able if they wish to use levy receipts for affordable housing. This choice will provide flexibility for charging authorities to respond to potential changing circumstances either nationally, in terms of the long-term future role of established mechanisms used to secure affordable housing, i.e. Planning Obligations, or locally in terms of evidence of need and the charging authority's priorities.

1.3.3 In responding to this question it is important to assess the value of bringing affordable housing within the scope of CIL receipt expenditure. The one

advantage is that more development, in the shape of smaller schemes that fall below existing thresholds for the provision of affordable housing, will be generating revenue for the charging authority that can be spent on affordable housing. However, this does not automatically translate to more provision. There would still be an extensive process that would need to be followed before affordable units are developed and there are no guarantees that this process would deliver what is needed. Unless clearer regulations/guidance are prepared, a potential outcome could be that direct provision on-site is reduced and the charging authority (the Borough Council) has a pot of money to spend on affordable housing but no obvious solution of where, by whom and how this will happen. It is difficult to foresee a development of market housing accommodating additional affordable housing paid for by CIL. It is not clear who would deliver this off-site provision and where it would take place, i.e. would there be an expectation of Council's to allocate specific sites in local plans for affordable housing where a proportion of the CIL receipts can be spent? It is evident that this part of the reform consultation could seriously prejudice the Government's objective of securing mixed communities.

1.3.4 In addition, it is questionable whether the inclusion of affordable housing within the scope of CIL receipt expenditure would be in the spirit of the levy. It is arguable that affordable housing is part of the development of an area and not 'infrastructure to support the development of its area' as defined by CIL Regulation 59(1). Furthermore, it is unclear how affordable housing can be justified as a cost of hosting development, e.g. how would the development of market housing in a local area aggravate an existing deficiency of affordable housing provision? There appears to be no direct relationship which means that the CIL receipts would be spent on remedying pre-existing deficiencies in infrastructure provision which would not accord with the purpose of CIL, as outlined in the Reform Consultation document (please see the second paragraph at the top of page 15)

1.3.5 Finally, if CIL receipts are spent on affordable housing there is a real danger that other strategic infrastructure projects necessary to support the growth of the wider area may not be delivered because the priority will inevitably be to secure affordable housing to address identified need.

1.3.6 ***Q.10: Recommended Response*** – Yes, local authorities should be given the choice to be able if they wish to use both the levy and planning obligations to deliver local affordable housing priorities. This could provide flexibility and freedom for local authorities to decide the appropriate mechanism for securing affordable housing locally taking into account the scale and location of development. However there are concerns that whilst the outcome could, potentially, be a greater financial contribution for affordable housing, the process would not necessarily guarantee delivery – please see response to question 9 for further details.

1.3.7 If the mixed approach is adopted, further guidance must be produced by the Government on how this needs to be integrated into the viability assessments for CIL. The mixed approach will create complications for the preparation of CIL resulting (more than likely) in the need for additional viability tests reflecting scenarios where either Planning Obligations or CIL receipts are used to secure affordable housing. This is a significant issue because Planning Obligations can not be used for the securing of funding for infrastructure that features on the CIL Reg 123 list – this could result in double-charging a developer for affordable housing. The outcome of the mixed approach could be a complex CIL charging schedule with more than one rate for a particular type of development, e.g. residential (key sites) residential (other sites), which would not accord with existing CIL guidance which argues against undue complexity and in favour of limiting the number of different charges.

1.3.8 ***Q.11: Recommended Response*** – If local authorities are permitted to use both the levy and planning obligations to fund affordable housing, transparency and fairness are essential. One potential option to achieve this could involve referencing the affordable housing policy in the local authority's adopted Development Plan Document or Local Plan. The thresholds contained within the adopted policy could provide a statutory framework to which the different funding mechanisms can be applied. For example, for sites which exceed the threshold of the adopted policy, existing mechanisms, i.e. Planning Obligations, could continue to be used to secure affordable housing, ideally directly on-site. For other development sites which fall below the thresholds – which, currently, are not required by policy to provide affordable housing - CIL could be collected. Wording to this effect could be included in the CIL Reg 123 list. By linking the CIL and Planning Obligation choices to an adopted policy - which itself has been evidence based and fully tested through the Local Development Framework (LDF) process - fairness and transparency would be ensured. This method would also ensure that both allocated and windfall sites are picked up in terms of making a contribution to securing affordable housing. Linking the levy and Planning Obligation choices to adopted policy would ensure a truly local approach which could be reassessed in light of evidence of need available at the time of the LDF/Local Plan review.

Q.12. If the levy can be used for affordable housing, should affordable housing be excluded from the regulation that limits pooling of planning obligations, or should the same limits apply?

1.3.9 ***Issues*** – The existing CIL Regulations place a limit on the pooling of Section 106 Obligations, i.e. local authorities may only enter up to five separate planning obligations to contribute to a single infrastructure project. This limit was set before the Government had the idea of including affordable housing within the scope of spending of CIL receipts. In light of the reform proposals outlined above, the Government is asking whether affordable housing should be excluded from the regulation that limits pooling of obligations or whether the same limits should apply.

1.3.10 ***Recommended Response*** – If affordable housing is to be covered by CIL it will be important that it is excluded from the regulation that limits pooling of Planning Obligations. This un-constrained approach would facilitate the delivery of vital infrastructure that is not identified on the Reg 123 list for CIL receipts expenditure.

1.4 Financial and Value for Money Considerations

1.4.1 The proposed reforms will impact on the funding that can be secured through CIL. The apportionment that needs to be passed to the local councils, proposed to be at the discretion of the charging authority, i.e. the Borough Council, will limit the amount of money that can be spent from the CIL receipts on other infrastructure that is necessary to support the growth of the borough. The proposal to include affordable housing within the expenditure of CIL receipts could, potentially, result in more developments making a financial contribution to securing affordable housing but there are doubts over the effective delivery of additional units and also concerns that this reform may prejudice the delivery of mixed communities and other forms of infrastructure needed to support the development of the borough.

1.5 Risk Assessment

1.5.1 There is a risk that if the Council does not respond to the reform consultation, the CIL Regulations may be reformed in a way that does not benefit the Borough Council in terms of the collection and expenditure of CIL receipts and how this relates to local circumstances and priorities.

1.6 Equality Impact Assessment

1.6.1 See 'Screening for equality impacts' table at end of report

1.7 Recommendations

1.7.1 The Panel endorses the recommended responses to the Government's consultation on the Reforms to the Community Infrastructure Levy set out in the report.

1.7.2 Cabinet confirms the action taken by the officers, having regard to the views of the CIL Panel, in responding to the consultation by the deadline of 30 December.

Background papers: contact: Nigel De Wit

Community Infrastructure Levy: Detailed proposals and draft regulations for reform Consultation (October 2011) (DCLG)

Steve Humphrey
Director of Planning, Transport & Leisure

Screening for equality impacts:		
Question	**Answer**	**Explanation of impacts**
a. Does the decision being made or recommended through this paper have potential to cause adverse impact or discriminate against different groups in the community?	No	This is a response to a Government consultation.
b. Does the decision being made or recommended through this paper make a positive contribution to promoting equality?	No	This is a response to a Government consultation.
c. What steps are you taking to mitigate, reduce, avoid or minimise the impacts identified above?		

In submitting this report, the Chief Officer doing so is confirming that they have given due regard to the equality impacts of the decision being considered, as noted in the table above.