BUSINESS LDN

TECHNICAL CONSULTATION: THE INFRASTRUCTURE LEVY

CONSULTATION RESPONSE

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Date submitted: 9 June 2023

INTRODUCTION

1. BusinessLDN is a business membership organisation with the mission to make London the best city in the world to do business, working with and for the whole UK. BusinessLDN works with the support of the capital's major businesses in key sectors such as housing, commercial property, finance, transport, infrastructure, professional services, ICT, and education. We welcome the opportunity to respond to the Government's technical consultation on the proposed Infrastructure Levy (IL).

SUMMARY POSITION

2. The existing planning gain system comprising Section 106 legal agreements[1] (S106) and Community Infrastructure Levy (CIL) has evolved, and been refined, over a long period of time. When considering the Government's objectives for the replacement IL system[2], which primarily focus on simplifying and speeding up the process and seeking to capture more land value uplift from the development process, including at least as much affordable housing as the current system, it is our view that these objectives could be better achieved by reforms to the existing system. This is especially the case given the Government is proposing the reforms at a time when there is a national housing crisis and the Government's stated objective is to increase housing delivery to 300,000 homes a year. Any changes to the system must be considered in this context and in respect of any potential risks to achieving that objective.

3. Our answers to the consultation questions below explain our concerns about the IL proposals once they become operational. But first, we set out some ideas for reforms that could be undertaken to the existing system that could simplify and speed up the process without jeopardising the delivery of infrastructure and affordable housing, or further exacerbating the housing crisis and sluggish economic growth.

[1] Section 106, Town and Country Planning Act 1990

[2] Planning for the Future White Paper, DLUHC 2020

4. Instead of introducing a new system, the following reforms should be made to the current system:

   i. **Make CIL mandatory**: Whilst nearly all local authorities (LAs) in London have adopted a CIL charging schedule, the position across the country is patchy. According to Government data[3] it is understood that, as of April 2023, there are 158 CIL charging authorities (down from 163 due to local government reorganisation, which represents only 51% of LAs with CIL in place.)

   ii. **Reconsider delivery of affordable housing through CIL**: The primary legislation that introduced CIL was the Planning Act 2008 and that originally stated that 'infrastructure' for CIL funding purposes included affordable housing (section 216(2)(g)). However, this reference to affordable housing was deleted by the CIL Regulations 2010[4]. In theory, section 216(2)(g) of the Planning Act 2008 could be re-enacted to satisfy the Government's objective for LAs to have the power to use CIL income to support direct or indirect (e.g. via use of CIL as a form of grant funding) delivery of affordable housing. We think this would be challenging to implement in practice, for the same reasons given in respect of affordable housing delivery under IL, but it would be easier to explore the principles within the context of the existing system that is well established and understood than in a new system with lots of unknown variables.

   iii. **More liberal application of CIL**: At present the CIL regulations are quite tightly drawn and don't easily allow for CIL to be paid via delivery of 'in-kind' or 'on-site' delivery of infrastructure or to repay a developer who has provided strategic infrastructure that unlocks a large area of development. A more liberal use of CIL could achieve much of what the IL is looking to achieve in terms of the delivery of strategic infrastructure.

   iv. **Standardised S106 templates**: A great deal of time can be spent negotiating S106 agreements with needlessly different provisions that vary from authority to authority (and even within authorities) but are intended to do the same thing, for example on obligations concerning local training and procurement objectives. Attempts have been made before to standardise the process, including a model S106 agreement prepared by the Law Society[5]. Research should be undertaken to understand why this has not been adopted more widely. Once understood, a standardised template could be made mandatory or at least its use heavily encouraged by guidance. Parties to the S106 could make agreed amendments to the mandatory template, in the same way that has long been established for construction contracts, but there would still be enhanced standardisation of the process. This would enable negotiations to focus on the genuinely site-specific issues pertaining to the planning application in question.

   v. **Resourcing at S106 stage**: Following a committee resolution to grant planning permission subject to a S106 agreement, it is common practice for the S106 negotiations to only then commence and then to take months before agreement is reached and the planning permission decision notice issued. In many cases, this stage alone can exceed the

[3] Planning Practice Guidance Paragraph: 003 Reference ID: 25-003-20190901, DLUHC 2019

[4] CIL Regulations 2010 (SI 2010 No. 948)

[5] Planning Obligations: Practice Guide, DCLG 2006

statutory determination timescale. As above, standardising the system would speed matters up, however a major contributor to the delay is frequently that the LA has inadequate resourcing in terms of planning and legal services to ensure speedy progression of the necessary legal documents, but are also reluctant to appoint external legal advisors to act on their behalf.

Work currently being undertaken by Government to bolster the capacity of planning departments may help to alleviate this, but realistically a much more substantial investment is required to see meaningful change in terms of the speed of planning decision making. In contrast, introducing an entirely new IL system would be a huge diversion of resource over the next decade and thus it is questionable whether we would see the benefits of a quicker system. It would also speed up the process if the applicant were able to provide the first draft of the S106 (which would be made simpler by standard clauses). The Government could also consider a deadline after committee resolution by which time the S106 must be agreed, with the applicant able to provide a unilateral undertaking thereafter.

vi. **London's Threshold Approach**: The Threshold Approach to affordable housing in the London Plan has been relatively successful in terms of providing clarity and certainty over policy expectations and in speeding up the planning process when affordable housing is required and where policy objectives can be readily met. However, where they cannot, there remains the option to go down the 'Viability Tested Route' so that marginal sites can still be brought forward. This has rebalanced the land market because when competitors are bidding for land there is a level playing field on which all parties know that the affordable housing expectation is 35% (or 50% on public sector land) and if that cannot be met a full viability assessment will be required.

In contrast, the new IL system would require a minimum of three valuations on all schemes over the IL threshold, including all schemes without any residential component. Furthermore, there would be no flex to bring forward marginal sites, thus they will remain undeveloped. For these reasons, the Government should engage with LAs across the country to explore rolling out the Threshold Approach on a national basis. It could be made mandatory, with LAs (or strategic authorities) having the ability to set localised threshold levels, and it could apply to all sites where affordable housing is required, not just schemes of strategic importance. This would genuinely reduce the need for viability/valuation negotiations and speed up the process, whereas IL will not achieve either of these objectives.

5. The Government's own data[6] shows that development in urban areas, particularly London, is already contributing substantially through S106 and CIL. The estimated value of planning obligations agreed, and CIL levied (including affordable housing), in 2018/19 in England was £7 billion of which 28% was generated in London. The scope to increase contributions is from greenfield development and it would be better to focus on ways to capture this, rather than risk urban development which is already contributing to housing and economic growth, revitalising areas, environmental and public realm improvements through CIL and S106.

[6] The Incidence, Value and Delivery of Planning Obligations and Community Infrastructure Levy in England in 2018-19, MHCLG 2020

6. It is highly unlikely that the IL will deliver on the Government's objectives to simplify and speed up the planning gain process nor capture more land value uplift from development. In fact, the new system looks set to create more layers of complexity than the current system and pose significant risks to the development pipeline.

7. Our headline concerns with the IL proposals are:

    i. **Infrastructure delivery:** The expenditure of IL income must only be used for infrastructure and affordable housing – the reason for having the Levy and to ensure sufficient funds are available to mitigate the impact of development. Any deviation from this would completely undermine the purpose of the Levy and prevent much needed development from coming forward. LAs have expressed grave reservations about borrowing against future IL receipts and, therefore, there is significant risk over the timing of LA-delivered infrastructure, which undermines the delivery of sustainable development and will increase local opposition.

    ii. **Setting IL charging rates**: Each IL charging rate will need to be set at a mean rate that is appropriate for the majority of schemes coming forward in that charging category and that does not stymy marginal sites. Without the flex to optimise planning gain on a site-by-site basis through S106, it is very difficult to see how infrastructure and affordable housing levels can be maintained at current levels, let alone achieve the Government's ambition to exceed current levels. Viability is not static and changed market conditions could render more developments unviable.

    iii. **Brownfield development**: The Technical Study accompanying the consultation document models different development typologies and in so doing clearly illustrates that the most value is to be extracted from greenfield development. Yet, for the reasons set out in our responses to the consultation questions below, the new IL system would be adding considerable risk to brownfield development (a key Government objective) with little, if any, financial benefit.

    iv. **Development viability**: Given the uncertainty over the final IL liability throughout the lifetime of a project, it will be more difficult for developers to plan their cashflow and to secure funding, therefore financing costs will go up due to increased risk. Ultimately this will impact on the viability of development and the planning gain that can be extracted from the development process and will likely constrain development further.

    v. **Drawn out valuation process**: On most projects there will be three valuations, and this will include projects without any residential component. This will not overcome the existing problem of lengthy viability negotiations; agreeing valuations will remain complex and could be contentious. It is therefore difficult to see how this will speed up the planning process – a crucial original aim of IL – and actually risks lengthening the overall planning timeframe.

    vi. **Payment process**: A benefit of IL, as originally conceived, was the timing of payment upon completion and thus the benefits for development cash flow and the amount of planning gain that could be extracted from each project. However, payment upon

completion means there could be significant scope for variation in the final amount due depending on market conditions in the intervening period, particularly on larger projects that may take years from commencement to completion. Furthermore, the Technical Consultation document indicates that IL payments could in fact be requested earlier in the process and it appears that this could easily become the norm.

vii. **Use of S106 agreements**: The proposed threshold options for use of S106 are all far too high. We understand the aspiration to narrow the scope of S106 and only use it on larger schemes, but the reality is every development site is unique and therefore the need to secure mitigation via S106 is many and varied and cannot simply be determined by the size of the development proposed. The LA should retain discretion to determine where planning obligations are required to make development acceptable in planning terms. Furthermore, the introduction of the new concept of delivery agreements is an unnecessary complication and simply replaces one legal negotiation with another.

viii. **Interaction between S106 and IL**: Clarity is required as to how the two systems of S106 and IL will successfully coexist and interact. If works are being provided 'in-kind' under S106 (or a delivery agreement or planning conditions) the developer should not pay twice where such infrastructure would otherwise have been funded by IL. In order to allow for successful 'offsetting' under S106 (so that the developer does not pay twice) the S106 agreement will presumably need to include some sort of complex valuation mechanism to determine the value of the S106 package to be deducted from IL. Careful thought and consideration will need to be given as to how this will work in practice.

ix. **Re-using existing buildings**: The IL, as currently constructed, would discourage developers from re-using and extending existing buildings (generally a better outcome in terms of sustainability and carbon emissions), as it will be based on the total GDV of the scheme rather than, for example, just the GDV of an additional storey added to an office block. This is of particular concern to development in cities, most of which is redevelopment on brownfield land. Careful consideration will be needed for change of use scenarios and brownfield sites with existing, or recently demolished, floorspace.

x. **Community support**: The current S106 and CIL system by and large shows clear community benefits that arise from each development, including physical infrastructure delivery and socio-economic benefits in the immediate locality. This is particularly the case where such infrastructure is delivered on-site. If a tax is extracted from the development value and paid into a centralised pot that could be spent on infrastructure (or indeed any council services) anywhere in that local authority area or beyond, it will be much harder to convince communities to support development because there is no direct or tangible link between the scheme built and infrastructure that is delivered.

xi. **Right to require**: Setting an upper limit would be sensible and LAs should have the flexibility to set their own threshold to suit local circumstances and priorities, provided this allows for a financial payment buffer in the event of calculating the final adjustment payment in an economic downturn or in a situation of significantly increased build

costs. The right to require calculation must also account for dwelling size mix and the level of affordability offered as these have significant bearing on the viability of a scheme.

xii. **Test and Learn**: The 'test and learn' approach is supported given the complexity of the new system, but the uncertainty surrounding the requisite decade-long transition period will negatively impact on the development pipeline for years to come.

8. The above concerns apply as matters of principle across the country. In addition, London has some specific challenges when it comes to introducing the IL, including a unique development plan system (i.e. it has the London Plan, the spatial development strategy for the city, 33 LA local plans and additional Mayoral Development Corporation local plans to take account of), extreme variation in land values even within a single borough, the retention of the Mayoral Community Infrastructure Levy (MCIL), and development being predominantly on brownfield land. These factors make a broad-brush system particularly challenging and will necessitate highly complex IL charging schedules. The challenge of finding an appropriate middle ground for Levy charging rates whereby less viable developments are not put at risk, whilst ensuring that rates are high enough to maintain existing levels of infrastructure contributions and affordable housing, will be particularly acute in the capital because of this.

9. It is also significant to note that, whilst the Greater London Authority's (GLA's) Threshold Approach has been relatively successful in reducing the need for affordable housing viability testing in London (in 2022 66 per cent – or two thirds – of eligible referrable applications followed the Fast Track Route[7]) it is striking that some schemes still need to follow the viability tested route because of the development costs and circumstances surrounding complex brownfield development in London. This reinforces the need for some flexibility in the IL process to accommodate the intricate viability conditions that exist in the capital.

10. Also of relevance to London, the Technical Consultation and accompanying Technical Study, are predicated on the presumption that most sites are not in use, or at least have been cleared *("Most development occurs on vacant land, whether that be greenfield, or brownfield sites that have been developed previously but are no longer in use"*). This is simply not the case in London where 99% of development is on previously developed sites and most of these are in fact in existing use. There are actually very few sites where there is no activity or existing use value. The risk and return of development must reflect the loss of value where existing uses are extinguished to ensure that development happens and establishing existing use value is likely to be highly contentious and contribute to lengthy valuation negotiations. In the context of the evidence base for developing IL, this is a fundamental flaw that needs to be addressed through further, robust modelling of brownfield scenarios.

11. Furthermore, the Consultation also seems to be based upon the assumption that all developers have a goal to negotiate down their planning contributions post consent. In London this is now extremely rare due to the GLA's widespread use of S106 review mechanisms (which are upward only with the developer taking on all the risk). For all applications, any

[7] Greater London Authority's London DataHub

attempt to reduce a S106 package is almost certainly going to be resisted by the relevant LA, which would then force the applicant to an appeal where they would have to convince the Planning Inspectorate that the obligations they are seeking to reduce/remove no longer serve "a useful purpose" (the relevant legal test) and this is a very high bar to overcome.

12. These fundamentally inaccurate assumptions are key drivers for the complexity of IL and its application to development in London.

RESPONSES TO THE CONSULTATION QUESTIONS

Q.1: Do you agree that the existing CIL definition of 'development' should be maintained under the Infrastructure Levy, with the following excluded from the definition:

- ***developments of less than 100 square metres (unless this consists of one or more dwellings and does not meet the self-build criteria)***
- ***Buildings which people do not normally go into***
- ***Buildings into which peoples go only intermittently for the purpose of inspecting or maintaining fixed plant or machinery***
- ***Structures which are not buildings, such as pylons and wind turbines.***

13. **Yes**. Retention of the existing CIL definition of 'development', with the above exclusions, is supported.

Q.2: Do you agree that developers should continue to provide certain kinds of infrastructure, including infrastructure that is incorporated into the design of the site, outside of the Infrastructure Levy?

14. **Yes**. LAs in London have expressed strong reservations to us about their willingness and ability to borrow against future IL receipts, largely due to the well-known financial constraints that some LAs are facing and the uncertainty around amounts to be recovered. This brings significant risk to the delivery and timing of any LA-delivered infrastructure and reinforces that developers should be able to take control of any site-specific infrastructure provided that any in-kind delivery is offset against their IL liability to avoid paying twice. Delays in infrastructure delivery will increase community concern with, and opposition to, development.

15. However, it would be imperative that the in-kind routeway in the new IL system operates more effectively than the in-kind provision in the existing CIL system. The CIL regulations[8] make the distinction between strategic infrastructure (which in theory is eligible to be in kind) and site-specific infrastructure (necessary for planning permission to be granted) unclear and LAs are therefore reluctant to use this route. In terms of timings and valuations, the regulations also

[8] Community Infrastructure Levy Regulations 2010

make it difficult to align 'in kind' payments to phases of development. IL regulations should therefore facilitate more flexibility over these elements otherwise they risk ending up being unusable.

16. There is some concern about the statement in paragraph 1.25 of the consultation document that LAs *"may indicate in their Infrastructure Delivery Strategy that on sites over a certain size they expect a certain proportion of land to be set aside for 'Levy-funded' infrastructure"*. It would not be appropriate for a blanket target proportion to be applied in this way as any land allocated for IL funded infrastructure should be targeted to identified need and reflect the specific circumstances of the development site in question and its local area.

Q.3: What should be the approach for setting the distinction between integral and Levy-funded infrastructure?

17. **Option (c)** is supported. High level principles should be established in national policy and guidance, with discretion to be afforded to LAs to develop more specific principles and definitions depending on individual development site requirements, the LA's local priorities and the characteristics of that locality. Clear distinction will be essential as on some larger schemes there may be some overlap between integral and IL funded infrastructure provision and potential for ambiguity.

Q.4: Do you agree that local authorities should have the flexibility to use some of their levy funding for non-infrastructure items such as service provision?

18. **No**. It is imperative that IL income is only spent on the delivery of infrastructure and affordable housing.

19. The Government has repeatedly claimed that the IL will deliver the same, if not more, affordable homes as the current system provides, but this will be a significant challenge in practice. A recent report[9] for Government analysing planning obligations and CIL showed that in 2018/19 67% of the total value of agreed developer contributions was for affordable housing worth £4.7 billion (and a similar level was achieved in 2016/17). With a more standardised approach, the IL must be set at a level that does not put off development coming forward on more complex (and thus more costly) sites, whilst LPAs will no longer be able to extract the maximum reasonable amount of affordable housing from each site.

20. In this context, if the Government is to ensure that the IL does deliver the same level or more of affordable housing and other infrastructure contributions than the current system, it is vital that receipts are ring-fenced in order that funds are not diverted away to general service provision.

[9] *The Incidence, Value and Delivery of Planning Obligations and Community Infrastructure Levy in England in 2018-19*, MHCLG, 2020

Q.5: Should local authorities be expected to prioritise infrastructure and affordable housing needs before using the Levy to pay for non-infrastructure items such as local services? Should expectations be set through regulations or policy?

21. **Yes**. However, as above, prioritisation should not be required because IL income should only be spent on the delivery of infrastructure and affordable housing. Diverting IL income to general service provision should not be an option.

Q.6: Are there other non-infrastructure items not mentioned in this document that this element of the Levy funds could be spent on?

22. **No**. As above, IL income should only be spent on the delivery of infrastructure and affordable housing.

Q.7: Do you have a favoured approach for setting the 'infrastructure in-kind' threshold?

23. **Option (d)** is supported to afford LAs discretion to set an 'infrastructure in-kind' threshold to suit local circumstances and individual site requirements.

24. As a matter of principle, there is no reference to a minimum quantum of commercial floorspace. Any threshold being set should not refer solely to the number of units or homes being delivered.

25. With regard the threshold options set out at paragraph 1.48 of the Technical Consultation document, the high, medium and low options are all far too high. By way of example, to the best of our knowledge, Barking Riverside is currently the only scheme in London that would exceed the threshold of 10,000 units if this were to be adopted. Even the low threshold of 500 units is considered excessively high as schemes below this can still have unique infrastructure needs and complex timing issues.

26. It would be in everyone's best interests, the Government, LAs and developers, for the threshold to be set lower than options (a) to (c) to provide more flexibility and ensure delivery of infrastructure. Regardless, giving LAs discretion to set their own thresholds would ensure that variations in the scale of development coming forward in different parts of the country, and their differing infrastructure needs, can be reflected in localised thresholds.

27. In addition to this, the IL regulations, when brought forward, should provide applicants with an 'opt in' routeway whereby the applicant can put forward a case during pre-app negotiations to follow the infrastructure in-kind S106 routeway if there are circumstances surrounding viability or infrastructure delivery (the tests for which should be set out in national policy and guidance). The 'Levy backstop amount' will ensure that the value of the S106 agreement must maintain at least the same certain monetary value as that development's IL liability.

Q.8: Is there anything else you feel the government should consider in defining the use of s106 within the three routeways, including the role of delivery agreements to secure matters that cannot be secured via a planning condition?

28. We understand the desire to narrow the scope of S106 and restrict its use to larger schemes, but the introduction of the new concept of delivery agreements is an unnecessary complication in the IL system. Delays caused by S106 agreements will simply translate into delays negotiating delivery agreements.

29. On some schemes there could potentially be a S106 agreement and a delivery agreement and yet, in reality, delivery agreements will be very similar to existing S106 agreements. Rather than introduce a new concept in the IL process, it would be more sensible to work with the existing S106 process and, instead, refine it and make it work more effectively for the IL system. In parallel, the scope and use of planning conditions should be reviewed to allow them to have a broader remit where possible, which may assist with narrowing the scope of S106 agreements.

30. The points made above in paragraph 29 will lead to better outcomes in terms of the Government's objectives to simplify and speed up the process rather than overcomplicating matters by introducing a new, third mechanism.

31. It would also be an opportune time to reform section 106 of the Town and Country Planning Act 1990 (TCPA 1990) so that the use of S106 agreements is not limited to just the four areas set out in sub-sections 106(1)(a)-(d) of the TCPA 1990. If a S106 could be used to secure anything (subject to meeting the legal tests set out in regulation 122(2) of the CIL regulations) then it could more easily dovetail with the planning conditions and meet the necessary mitigation requirements of a given scheme (for example those measures currently envisaged to be secured by a delivery agreement). This of course would not address the above-mentioned issue of lack of resources in most LAs to quickly progress S106 negotiations. Substantial additional resource investment is required into all LA planning departments to address years of underinvestment that are now substantially impacting service delivery.

Q.9: Do you agree that the Levy should capture value uplift associated with permitted development rights that create new dwellings?

32. **Yes**.

Are there some types of permitted development where no Levy should be charged?

33. **No**, provided the CIL definition of 'development' is retained as per Q.1 above and provided that the GDV shouldn't relate to the whole building where for example the PD right being exercised is a change of use just affecting a small part of the building. However, national guidance should encourage LAs to set lower IL charging rates for non-residential development to encourage the re-use of vacant commercial buildings.

Q.11: Is there a case for additional offsets from the Levy, beyond those identified in the paragraphs above to facilitate marginal brownfield development coming forward?

34. **Yes** and this needs further investigation.

35. In particular, the Technical Study accompanying the consultation document models different development typologies and in so doing clearly illustrates that the most value is to be extracted from greenfield development. In contrast, it is evident that there really isn't much more value to extract from development on brownfield land. The limited number of brownfield scenarios that have been modelled illustrate marginal upside when compared against the current system. It is also significant to note that the Technical Study contains information that is now two years out of date and, given the market dynamics over the last two years, re-modelling those scenarios now would yield very different results. Furthermore, the Study also departs from current standard practice on the matter of Developer Return as currently advocated in National Planning Practice Guidance. This is a major departure from current practice that skews the viability results of the limited number of brownfield scenarios tested.

36. In short, the new IL system would be adding considerable risk to brownfield development (a key Government objective) with little or any financial benefit. The scope for further contributions is from greenfield development and this should be the focus of the IL.

37. There are certain types of brownfield development that would simply never come forward due to highly abnormal costs. In London, for example, Battersea Power Station or gas holder sites such as Fulham Gasworks would not be deliverable under an IL system. Exceptional circumstances tests, and LA discretion not to apply the IL in certain circumstances, should therefore be set out in the IL regulations.

38. Such tests currently exist in the CIL regulations, although they are rarely used. An obvious and straightforward reform that could be made to the existing CIL system would be to make exceptional circumstances relief available in every LA area. In terms of developing the new IL approach, there would need to be relief and/or credits granted for any on-site requirements above the threshold level that were not included in the assessment that set the 'Build Cost' allowance. Furthermore, this would need to be mandatory and a simple process of calculation.

Q.12 & 13: The government wants the Infrastructure Levy to collect more than the existing system, whilst minimising the impact on viability. How strongly do you agree that the following components of Levy design will help achieve these aims?

- ***Charging the Levy on final sale GDV of a scheme***

39. Strongly Disagree. This approach assumes that there is always a distinct GDV at a fixed point in time. However, this is not always a clear-cut matter. With assets that are not sold, but held as a long-term investment, such as build to rent housing and commercial property, this is more challenging and extensive negotiations could be required to agree the GDV valuation.

This will not speed up the planning process, merely replace the existing problem of lengthy S106 negotiations with a new problem.

40. Furthermore, if the principle of charging IL on the final GDV of a scheme is pursued, it is imperative that there is a mechanism to appropriately value in-kind infrastructure to deduct from the IL amount and deal with decreases in GDV, as well as increases in GDV, over the lifetime of the project. The Technical Consultation seems to be founded on the premise that if the GDV has increased between the initial 'indicative liability' valuation and the 'final adjustment' valuation, this is all value uplift. However, as GDV does not account for delivery costs and given the inflationary pressures of recent months, and the huge impact this has had on construction and finance costs, this is clearly not the case.

- ***The use of different Levy rates and minimum thresholds on different development uses and typologies***

41. **Strongly Agree**, but there are some important considerations that must be accounted for in the IL regulations.

42. Setting an IL charging rate will be a complex process. It will be challenging to identify a mean rate that is pitched at the right level to support all development coming forward in that charging category while maximising receipts for infrastructure and affordable housing delivery and, crucially, not stymying any marginal sites. In essence, the IL bar will need to be set relatively low to ensure those sites will not be rendered undeliverable. In a London context, that means one third of all eligible referrable applications that need to follow the Viability Tested Route, plus all the viability tested applications below the 150-unit referrable threshold.

43. The Technical Consultation appears to assume that IL charging schedules and rate setting will be approached in a similar fashion to existing CIL charging schedules. However, given the larger sums of money involved, the fact that any flex in the system for negotiation (currently S106 and affordable housing) is proposed to be removed, and the need to have a finer grain approach to prevent marginal sites being mothballed, IL charging schedules will need to be much more sophisticated and be justified by more rigorous viability testing of different development typologies.

44. Therefore, IL charging schedules will need to contain a much larger range of rate types and thresholds if the development pipeline, infrastructure delivery and affordable housing provision are to be maintained at current levels.

45. It should also be noted that it will become commonplace, especially on brownfield redevelopment sites, for schemes to be subject to several different IL charging rates. For example, an ostensibly straightforward project involving a redundant office building could involve different rates for refurbishment of existing floorspace, an extension to provide additional floorspace, and the introduction of a mix of uses. Calculating different rates based on floorspace is fairly clearcut, but it will be more complex when calculating the GDV of a scheme, again indicating that the valuation process is likely to be complex, contentious and therefore lengthy.

46. Considering the above, the Government should work with some LAs and developers to produce a detailed mock charging schedule to test the concept before drafting the IL regulations or embarking on the test and learn process.

- ***Ability for local authorities to set 'stepped' Levy rates***

47. **Strongly Agree**. For the land market to be able to operate effectively, clarity will be needed on the level and timing of future increases in charging rates.

48. The charging schedule that is operational when commencement of development occurs should be fixed for that scheme. Developers (and their funders) need certainty to have the confidence to implement a planning permission, especially one that will be delivered over several years.

- ***Separate Levy rates for thresholds for existing floorspace that is subject to change of use, and floorspace that is demolished and replaced***

49. **Strongly Agree**, for the reasons set out above, although noting the points made previously that it will be commonplace, especially on brownfield redevelopment sites, for schemes to be subject to several different IL charging rates and calculating the different rates on a GDV basis, rather than a floorspace basis, will be more complicated.

Q.14: Do you agree that the process outlined in Table 3 is an effective way of calculating and paying the levy?

50. **Unsure**.

51. When the IL concept was originally put forward in the Planning for the Future White Paper, the Government said that one of the key benefits arising from the new system would be that the IL payment would be made at the end of the development process, thus helping developers with cash flow so that any early income could be reinvested back into the scheme to optimise delivery and planning gain.

52. However, this benefit has been watered down significantly now the detail is available on how the payment process would operate and this will adversely impact larger, complex schemes. Stage 2 of the payment process, as set out in Table 3, states that the main payment, the 'provisional liability payment', will in fact be made post-commencement but prior to first occupation of the scheme (or of a phase of the scheme) which is potentially a large window.

53. The Technical Consultation allows provision for LAs to seek earlier payments and there is a likelihood that this could become commonplace, thus losing a key benefit of the IL system. It is not yet clear from the detail so far available, but there is a possibility that it may be perceived to be beneficial to bring forward the Stage 2 payment to commencement (as per the existing CIL system) in order to fix the actual 'right to require' values. Either way, the benefits for developer cash flow, optimising delivery and increased planning gain have all been lost as the IL proposal has been worked up in more detail.

54. Reference is made to phased developments in Table 3. For the avoidance of doubt, the existing provisions contained in the CIL regulations for phased payments on large scale, multi-phase developments will need to be carried forward.

55. Furthermore, detailed clarification will be required to carefully define the point of 'completion' when the 'final adjustment payment' is calculated. Fixing a point in time for completion is not straightforward on some investment assets that are held for the long term, such as build to rent housing and commercial property.

56. In all valuations for residential development that trigger the right to require, the calculation to determine the number of affordable homes to be delivered must take account of the opportunity cost, and risks associated with, the delivery of those affordable homes, and should not be based simply on the build costs for physically erecting the homes. The right to require calculation must also account for dwelling size mix and the level of affordability offered as these have significant bearing on the viability of a scheme.

57. Finally, it is not clear in the Technical Consultation whether there is a minimum developer profit which triggers IL.

Q.16: Do you agree with the proposed application of a land charge at commencement of development and removal of a local land charge once the provisional levy payment is made?

58. **Yes**.

59. However, this is no different from the current position whereby both a planning permission and a S106 are local land charges which are registered once issued and completed. In practice it is difficult to remove a local land charge as LAs usually prefer to add a reference that the charge has been discharged rather than remove it entirely as it forms part of the planning background information provided as part of a LA search. It would be sufficient to add a similar note of discharge once the payment has been made rather than remove the charge entirely.

60. If the intention is for the IL requirement to be noted on the registered title, this will add significantly more risk to sales of residential and commercial developments, particularly on phased developments, and given the intended timeframe for payment at completion of the development. Registration of the IL on the title may create nervousness from purchasers about if/when the land charge will be removed and if/when they can occupy the property or whether they could be liable for the entirety of the charge, and which may relate to a much wider area than their individual residential or commercial unit. It could also create nervousness for lenders from whom occupants may be seeking to secure finance.

Q.17: Will removal of the local land charge at the point the provisional Levy liability is paid prevent avoidance of Infrastructure Levy payments?

61. **Disagree**

Q.18: To what extent do you agree that a local authority should be able to require that payment of the Levy (or a proportion of the Levy liability) is made prior to site completion?

62. **Disagree**

Q.19: Are there circumstances when a local authority should be able to require an early payment of the Levy or a proportion of the Levy?

63. As stated above in response to Q.14, there will be circumstances where it might suit a LA or a developer to make the stage 2 'provisional liability payment' earlier in the process. The IL regulations should allow for discretion to be exercised *provided* both parties agree and the necessary criteria to be met should be set out in guidance.

64. If an early payment was to be insisted upon by the LA for any reason, the IL regulations should make provision that the payment is based upon the current valuation and the LA forfeits the stage 3 final adjustment payment as any benefit to the developer of a late payment (compared to the existing CIL situation) will have been lost.

65. A better solution would be that, if the LA needed IL income sooner to deliver essential infrastructure, this would be the type of situation when the applicant and LA should be able to agree to opt in to the S106 routeway regardless of scheme or site size.

Q.20: Do you agree that the proposed role for valuations of GDV is proportionate and necessary in the context of creating a Levy that is responsive to market conditions?

66. **No**. In London, it is not necessary to undertake viability testing on all residential projects when the requirements of the GLA's Threshold Approach are satisfied. In the new IL system, all projects, including wholly commercial schemes, will all require three valuations, which will be complex and potentially contentious.

67. The Levy was originally tabled as a means to overcome the existing problem of lengthy viability negotiations; however it is difficult to see how this objective can be achieved when there will be three valuations on most projects. The new process will be very resource intensive for everyone involved in the planning process, particularly deviating officer resource away from other planning services at a time when planning department capacity is significantly under resourced.

68. A specialist valuations team should be set up within the Planning Inspectorate to provide LA support where needed and mediate between parties when agreement cannot be reached.

Q.21: To what extent do you agree that the borrowing against Infrastructure Levy proceeds will be sufficient to ensure the timely delivery of infrastructure?

69. **Strongly Disagree**.

70. LAs in London have expressed strong reservations to us about their willingness and ability to borrow against future IL receipts, largely due to the well-known financial constraints that some LAs are facing. The whole process would carry too much risk for them.

71. The IL system assumes that each LA wants to directly deliver infrastructure, has the skills and capacity to do this, and is prepared to take on the risk to borrow against future, uncertain IL receipts. This is simply not the case. There is no evidence to suggest the process outlined in the consultation will ensure the timely delivery of infrastructure.

72. In many instances, the developer will be best placed to deliver as 'in-kind' infrastructure to be deducted from their final IL liability. This further reinforces the need for an applicant and LA to be able to opt in to the S106 routeway regardless of scheme or site size.

Q.22: To what extent do you agree that the government should look to go further, and enable specified upfront payments for items of infrastructure to be a condition for the granting of planning permission?

73. **Neutral**. This would only overcome one of the three concerns set out above in the response to Q.21. Even if a developer were to make upfront payments, thus negating the need for the LA to borrow, the issues of skills and capacity still need to be overcome to enable delivery.

74. As above, the developer may be best placed to deliver as 'in-kind' infrastructure to be deducted from their final IL liability. This further reinforces the need for an applicant and LA to be able to opt in to the S106 routeway regardless of scheme or site size. The CIL regime already allows for 'in-kind' delivery of infrastructure and these provisions could be amended to make them more widely applicable, especially if CIL were to be made mandatory for all LAs.

Q.24: To what extent do you agree that the strategic spending plan included in the Infrastructure Delivery Strategy will provide transparency and certainty on how the Levy will be spent?

75. **Neutral**. To be effective an Infrastructure Delivery Strategy, and its strategic spending plan, will need to be detailed and properly justified. It should also identify any concerns or obstacles that may affect the LA's ability to borrow or forward fund infrastructure delivery.

Q.26: Do you agree that views of the local community should be integrated into the drafting of an Infrastructure Delivery Strategy?

76. **Yes**. The current S106 system shows clear community benefits that arise from each development, including physical infrastructure delivery and socio-economic benefits in the immediate locality. If a tax is extracted from the development value and paid into a centralised pot that could be spent on infrastructure (or indeed broader council services) anywhere in that LA area or beyond, it will be much harder to convince communities to support development because there is no direct or tangible link between the scheme built and infrastructure that is delivered.

77. It would therefore be important for local communities to input into their local Infrastructure Delivery Strategy, in the context of the overall infrastructure needs from that area's local plan, and to help define the balance between affordable housing delivery and broader infrastructure provision. Such engagement in the process would help to reinforce the relationship between the community's support for new development and the local infrastructure benefits arising for them.

Q.27: Do you agree that a spending plan in the Infrastructure Delivery Strategy should include:

- ***Identification of general integral infrastructure requirements***
- ***Identification of infrastructure/types of infrastructure that are to be funded by the Levy***
- ***Prioritisation of infrastructure and how the Levy will be spent***
- ***Approach to affordable housing including right to require proportion and tenure mix***
- ***Approach to any discretionary elements for the neighbourhood share***
- ***Proportion for administration***
- ***The anticipated borrowing that will be required to deliver infrastructure***
- ***Other – please explain your answer***
- ***All of the above***

78. **All of the above** though with flexibility so that infrastructure/types of infrastructure that are identified to be funded by IL could equally be provided through other routes, including direct delivery by developers who can then be repaid in full or in part through IL receipts.

Q.30: To what extent do you agree that the 'right to require' will reduce the risk that affordable housing contributions are negotiated down on viability grounds?

79. **Neutral**.

80. The Technical Consultation seems to be based upon the assumption that all developers seek to negotiate a below policy-compliant level of affordable housing or intend to negotiate down

their planning contributions post consent. This is not an accurate representation. Deeds of variation to a S106, when a permission is amended, should not be misconstrued as negotiating down contributions. Such amendments are generally driven by issues arising during the course of construction and, in most instances, contributions will increase.

81. In London specifically, this is simply not the case due to the GLA's Threshold Approach to affordable housing. Developers are incentivised to follow the Threshold Approach wherever feasible to avoid lengthy viability negotiations and speed up the planning process. Applicants only follow the viability tested route where there are specific circumstances and abnormal costs dictating that the 35% threshold cannot be met. The GLA's widespread use of S106 review mechanisms (which are upward only) further protects the affordable housing delivery.

82. In an IL system, the most likely outcome is that a significant number of sites will yield substantially less affordable housing than under the current system which yields the optimal planning gain for each site (supplemented by a rigorous review mechanism process). Therefore, it is highly improbable that the Government's overarching objective to maintain, and seek to exceed, current affordable housing delivery can be satisfied.

Q.31: To what extent do you agree that local authorities should charge a highly discounted/zero-rated Infrastructure Levy rate on high percentage/100% affordable housing schemes?

83. **Agree**.

84. These schemes benefit from CIL relief and would still need to provide integral infrastructure. We recognise that the business model of not-for-profit housing associations is based on the reinvestment of any surpluses made in development and therefore imposing the levy to all affordable housing developments provided by such organisations would be counterproductive to the aim of increasing overall affordable housing supply.

Q.33: As per paragraph 5.13, do you think that an upper limit of where the 'right to require' could be set should be introduced by the government? Alternatively, do you think where the 'right to require' is set should be left to the discretion of the local authority?

85. **No**. Setting an upper limit for 'right to require' would be sensible. However, if an upper limit is to be set, LAs should have the flexibility to set their own threshold locally to suit local circumstances and priorities. It should not be set by the Government.

86. In setting a threshold, LAs should bear in mind that the right to require threshold should not be set at 100% of the IL liability even if that is the absolute priority in that area. There needs to be a financial payment buffer towards other infrastructure delivery to provide flexibility in calculating the final adjustment payment. In the event of an economic downturn, or a significant increase in build costs, it would be impossible to adjust downwards should the right

to require threshold be set at, or close to, 100% and the IL liability be all, or mostly all, physical dwellings in a mixed tenure development.

Q.34: Are you content that the Neighbourhood Share should be retained under the Infrastructure Levy?

87. **Yes**. If we are to move away from the current planning gain system whereby S106 provides a clear link between new development and the benefits arising for the surrounding local community, retaining the Neighbourhood Share approach would, to some extent, help with convincing communities to support new development in their locality.

Q.44: Do you agree that the proposed 'test and learn' approach to transitioning to the new Infrastructure Levy will help deliver an effective system?

88. Agree

89. The long-term nature of the test and learn process will inevitably introduce uncertainty and some development will likely be held in abeyance. Notwithstanding this, given the complexity of the new system, it will be essential for test and learn to be undertaken. In fact, the test and learn approach should be undertaken before the IL regulations are drafted. Notwithstanding this, for the reasons set out in the answers above, we consider that the test and learn approach will ultimately prove that the IL system is fundamentally flawed in its currently proposed form.

90. Due to the unique circumstances in London, it is absolutely essential that more than one London Borough is involved in the test and learn phase.