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BY E-MAIL ONLY: InfrastructureLevyConsultation@levellingup.gov.uk

Dear Sir or Madam,

TECHNICAL CONSULTATION ON THE INFRASTRUCTURE LEVY

The response to this consultation is provided by the Planning & Environment team of Irwin Mitchell LLP.

Irwin Mitchell is a full-service national law firm, established in Sheffield in 1912. The firm is now the largest full-service law firm in the United Kingdom, offering legal and wealth management services from 19 offices, and employing more than 2,500 people.

The Planning & Environment Team advises businesses and individuals on a wide range of contentious and non-contentious planning and environmental law matters – covering everything from farm-diversification and renewable energy schemes to large-scale urban regeneration projects and strategic land.

This response has been informed by discussions with our clients and contacts within the real estate sector.

Preliminary Observations

This consultation states that the aim of the proposed Infrastructure Levy is to be more efficient, more transparent, more consistent, and faster than the current system for securing developer contributions. There is nothing in the design of the Levy, however, that suggests that these aims will be met.

Speed & efficiency

It is highly unlikely that the new system will operate more quickly or more efficiently than the current one. The proposed Infrastructure Levy will still require negotiated s.106 Agreements on the vast majority of large development sites, to deal with site specific issues, such as on-site affordable housing, first homes

and biodiversity net gain. Most of the delays associated with s.106 Agreements at present do not arise from the negotiations themselves, but rather from a lack of the qualified solicitors and planning officers within local planning authorities required to progress them. The introduction of the proposed Infrastructure Levy will do nothing to change this. Indeed, it is likely to add new sources of delay into the system, as neither the private nor the public sector are geared up for the sheer number of additional valuations that the Infrastructure Levy will require.

If local planning authorities were better resourced, then we could significantly reduce the level of delay within the current system, without the need for such wide-ranging and disruptive reforms.

The Infrastructure Levy is also unlikely to raise more funds than the current system. There is only so much value that can be extracted from a development site before it becomes unviable. Research undertaken by Savills estimates that the current system typically captures about 50% of the land value uplift in a development site by way of developer contributions – after the costs of enabling works and site remediation have been factored in. The resulting return to the landowner, and indeed the developer, are then subject to tax. Given that the aim of the Infrastructure Levy is to secure at least as much affordable housing as the current system, whilst simultaneously ensuring that developments are not rendered unviable across the board, there is a realistic prospect that it may not, in fact, secure any additional funds over and above those that are already being received. This risk is also highlighted by the "Exploring the potential effects of the proposed Infrastructure Levy" Report (Feb 2023) that was published alongside this consultation (the Liverpool Report), which states "*there is potential to raise more but whether this can be realised compared with the existing S106 and CIL system depends not just on rates and thresholds chosen but on the extent of exemptions, how market participants react especially landowners, land promoters and developers, and the extent to which local authority borrowing costs in advance of receiving levy income reduces what is available to spend*".

Consistency & transparency

It also does not appear likely that the Infrastructure Levy will improve consistency or transparency within the system. There will still be significant variations between local planning authorities, in terms of rate setting and collection. Whilst the role of infrastructure delivery statements will not improve the overall transparency of what is being collected or spent by local planning authorities in their communities.

Undermining the aims of the Levelling Up Agenda & wider planning reforms

We are also extremely concerned that the roll out of the Infrastructure Levy will simply further worsen or embed the regional inequalities that are already present within the system. The Liverpool Report makes this point extremely clearly when it states, in paragraph 5.32 that *"a locally raised and spent IL will result in the highest value sites returning the greatest value of developer contributions. It is, therefore, likely that a shift to the IL would reinforce the geographic inequalities already evident in the current system*". Such an approach fundamentally undermines the government's Levelling Up agenda, which is designed to reduce these types of regional inequalities, as opposed to reinforcing them.

The proposal also undermines a number of other key components of the government's wider planning reform agenda. Most notably, the adoption of the new Infrastructure Levy is unlikely to be compatible with the government's aspiration for a 30-month local plan adoption process. For the reasons set out below, it is vital that any new Infrastructure Levy charging schedule, and the infrastructure delivery strategy, are both prepared and examined alongside council's local plan. The evidence gathering required by a local planning authority to support the adoption of the Infrastructure Levy and the sheer complexity of the decisions that need to be taken around rate-setting and viability testing means that this process is unlikely to be quick and will add significant additional complexity to the local plan process. It is also likely to be extremely contentious, as this is on only point at which the viability impacts of the proposed rates can be tested and assessed. As a result, the examination of proposed charging rates is likely to become very time intensive for both developers and local planning authorities alike.

We should also highlight that introducing the levy will disproportionately impact specialist or innovative forms of development, such as highly sustainable dwellings, student accommodation, co-living and specialist

housing for the elderly, at a time when the government is actively seeking to encourage the expansion of these sectors. Last year, the government recognised the critical need for the provision of specialist housing for the elderly, by endorsing the Mayhew Report – which calls for the delivery of 50,000 new units a year – and setting up the Housing with Care Taskforce, which met for the first time a few weeks ago. However, there is a lack of recognition at all levels of government – including at local authority level – that the operational models and viability profiles for these types of development are very different to those from general market housing. As a result, they have tended to be overlooked when local planning authorities are formulating their local plans or setting there CIL charging rates. Where viability assessments are carried out, the assumptions on which they are based (around sales rates, levels of non-saleable floorspace or operational costs) tend to be wholly inadequate – leading to CIL charging rates that are difficult for the sector to absorb. There is a real risk that this error will be repeated under the new system, resulting in Infrastructure Levy Rates being set at a level which prevents any expansion of the sector that the government seeks to achieve. It is notable in this respect that the Liverpool Report did not assess the impact of the Infrastructure Levy on a single specialist housing scheme for the elderly when carrying out the financial modelling on which this consultation has been based.

Impact on wider land transactions

We are also concerned that the government has failed to take into account the impacts of a transition of this type on the wider land market – and in particular on-site assembly, land promotion and strategic land. Assembling a development site and promoting it through the local plan process is a lengthy and resource intensive exercise. Option and promotion agreements are negotiated with landowners at the very beginning of the process and frequently extend over a ten to fifteen-year period. These agreements also tend to include estimates or caps on both promotion costs and expected developer contributions and regularly include fixed minimum land values. Agreements also frequently include tax freezer provisions whereby landowners are able to delay the sale of their land if the tax levels become excessive.

Shifting to a process which is predicated on taking a percentage share of the gross development value will fundamentally undermine the promotion and delivery of sites that are subject to an ongoing option or promotion agreement, as it is highly likely that the minimum land values required to incentivise the release of these sites will exceed the existing use value allowance that is contained within the minimum threshold.

Also, as is made clear in the Liverpool Report, moving away from easily predictable returns (which a minimum land value provides) is likely to deter landowners from releasing their land for these types of longer-term strategic developments in the first place.

Conclusion

Whilst we understand the government's frustrations with the current system of securing developer contributions, it does in fact function relatively well. Many of the complaints cited in this consultation, such as delay and a lack of transparency, could be more effectively resolved by:

a) better resourcing local planning authorities – both at officer level and within their legal teams – to allow applications to be dealt with, and s.106 agreements negotiated, more rapidly; and

b) adjusting or revising the reporting and spending mechanisms that are already in place. Much could be achieved by simply enforcing the requirement that all councils produce infrastructure funding statements; and by standardising the allocation mechanisms within CIL charging authorities – so that it is easier for County Councils to access funding.

We would urge the government to simply retain, and amend, the current system as opposed to launching on a highly disruptive and uncertain set of reforms which are unlikely to achieve your stated objectives.

CHAPTER 1 - FUNDAMENTAL DESIGN CHOICES

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) – Yes**

- **Buildings which people do not normally go into - Yes**

- **Buildings into which peoples go only intermittently for the purpose of inspecting or maintaining fixed lant or machinery - Yes**

- **Structures which are not buildings, such as pylons and wind turbines - Yes**

Whilst there is logic in maintaining the same definition of 'development' as the CIL Regulations, the proposed list of exclusions is incomplete.

The CIL Regulations also currently exclude:

- development which is only classified as development as a result of the operation of s.55 (2A) TCPA 1990 – i.e. large retail mezzanines; and
- the change of use of any building previously used as a single dwellinghouse to use as two or more separate dwellinghouses (sub-division).

If we are to retain the CIL definition of 'development' then it should be retained in its entirety – including the above additional exemptions.

If the government decides to adopt an exclusion for sub-division, then it would also be logical to include an exemption for amalgamation – to allow units that are moving from flats back into family housing to also benefit.

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? - Yes

Yes – we are extremely concerned that placing the primary responsibility for the delivery of infrastructure solely or mainly onto the shoulders of local planning authorities is likely to result in less infrastructure being delivered. Particularly in two tier authority areas, where some County Councils are already struggling to access CIL funding for county funding infrastructure.

By maintaining the ability for developers to deliver infrastructure directly, we will be able to both ensure that high quality developments can be delivered and that there is a mechanism by which councils can obtain assistance with delivery if and when this is required.

3 What should be the approach for setting the distinction between 'integral' and 'Levy-funded' infrastructure? [See para 1.28 for options a), b), or c) or a combination of these]

It is crucial that the approach that is adopted for setting the distinction between 'integral' and 'levy-funded' infrastructure results in a distinction that is clear and predictable – so that the likely approach to any particular development is readily apparent prior to a planning application being submitted for it.

That said, the types of integral infrastructure that will be needed are going to vary depending on the size, nature, and location of the development site in question. For example, it may make sense for a strategic, residential led site to provide a new primary school or health centre within the development as 'integral infrastructure' whereas the integral infrastructure required for a smaller residential development, a logistics scheme or office-led development would necessarily be different.

As a result, we would prefer an approach that combined options b and c – with nationally set policies and guidance setting out the parameters of what can constitute integral infrastructure, with site specific requirements and more detailed information being set out by local authorities through their infrastructure delivery strategy.

This would have the benefit of providing a 'fall-back' position in the event that the council's infrastructure delivery plan is not kept up to date, and will also provide some firm limits, that will prevent more and more infrastructure being considered 'integral' over time without any reductions being made in the overall charging rate of the Infrastructure Levy.

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? - Yes/No/Unsure

No. As is abundantly clear from the Liverpool Report, there are firm and clear limits on the amount of funding that can be raised via the Infrastructure Levy.

Much like the current system of developer contributions, the total level of levy receipts can only ever be a contribution towards the cost of funding the infrastructure needs of a local authority area. The Levy will never be able to meet the full cost of and demand for infrastructure provision within a local authority area, nor is it desirable that it be asked to do so.

We are already experiencing issues in two-tier authorities whereby County Councils are struggling to access levy receipts for infrastructure in parts of the Country (notably in Kent, Gloucestershire, and parts of Surrey, but the same holds true in other county areas – see coverage of the issues here and here.).

These issues are likely to be exacerbated if Infrastructure Levy receipts are allowed to be spent on a wider range of projects and s.106 Agreements are no longer there to 'top up' project funding for necessary infrastructure projects.

Against that background, if the receipts of the Infrastructure Levy are going to be able to make a meaningful contribution towards infrastructure provision, it is important that the types of infrastructure that they are expected to fund are both clear and tightly defined.

Otherwise there is a real risk that levy receipts will either not be spent at all, or that the receipts will be diverted to service provision and that necessary infrastructure required to support the growth of a local authority area will simply not come forward.

This breaking of the link between development and infrastructure delivery has already started to take place under CIL, and has resulted in CIL receipts being stockpiled, in some areas, as opposed to being spent on the timely delivery of necessary infrastructure (see para 4.39 of the Liverpool Report and the Property Week investigations of 2019 and 2021). This problem is likely to increase under the new system, as the Infrastructure Levy retains CIL's focus on raising revenue and does little to ensure that infrastructure will in fact be delivered in a timely manner (see answers to questions below).

Breaking of the link between development and infrastructure delivery will do nothing to reassure local communities that new developments will be accompanied by the infrastructure required to support them – which is concerning, given the prevalence that infrastructure concerns have amongst local groups that oppose new developments. As such any potential dilution or dissipation of levy receipts into non-infrastructure related spending should be strongly resisted.

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? - Yes/No/Unsure

Should expectations be set through regulations or policy?

Yes. Please see the response to question 4 (above).

In order to ensure that expectations over the use of Levy receipts are both clear and enforceable, they should be set in the regulations themselves**.**

6 Are there other non-infrastructure items not mentioned in this document that this element of the Levy funds could be spent on? - Yes/No/Unsure

No. Please see the response to question 4 (above).

7 Do you have a favoured approach for setting the 'infrastructure in-kind' threshold? - High threshold/medium threshold/low threshold/local authority discretion/none of the above

The thresholds for the 'infrastructure in-kind' routeway should be set by local planning authorities as part of their rate setting process, with the relevant thresholds being informed by the strategic site allocations within that local planning authority's local plan.

The size and scale of strategic development sites varies hugely between local planning authority areas and between urban, suburban and rural areas. It should be noted, however, that the 'high' threshold would exclude almost all of the strategic sites allocated or proposed in London and the south of England, with a very significant proportion also falling below the 'medium' threshold.

By way of a few examples:

- Arun District Council's strategic housing site allocations range in size from 250 to 2,500 dwellings, with most of the strategic allocation being under 1,000 dwellings.
- Chichester District Council's 2019 Site Allocation DPD does not allocate a single residential site larger than 600 units – with the majority of allocations being around 50 units in size.
- The submitted new local plan for Tunbridge Wells, which is currently at examination, contains a new garden village (2,800 dwellings) and an urban extension (3,490-3,590 dwellings), both of which fall far below the proposed 'high threshold'. The majority of other allocations in the plan are below 200 units.

There will also need to be separate, bespoke, thresholds for non-residential developments – which will presumably be set by reference to floor areas or types of development proposed.

By allowing local authorities to set their own thresholds, you will allow them to find a balance between requiring infrastructure delivery by developers and payment of the levy as a cash receipt which works in their own areas, in the light of the proposed mix of sites allocated in their local plans and that authorities ability to take on responsibility for infrastructure delivery directly.

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?

Unfortunately, this consultation significantly underestimates the role of s.106 agreements or 'delivery agreements' moving forward.

The reality is that even under the 'core-levy' routeway the vast majority of residential development sites will still require negotiated s.106 Agreements to deal with on-site requirements – including (but not by any means limited to):

- Securing the delivery of First Homes and, in particular, the direct covenants required to enable the first homes discount to be secured in perpetuity and passed on to future purchasers;

- Securing on-site delivery and maintenance of Biodiversity Net Gain land – particularly after November when the 10% BNG uplift secured by the Environment Act becomes mandatory;
- Payment of SANG and SAMM Mitigation payments in affected areas, which are largely dealt with outside of the CIL regime at present;
- Securing Water and Nitrate Neutrality solutions in affected areas – on the basis that the strategic solutions proposed by central government (and in particular the upgrading of waste water treatment works required by LURB) are not proposed to take effect until the 2030s, so there will be an overlap between IL rollout and these strategic solutions becoming affective; and
- A wide range of non-financial obligations that are regularly sought from development proposals including: employment and training strategies, management and maintenance obligations for onsite play areas or other communal spaces, the provision of 'affordable workspaces, SUDS and flood alleviation schemes.

The timing and design of all of these obligations will still require negotiation and assessment – and as such – unless the adoption of the levy is accompanied by significant additional legal and planning resource for local planning authorities, in order to reduce the workloads of existing planning and legal officers, there is very little prospect that the revisions proposed will reduce the need for or time taken by negotiations over s.106 obligations.

CHAPTER 2 - LEVY RATES AND MINIMUM THRESHOLDS

9 Do you agree that the Levy should capture value uplift associated with permitted development rights that create new dwellings? - Yes/No/Unsure

Are there some types of permitted development where no Levy should be charged? - Yes/No/Unsure

If the government is committed to the idea of the infrastructure levy, then it is logical to extend it to residential dwellings created through permitted development rights as well as those which required a full planning permission for their development. Not least as dwellings created through permitted development rights are less likely to benefit from on-site infrastructure provision such as integrated play areas or communal facilities; and the residents of these dwellings will need to access school places, health facilities and other local infrastructure that is likely to be funded through the infrastructure levy.

That said, we would strongly recommend exempting from the infrastructure levy minor householder or commercial developments which are not subject to a prior approval procedure. As these rights can be exercised without involving local planning departments at all, imposing a levy liability on them will likely cost local authorities more in identifying chargeable developments to levy IL against and then monitoring compliance with the new regime than they would raise in contributions.

10 Do you have views on the proposal to bring schemes brought forward through permitted development rights within scope of the Levy?

Do you have views on an appropriate value threshold for qualifying permitted development?

Do you have views on an appropriate Levy rate 'ceiling' for such sites, and how that might be decided?

The rationale for adopting nationally set maximum thresholds solely for permitted development schemes does not appear to be particularly well justified.

Whilst we appreciate that the Liverpool Report identified a very narrow window within which Infrastructure Levy rates could be set for permitted development schemes, this is not a unique

feature of permitted development schemes. Many of the brownfield development appraisals (particularly median value areas and apartment buildings) in the Liverpool Report share similarly narrow Infrastructure Levy rates window.

Similarly, there are green field schemes in low value areas that the Liverpool Report have assessed that are modelled as having negative Infrastructure Levy rates windows.

If the government is proposing to set a national maximum rate to protect the viability of permitted development schemes, then based on the evidence provided, similar mechanisms should be put in place for all other types of constrained developments – such as brownfield developments and greenfield schemes in low value areas.

11 Is there is a case for additional offsets from the Levy, beyond those identified in the paragraphs above to facilitate marginal brownfield development coming forward? - Yes/No/Unsure

For the reasons set out in our response to question 12 below, we would strongly advocate a general "safety valve" provision that would allow a general reduction in Infrastructure Levy rates in the event that the proposed liability would render a scheme unviable.

This would not only facilitate the delivery of marginal brownfield development but would also assist with addressing some of the limitations of the proposed minimum threshold (namely that it does not include any allowances for developer profit, landowner return or abnormals), which, as designed, is not a satisfactory mechanism for ensuring that the Infrastructure Levy does not render development proposals unviable.

12 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 - Strongly Agree/Agree/Neutral/Disagree/ Strongly Disagree/Unsure**

- **The use of different Levy rates and minimum thresholds on different development uses and typologies - Strongly Agree/Agree/Neutral/Disagree/ Strongly Disagree/Unsure**
- **Ability for local authorities to set 'stepped' Levy rates - Strongly Agree/Agree/Neutral/Disagree/ Strongly Disagree/Unsure**

- **Separate Levy rates for thresholds for existing floorspace that is subject to change of use, and floorspace that is demolished and replaced - Strongly Agree/Agree/Neutral/Disagree/ Strongly Disagree/Unsure**

<u>Charging the Levy on final sale GDV of a scheme</u>

There is a real risk that charging the levy on the final sale of GDV of a scheme may have an adverse impact on viability of some developments, as well as posing a risk to local authority funding.

Firstly, it includes a large element of uncertainty into the process for all parties. The final GDV of a development is not known until the point of sale (if it is, indeed, sold) and can change over time. This means that until the point of sale, neither the developer nor the Council can be certain of the extent of the liability that will fall due. This will cause problems with forward planning for both Councils and developers - particularly for those developers who do not operate a 'for private sale' business model – such as 'IRCs' retail and commercial operators, and those developing build to rent and student accommodation schemes.

Developers need to be able to price-in anticipated costs and liabilities when they are agreeing land contracts at the very start of the process. This requires a fixed and predictable regime of developer contributions. A levy which is charged at a % of GDV cannot be 'priced up' at the start of a project – and as such is very difficult to accurately factor into land negotiations. As such, it is highly likely that the price paid for the land to be developed will not accurately reflect the assumptions made by the local authorities during the rate-setting process – which immediately risks eroding their likely rate of return.

Local authorities are also not certain of the level of receipt that they will receive from any particular scheme – which makes the forward funding of infrastructure projects difficult.

This inherent uncertainty will also have an impact on the ability of developers to access development finance.

Development finance plays an increasingly important role in our development ecosystem, particularly for SMEs. How easy or difficult it is to access finance can make or break development companies. A key metric for lenders, when deciding whether to lend on a project, is the anticipated level of developer profit which is frequently calculated as a % of GDV – the exact same basis on which the Infrastructure Levy is to be charged. At present, the minimum threshold does not include an allowance for developer's return, abnormals, or the premium that a landowner might expect for releasing land for development. As such, the impact of the levy, at least in the initial ten year "test and learn" phase will be to directly squeeze the proportion of GDV available both for the landowner, and crucially, for developer profit. Whilst a lender's position on what constitutes an acceptable profit level can vary dramatically – the general rule is that the less certain a project appears to be, the higher the rate of return that will be required. This creates a risk that, at least during the ten-year transition period, lenders will be actively disincentivised from lending to projects within a pilot local authority. There are already lenders in the market that will not provide development finance to schemes which have accepted a late-stage viability assessment within a s.106 agreement – because of the uncertainty this creates over the total liabilities attached to the scheme. This is a risk which does not appear to have been considered in the design of the policy.

I would also ask that the government strongly consider:

1. Charging the re-designed infrastructure levy on the 'net sales area' of a development as opposed to its GIA – so as to avoid charging the levy on floorspace which is not value generating. This is important as some types of development – such as specialist housing for the elderly (in particular IRCs), apartment buildings and co-living schemes - include large areas of amenity space which is not value generating. Charging IL on these areas places these schemes at an economic disadvantage when compared to for market sale developments, and place a disproportionate financial burden on them; and

2. including an allowance for developer profit and abnormal costs within the minimum thresholds for each type of development. Without these elements included, there is a real risk that the minimum thresholds will quickly fail to cover the costs of bringing forward developments – as build costs increase or abnormal costs are discovered.

This is also the reason that I would urge the government to include a 'safety valve' that allows viability discussions on a site specific basis.

<u>The use of different Levy rates and minimum thresholds on different development uses and typologies</u>

We strongly support the use of different Levy rates and minimum thresholds for different development uses and typologies – but would highlight that in order for the Infrastructure Levy to avoid making a wide range of development types unviable then there will need to be detailed viability testing of a very large number of development typologies – which is likely to result in a complex and unwieldy charging schedule incorporating a very large number of bespoke charging rates and minimum thresholds.

Just taking potential residential uses as an example – it is likely that a local authority would need to have separate charging rates for ALL of the following types of residential developments, as they all have very different viability profiles:

- Market housing for sale;
- Residential apartments designed to be transferred to private ownership;
- Build to rent schemes (whether housing or apartment based);
- Student accommodation;
- Integrated retirement communities (whether run on a rental or a 'for sale' basis, or a combination of both);
- Co-Living;
- Discount market housing schemes;
- Live/work units;
- Self-build housing;
- HMOs/ Hostels;
- Holiday let or Airbnb type accommodation;
- Care homes and residential institutions; and
- Hotels.

All of the above development typologies are likely to need individual charging rates and minimum thresholds – which may need to vary in turn depending on where in the local planning authority area the development site happens to be, and how the proposed development will be built out. There will be similar complexities when looking at commercial and employment related developments.

This is likely to make the rate setting process extremely resource-intensive and time consuming for local planning authorities, landowners and developers alike.

This is a risk that is acknowledged by the Liverpool Report which states that "*complexity and negotiations will become part of levy practice, especially at the rate setting stage, and generate a certain amount of uncertainty about outcomes.*"

Ability for local authorities to set 'stepped' Levy rates

We would strongly resist 'stepped' levy rates, which are likely to introduce perverse incentives and additional uncertainty into a system which already looks to be more complex and uncertain than the current one.

The most likely outcome of introducing stepped rates will be to create times of peak demand prior to rates changes, where developers try to get applications through the system under the previous rate, which will simply place unnecessary pressure on a system which is already under resourced.

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

We strongly support this proposal.

Given the differences in the viability profiles between conversion projects, regeneration schemes that involve demolition, and green field schemes – it would seem necessary to have different rates and minimum thresholds for these types of schemes.

13 Please provide a free text response to explain your answers above where necessary.

Please see above

CHAPTER 3 - CHARGING AND PAYING THE LEVY

14 Do you agree that the process outlined in Table 3 is an effective way of calculating and paying the Levy? - Yes/No/Unsure

No. In particular stage 1 of the proposed process is problematic. The indicative liability, for which the applicant is being asked to assume liability, could well bear no resemblance to the actual infrastructure levy liability that the scheme will incur. This inaccurate liability is then registered as a land charge.

The land charges registry is an important source of information for any party engaged in the property market. It is relied on by prospective purchasers and lenders when making decisions about whether to invest in property and as such, it is important that it is accurate. Registering an indicative levy amount of this type on the land registry has the potential to mislead or deter prospective purchasers or lenders.

Any land charge should be as accurate as possible, as such it should be based either on an accurate valuation of the prospective GDV at the time or left until the provisional liability has been calculated.

15 Is there an alternative payment mechanism that would be more suitable for the Infrastructure Levy? - Yes/No/Unsure

Please see above

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? - Yes/No/Unsure

As stated above, we have real concerns about the imposition of a land charge at the point that permission is granted – when only an indicative levy calculation is available. A local land charge should only be registered once more accurate information is available.

17 Will removal of the local land charge at the point the provisional Levy liability is paid prevent avoidance of Infrastructure Levy payments? – Strongly Agree/Agree/Neutral/Disagree/Strongly Disagree/Unsure

Unsure – whilst we can understand concerns about potential avoidance, that would only be a concern in the event that the final GDV was greater than the provisional payment that had been made. The proposed point at which the charge is to be removed seems to strike an appropriate balance if a new procedure is to be required.

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? - Strongly Agree/Agree/Neutral/Disagree/Strongly Disagree/Unsure

In the absence of any ability for a developer to test the impact of the levy liability on the actual viability of the development once rates have been set, we would be extremely nervous about introducing the ability for local authorities to request early payment into the system.

As not all councils would adopt the same approach to early payments, this could introduce further uncertainty and place additional pressures on developer cashflow in a system which has limited scope to deal with unexpected costs as it is.

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?

Please see answer to Q.18 above.

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 - Yes/No/Unsure

In order for the proposed system to work effectively, there is likely to be a greater need for valuations of the proposed GDV of a scheme than is currently envisaged. For example, we would urge the government to require an actual valuation of the GDV of a scheme before a land charge is registered against a property – to ensure that the information about liabilities on the land charges registry can be relied upon by third parties.

However, we are deeply concerned that neither local authorities nor the private sector are prepared for, or sufficiently well-resourced to accommodate, the significantly increased demand for qualified valuation specialists that the system requires.

We strongly recommend that a dedicated plan for training and recruiting more qualified valuers is put in place – across both the public and the private sector – before the Infrastructure Levy is rolled out. Otherwise, the operation of the new system will be significantly delayed by the lack of valuers in much the same way that the current system is delayed due to a lack of qualified planning officers and local authority solicitors to process applications and s.106 agreements.

CHAPTER 4 – DELIVERING INFRASTRUCTURE

21 To what extent do you agree that the borrowing against Infrastructure Levy proceeds will be sufficient to ensure the timely delivery of infrastructure? - Strongly Agree/Agree/Neutral/ Disagree/Strongly Disagree/Unsure

Giving local authorities the ability to borrow against future infrastructure levy receipts is unlikely to do anything to accelerate infrastructure delivery – as the borrowing is against an uncertain receipt, which makes it an unattractive prospect for both local authorities and lenders alike.

For any number of reasons, entirely unrelated to the actions of developers or local authorities, Levy receipts could end up lower than anticipated at the point a loan is taken out – for example the sales values of developments in the local area could fall, or a development might not be implemented because a developer cannot find developer finance or be built out slower than expected because of a labour shortage of difficulties in sourcing materials. All of these issues could either delay or reduce the receipts received by a council, leaving them with a debt liability that they are potentially unable to meet.

By way of analogy some local highways authorities have seen a similar situation arise in their use of allocated Highways Programme monies, where they have used the money to forward fund highways schemes envisaged to be brought forward on allocated sites in Local Plans, only to later find that those allocations did not come forward or did not come forward as planned. This results in less or no funds generated by those schemes, leaving a shortfall in Highways Programme monies displacing other highways network programming. Not to mention the practicality and legality of making sure that there is policy and appropriate records to justify requiring monies via the current S106 system, for highways that have already been improved prior to the application for planning permission being submitted. Whilst this is possible, it places an additional burden on local authorities.

This risk is likely to deter local authorities from borrowing to forward-fund infrastructure, particularly in times where the costs of borrowing are high or likely to increase

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? - Strongly Agree/Agree/Neutral/Disagree/Strongly Disagree/Unsure

We strongly disagree with this proposal – if it is to be implemented via planning conditions as the consultation question currently suggests. It is currently unlawful and would require the unpicking of

a significant and longstanding principle of planning law – namely that planning conditions cannot be used to secure financial payments (see above).

The securing of financial contributions can only be lawfully done through s.106 Agreements – so if this approach is to be pursued then it would need to be done through the mechanism of s.106 Agreements and/ or delivery agreements.

That said, the need for such an approach could be removed if local planning authorities are allowed to set their own thresholds for the 'payment in-kind' routeway for s.106 agreements – as this would allow authorities to require on-site provision or delivery of infrastructure within agreed timescales.

23 Are there other mechanisms for ensuring infrastructure is delivered in a timely fashion that the Government should consider for the new Infrastructure Levy? - Yes/No/Unsure

We would urge the government to consider simply retaining the current system, which is working reasonably well given the context of a general lack of local government resourcing. Many of the concerns about delay, which underpin the justification for this levy, could be resolved by better resourcing local authorities and ensuring they have sufficient planning and legal officers to progress applications in a timely manner.

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? - Strongly Agree/Agree/Neutral/Disagree/Strongly Disagree

Given that Infrastructure Delivery Strategies are not intended to be binding on local planning authorities, who will be under no legal obligation to abide by them, then they cannot be said to provide transparency and certainty on how the Levy will be spent. At best, they will provide clarity and certainty over the Council's spending aspirations.

25 In the context of a streamlined document, what information do you consider is required for a local authority to identify infrastructure needs?

In order to be at its most effective, the Infrastructure Delivery Strategy would need to be prepared alongside – and ideally become part of – a Council's local plan, as it will effectively require the same (or at least a very similar) evidence base to be prepared for its production.

It is hard to see how a council can effectively forward plan for it's infrastructure funding needs outside of the local plan process – given that the decisions will be heavily reliant on the type and scale of growth (and site allocations) envisaged by those plans – on both a local and regional basis – and the choices that a local planning authority intends to make about how best to meet that growth

26 Do you agree that views of the local community should be integrated into the drafting of an Infrastructure Delivery Strategy? - Yes/No/Unsure

As set out above, given how closely connected the Infrastructure Delivery Strategy is with the aspirations and content of a council's local plan – the two documents really do need to be prepared together. If an IDS was formally incorporated into a Local Plan then the local community's views could be sought during the local plan consultation process. This would have the added advantage of highlighting the connections between the proposed site allocations and the infrastructure needed to support them, as well as removing the need for a separate – disconnected – public consultation exercise.

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**

The Infrastructure Delivery Strategy will need to include all of the information set out in question 27. It would also be helpful for the Infrastructure Delivery Strategy to include indicative timescales for delivery of key or strategic infrastructure that is needed to secure the delivery of major allocations within the local plan itself – such as new train stations or major highways projects.

28 How can we make sure that infrastructure providers such as county councils can effectively influence the identification of Levy priorities?

- **Guidance to local authorities on which infrastructure providers need to be consulted, how to engage and when**
- **Support to county councils on working collaboratively with the local authority as to what can be funded through the Levy**
- **Use of other evidence documents when preparing the Infrastructure Delivery Strategy, such as Local Transport Plans and Local Education Strategies**
- **Guidance to local authorities on prioritisation of funding**
- **Implementation of statutory timescales for infrastructure providers to respond to local authority requests**
- **Other – please explain your answer**

All of the proposed tools and mechanisms are likely to assist, however, many of the problems that county councils are experiencing with accessing CIL funding appear to arise from two main areas:

1. Disagreements over infrastructure funding priorities with the local planning authorities – particularly over strategic infrastructure funding that may cross between borough boundaries; and

2. The sheer complexity of the multiple allocation procedures that need to be navigated to access CIL receipts.

The introduction of a standardised allocation procedure across all two tier authority areas, and a specific dispute resolution procedure to resolve disagreements over funding priorities would be helpful – given that the allocation of IL funding is likely to become more contentious under the new system as the ability for County Councils to ‘top up’ CIL funding via s.106 Agreements is removed

29 To what extent do you agree that it is possible to identify infrastructure requirements at the local plan stage? - Strongly Agree/Agree/Neutral/Disagree Strongly Disagree/Unsure

See answer to Qs 24 – 26. Whilst a local plan can never foresee all likely infrastructure requirements arising during a local plan period, it is the best opportunity available for effective forward planning of infrastructure requirements.

CHAPTER 5 – DELIVERING AFFORDABLE HOUSING

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? - Strongly Agree/Agree/Neutral/Disagree/Strongly Disagree/Unsure

Whether the 'right to require' will successfully reduce the risk of affordable housing contributions being negotiated down on viability grounds will largely depend on the success or failure of:

1. The process of setting appropriate rates and minimum thresholds across all relevant development typologies;

2. The government's attempts to make the levy truly responsive to market conditions; and

3. The process of identifying sites for which the right to require is, in fact, appropriate.

As you are aware, no two development sites are the same, and it is extremely difficult to design a mandatory, fixed, system that can adequately take account of the needs of each individual development site – as such it is highly unlikely that the new system will eliminate viability arguments entirely. This is especially true in the event that there is no allowance for developer profits or abnormal costs provided for in the minimum threshold.

If rates and minimum thresholds are not set an appropriate level for each potential development type, and the right to require is imposed on sites for which it is unsuitable, then the imposition of the right to require is likely to result in challenge – whether on viability grounds or otherwise – from providers of specialist forms of residential accommodation, such as IRCs or Student Accommodation where the provision of on site affordable housing causes specific challenges.

Additionally not all forms of affordable housing cost the same to provide on site or have the same administrative burdens associated with them. First Homes have a different cost for developers to provide, and administrative burdens associated with them, to social housing, shared ownership or homes for affordable rent. There will still be negotiations over the location, tenure and specification of affordable housing even if there are not specific viability discussions on a particular scheme.

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? - Strongly Agree/Agree/Neutral/Disagree/Strongly Disagree/Unsure

Whilst we agree that developers and registered providers should be incentivised to bring forward schemes with high levels of affordable housing – the residents of these schemes do still need to access the same infrastructure as the rest of the community. Whilst there is a strong case for not over-burdening these schemes with additional financial obligations, we do still need to ensure that this support does not prejudice a local authority's ability to fund the infrastructure needed to support the residents of the scheme.

It is worth taking into consideration the fact that currently developers of 100% affordable housing schemes often benefit from lower build-costs because of the current planning system allowing affordable housing in areas where market housing would be refused e.g., rural exception schemes, Green Belt. These areas are usually also capable of achieving higher prices, even as affordable housing.

It may be that there is a case for greater central government funding to be made available to support infrastructure provision in areas where local planning authorities are providing high levels of affordable housing within their boroughs – to support the infrastructure requirements of those schemes.

32 How much infrastructure is normally delivered alongside registered provider-led schemes in the existing system?

Please provide examples

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? - Yes/No/unsure Alternatively, do you think where the 'right to require' is set should be left to the discretion of the local authority? - Yes/No/unsure

There is a very careful balance that needs to be struck in how much of the levy receipts should be paid via the right to require. Whilst it is probably not appropriate that this should be solely dealt with at a national level, there should be strong national guidance as to how this balance should be struck and clear indications of the types of development on which it would be inappropriate to require the provision of on-site affordable housing – i.e. small sites, commercial/ non-residential developments and specialist forms of accommodation – such as co-living, student accommodation schemes and integrated retirement communities.

CHAPTER 6 – OTHER AREAS

34 Are you content that the Neighbourhood Share should be retained under the Infrastructure Levy? - Yes/No/Unsure

If the Neighbourhood Share is proving an effective use of CIL funding, which provides genuine value for money and has provably managed to increase local support for development schemes (which was its original objective), then we have no objection to it remaining.

35 In calculating the value of the Neighbourhood Share, do you think this should:

A) reflect the amount secured under CIL in parished areas (noting this will be a smaller proportion of total revenues)

B) be higher than this equivalent amount

C) be lower than this equivalent amount

D) other (please specify) or

E) unsure

Unsure. Whilst we can understand the desire to retain the Neighbourhood Share, care needs to be taken to avoid diverting necessary Infrastructure Levy funding from strategic infrastructure requirements – particularly in two tier authority areas.

36 The Government is interested in views on arrangements for spending the neighbourhood share in unparished areas. What other bodies do you think could be in receipt of a Neighbourhood Share in such areas?

37 Should the administrative portion for the new Levy

A) reflect the 5% level which exists under CIL

B) be higher than this equivalent amount

C) be lower than this equivalent amount

D) other (please specify) or

E) unsure

Given that the Infrastructure Levy receipts are anticipated to be significantly higher than those currently received through CIL – it may well be that a 5% administrative portion is disproportionate to the work required to run the system itself.

Given the uncertainties around how much administrative work will be required to run the new system – it may be better for this to form part of a local authority's infrastructure delivery strategy as opposed to being set in the regulations themselves.

38 Applicants can apply for mandatory or discretionary relief for social housing under CIL. Q31 seeks views on exempting affordable housing from the Levy. This question seeks views on retaining other countrywide exemptions. How strongly do you agree the following should be retained:

- **residential annexes and extensions - Strongly Agree/Agree/ Neutral/Disagree/Strongly Disagree**
- **self-build housing - Strongly Agree/Agree/Neutral/Disagree/ Strongly Disagree**

If you strongly agree/agree, should there be any further criteria that are applied to these exemptions, for example in relation to the size of the development?

Given the difficulties that individual householders and those developing self-build housing often have in navigating the CIL system – and the fact that IL is not going to be any simpler or more straightforward for a lay person – it would make sense to continue to provide these reliefs.

We would also strongly recommend retaining mandatory charitable relief and including a general relief/ ability for levy rates to be reviewed or reduced on viability grounds – given the limitations of the rate setting approach and minimum thresholds discussed above.

39 Do you consider there are other circumstances where relief from the Levy or reduced Levy rates should apply, such as for the provision of sustainable technologies? -Yes/No/Unsure

Yes, we consider that set-offs from levy liabilities should be available for developments that take an innovative approach to furthering government objectives for the planning system – such as adopting new sustainable technologies (for instance ground source heat-pumps or greywater recycling) as part of their developments or which serve a proven need – such as the provision of specialist housing for the elderly. Particularly where there is little or no provision being made for that type of development, or there is an absence of up-to-date local need information from the relevant local authority.

40 To what extent do you agree with our proposed approach to small sites? - Strongly Agree/Agree/Neutral/Disagree/Strongly Disagree/Unsure

Providing a discounted rate for smaller sites and removing the right to require could well assist SMEs in bringing these sites forward, if the threshold of what constitutes a 'small site' is set appropriately.

The current threshold of ten dwellings is extremely low – with many SME's bringing forward developments of 10-40 units on a regular basis. These developers are just as vulnerable to economic shocks and cashflow issues as companies that focus on sites of 9 units or fewer.

It may be that a general IL rebate for SMEs is a better way of tackling the disproportionate financial burdens that they face rather than attempting to resolve the issue on an arbitrary basis based on the size or number of dwellings proposed for a site.

41 What risks will this approach pose, if any, to SME housebuilders, or to the delivery of affordable housing in rural areas?

Please see answer to Q.40 above.

42 Are there any other forms of infrastructure that should be exempted from the Levy through regulations?

As a general rule, any development which is to be funded, in whole or in part, through levy receipts should be exempt from the Levy through regulations – otherwise, you would simply be reducing the amount of levy receipts available to deliver infrastructure.

More specifically, we would strongly recommend adding early years education/ nursery developments to the list – given the proposals to amend the LURB to add these schemes to the list of infrastructure on which the levy should be spent.

43 Do you agree that these enforcement mechanisms will be sufficient to secure Levy payments? - Strongly Agree/Agree/Neutral/Disagree/Strongly Disagree/Unsure

In order to work effectively, the Infrastructure Levy is going to need to be a collaborative process, with developers and local authorities working together to effectively value schemes and ensure that the process can be run smoothly.

The proposed enforcement mechanisms do not appear to have been designed to promote the kind of collaboration that will be necessary if it is to operate effectively.

As stated above, the current design of the levy as a % of GDV above a minimum threshold does not currently allow any mechanism for addressing rapid cost inflation, the discovery of abnormals on site, or the erosion of the minimum threshold over time (due to differences in inflation rates or the time lag between uprating).

Where a site is marginal – there is a real risk that imposing a stop notice or placing limits on occupations prior to payment could well force developer insolvencies which simply result in the levy not being paid at all or being paid at a lower rate than would otherwise have been the case.

There are also no incentives in the regulations, or indeed any rights of recourse for developers, in the event that local planning authorities are not processing applications promptly, or are failing to address or remedy issues that have arisen because of mistakes made during the rate-setting process, or are simply refusing to issue a rebate that would otherwise be due as a result of the final adjusted payment.

We would advocate the inclusion of some kind of dispute resolution mechanism in the regulations to resolve these types of issues before enforcement powers can be used.

If this is to be by way of an appeal process, then the grounds on which an appeal can be made would need to be much broader than those available under CIL. Otherwise, the only way to deal with disputes over things like:

- the availability of Mandatory Social Housing Relief;

- whether a rate or minimum threshold has been set at a level that will not jeopardise the viability of a development;
- whether the right to require has been consistently applied; or
- the correct GDV valuation of a site

is by way of judicial review. This will further stretch local authority and court resources unnecessarily.

CHAPTER 7 – INTRODUCING THE LEVY

44 Do you agree that the proposed 'test and learn' approach to transitioning to the new Infrastructure Levy will help deliver an effective system? - Strongly Agree/Agree/ Neutral/Disagree/Strongly Disagree/Unsure

Given the radical shift that is proposed here, and the scale of the risks that it poses to the planning and development system in the event it goes wrong, a 'test and learn' approach to the levy is appropriate.

However, there are also draw backs to this approach – namely that it will disincentivise investment in the test and learn authorities during the roll out period. Given the risks and uncertainties inherent in the new system, many developers and lenders are likely to simply avoid the pilot areas wherever it is possible to do so. There is also a risk that some sites that could otherwise have come forward will be mothballed or de-prioritised.

We would also council against allowing authorities to join part way through the pilot programme – for much the same reason.

We would also urge the government to think very carefully about transitional provisions for test and learn authorities and how the requirements to bring forward the infrastructure levy and an infrastructure delivery strategy will sit alongside the move to a 30 month local plan process. As highlighted above, it is critical that these two processes happen at the same time, so any 'test and learn' authorities for the infrastructure levy should also be pilot authorities for the new form local plans that are required under LURB.

45 Do you have any views on the potential impact of the proposals raised in this consultation on people with protected characteristics as defined in section 149 of the Equality Act 2010? - Yes/No/Unsure

n/a

Yours faithfully

IRWIN MITCHELL LLP