

PLANNING ACT 2008

EXPLANATORY NOTES

COMMENTARY

Part 11: Community Infrastructure Levy

Section 205: The levy

329. This section provides the regulation-making power to the Secretary of State to establish a Community Infrastructure Levy ("CIL") and sets out the overall purpose of the levy. The overall aim of the charge is to ensure that costs incurred in providing infrastructure to support the development of an area can be funded wholly or mainly by owners or developers of land (subsection (2)).

Section 206: The charge

330. This section (subsection (1)) provides a power to charging authorities to charge CIL in respect of development within their respective areas and then goes on to define which authorities are charging authorities. The position under subsections (2) and (3) is that charging authorities will be (a) the local planning authorities responsible for the production of local development plans in England and Wales (see subsection (5)); (b) the Council of the Isles of Scilly (which is treated as a local planning authority for the purpose of Part 2 of the PCPA 2004 for the Isles of Scilly by an order under section 116 of that Act) and (c) the Mayor of London for Greater London (in addition to local planning authorities there).
331. However, subsection (4) permits CIL regulations to depart from the position under subsections (2) and (3) (except in the case of the Mayor). A regulation-making power is given to provide that certain local authorities are instead to be charging authorities for any area. For example, it is possible for National Park authorities to have two areas, one very large, and one very small and in the area of another local planning authority. National Park authorities are local planning authorities for the purposes of Part 2 of the PCPA 2004, but for reasons of scale and efficiency it might not be thought appropriate for them to be charging authorities for a small separate area.

Section 207: Joint committees

332. This section allows CIL regulations to provide that a joint committee established under section 29 of the PCPA 2004, where it includes a charging authority, is to exercise specified functions in relation to the area of the committee on behalf of the charging authority. These joint committees are established under section 29 of the PCPA 2004 to act as the local planning authority for the purposes of Part 2 of that Act.
333. Subsection (3) provides supplementary powers to make provision corresponding to that which exists in Part 6 of the Local Government Act 1972 relating to joint committees of local authorities. For example, these supplementary powers might be used to permit the delegation of CIL functions exercisable by a joint committee to members of staff of the constituent authorities.

Section 208: Liability and Section 209: Liability: interpretation of key terms

334. **Section 208** makes provision about how liability to pay CIL is incurred (with section 209 providing some definitions of the terms in section 208 together with regulation-making powers to define others).
335. **Section 208(1)** expressly provides for an opportunity for any person to assume liability for CIL before the commencement of development (subsection (2)(a)), though this must be done in accordance with regulations (see subsection (2)(b)) CIL liable “development” is defined in section 209(1) as “anything done by way of or for the purpose of the creation of a new building, or anything done to or in respect of an existing building”. Section 209(2) provides a regulation making power to exclude works or changes of use from this definition of development and to provide for the creation of, or for anything done to or in respect of, a structure to fall within it. Section 209(3) provides that CIL regulations must include provision for determining when development is to be treated as commencing. Section 209(4) relates to how “development” has been defined in section 209(1) and the operation of section 209(3) there. The obligation in subsection (3) may be interpreted as requiring any definition of commencement of development to relate only to development of the sort defined by subsection (1) - something done specifically in relation to a building (or structure). Subsection (4) is intended to allow for the commencement of development to be defined by reference to other works which may be authorised by a planning permission that also authorises the building works for which there is CIL liability.
336. In default of liability not being assumed before development is commenced, or in other circumstances specified by the regulations (for example insolvency), subsection 208(4) provides that the CIL regulations must provide for an owner or developer of land to be liable for CIL. Section 209(7) defines “owner” as a person who owns an interest in the land and “developer” as a person who is wholly or partly responsible for carrying out a development. Section 209 also provides a power in subsection (8) to provide for a person to be treated or not to be treated as an “owner” or “developer”. The intention here is to allow for CIL regulations to be able to provide that certain types of interests are to be included or excluded from default liability - for example, easements and profits.
337. Under section 208(6), the extent of liability is to be determined by reference to the time when planning permission first permits the development (which is CIL liable). Section 209(6) provides connected powers. For example, in the case of those planning permissions where development is only permitted in phases, the powers allow for CIL regulations to specify that liability arises as each phase is commenced.
338. Since much of section 208 is premised on liability being incurred in connection with a planning permission, subsection (7) provides a power to deal with cases where development which requires planning permission is commenced without it. This is to close a potential loop-hole where development might be unlawfully commenced to avoid CIL.
339. Finally, section 208(8) provides powers for CIL regulations to make provision for, in effect, the claw back of an exemption or reduction in CIL. This is where the description or purpose of the development in respect of which the exemption or reduction was granted subsequently changes.

Section 210: Charities

340. This section relates to exemptions to or reductions in CIL for charities. The first subsection provides a duty that CIL regulations must provide for an exemption from liability to pay CIL to certain classes of charity (which are defined in subsection (4)). This duty applies where the building or structure in respect of which CIL liability arises is to be wholly or mainly used for a charitable purpose of the charity concerned. Subsection (2) expressly provides two powers. First, a power in CIL regulations to provide an exemption in CIL to institutions established for charitable purposes.

Secondly, a power to require charging authorities to make arrangements for an exemption or reduction in CIL to institutions established for charitable purposes. Subsection (5) defines for the purposes of subsection (2) that a charitable purpose is one falling within section 2(2) of the Charities Act 2006. Subsection (3) contains a power to prescribe conditions which must be met in order for a charity not to qualify for an exemption or reduction under subsection (2).

Section 211: Amount

341. This section requires a charging authority which proposes to charge CIL to issue a document known as a charging schedule. This schedule would set out for the authority's area the CIL rates, or other criteria, by reference to which the amount of CIL payable is to be calculated. Subsection (2) requires charging authorities in setting these CIL rates (or criteria) to have regard (in the manner and to the extent specified by regulations) to (a) the actual and expected costs of infrastructure; (b) matters specified by CIL regulations relating to the economic viability of development (such as the economic effects of planning permission or of the imposition of CIL); and (c) the actual and expected sources of funding for infrastructure.
342. Subsections (3) and (4) mean that CIL regulations may make further provision about how CIL rates or other criteria are to be set. Subsection (4) provides examples in this connection such as requiring authorities to take account of the potential administrative expenses connected with CIL. Subsection (5) provides powers for CIL regulations to permit or require charging schedules to adopt specified methods of calculation. For instance, charging schedules could operate on the basis of descriptions of the type of development or according to the location of the development (subsection (6)).
343. Subsection (7) provides an express power for charging authorities to undertake preparatory work, including consultation. Regulations might set out limits on the use of the power. Subsection (10) makes it clear that the requirements for the examination, approval and bringing into effect of charging schedules apply to revisions of a schedule (as they do to the preparation of the original charging schedule).

Section 212: Charging schedule: examination

344. This section contains a number of provisions relating to the independent examination of a draft charging schedule. Before a charging schedule is approved under section 213, a draft of it must have been examined by a person appointed for that purpose by the charging authority. Moreover, the charging authority must satisfy itself that this person is independent of it and has appropriate qualifications and experience (subsection (2)). Subsection (9) means that those persons who have made representations about the draft of the schedule have a right to be heard before the examiner (subject to any requirements in regulations about when and how this right is acquired).
345. Subsection (4) requires the draft charging schedule submitted to the examiner to be accompanied by a declaration that the charging authority has complied with a number of requirements. These include procedural requirements relating to the preparation of the draft, requirements under section 211 as to how the contents of the schedule are to be determined and that the charging authority has used appropriate evidence to inform the draft. The purpose here is to ensure that the charging authority have satisfied themselves that the draft schedule is ready and in an appropriate form to be examined.
346. The examiner is required to make recommendations (having considered the matters in subsection (4)) relating to whether the schedule should be approved (with or without modification) or rejected and to give reasons for those recommendations. The charging authority must publish both the recommendations and the reasons (subsections (7) and (8)).

Section 213 Charging schedule: approval

347. **Section 213(1) to (3)** prescribes the circumstances in which a charging authority may approve a charging schedule and how it is to approve one. A schedule may only be approved if the examiner appointed under section 212 recommends approval and with any modifications the examiner recommends. A charging authority (other than the Mayor) must approve a charging schedule at a meeting of the authority and by a majority of votes of the members present. The Mayor must approve a charging schedule personally.
348. In addition, subsection (4) provides a regulation-making power to permit charging authorities to be able to correct errors in a charging schedule after it is approved (without having to formally review it).

Section 214: Charging schedule: effect

349. This section provides that a charging schedule which has been approved may not take effect until it has been published. It also permits charging authorities to determine that a schedule (which has been brought into effect) is to cease to have effect with a regulation-making power to prescribe the circumstances in which a charging authority may exercise this power (subsections (3) and (4)).
350. Subsection (5) requires that a decision to cease charging CIL must be taken by a majority of members of a charging authority (other than the Mayor of London) at a meeting of that authority. In the case of the Mayor, such a decision would have to be taken personally (subsection (6)).

Section 215: Appeals

351. Subsection (1) requires CIL regulations to provide for a right of appeal on a question of fact relating to the calculation of the amount of CIL due in respect of a particular development. Such appeals must be heard by a person appointed by the Commissioners for Her Majesty's Revenue and Customs. The person so appointed must be a valuation officer (appointed under section 61 of the Local Government Finance Act 1988 (c.41) or a district valuer (within the meaning of section 622 of the Housing Act 1985).
352. Subsection (3) provides particular regulation-making powers in connection with these appeals (and appeals about apportionment of liability under section 208(5)(d)(ii)). Specifically provision may be made about the period within which a right of appeal must be exercised, appeal procedures and the award of costs and the payment of fees for an appeal.

Section 216: Application

353. **Section 216(1)** provides that, subject to section 219(5) (which permits CIL regulations to permit or require CIL to be spent on expenditure relating to compensation under section 219), CIL regulations must require authorities charging CIL to apply it to funding infrastructure. Subsection (2) defines what constitutes "infrastructure", which ranges from roads and transport facilities and open spaces to affordable housing (which includes social housing within the meaning of Part 2 of the Housing and Regeneration Act 2008). Subsection (3) provides powers for CIL regulations to amend this definition and therefore, powers to control at a macro-level what CIL is spent on. Subsection (4) allows for finer controls here by providing powers, for example, to specify what works, installations and other facilities may be funded through CIL or to specify what is or is not to be treated as funding. Examples of how this latter power may be used are set out in subsection (6). It includes powers to permit CIL to be used for the reimbursement of expenditure already incurred and for the giving of loans, guarantees and indemnities.
354. For the purposes of providing for accountability and public scrutiny, powers are provided in subsection (5) to require charging authorities to prepare lists of projects

which they propose will be funded by CIL and to circumscribe the circumstances in which CIL can be spent on projects which are not listed. The procedures to be followed in preparing such lists may be prescribed in CIL regulations. Similarly, under subsection (7), regulations may require the separate accounting of revenue from CIL and require its use to be monitored and reported on by any body which holds CIL revenue (for example, an authority collecting it under section 217(5) or a body to which it is passed under regulations made under subsection (7)(f)).

Section 217: Collection

355. Section 217(1) provides that CIL regulations shall include provision about the collection of CIL. The rest of the subsections here provide instances of how that power may be exercised. For example, CIL regulations may require the repayment of CIL, with or without interest, in cases of overpayment (subsection (3)). In addition, regulations may make provision for payments to varying timescales and payments in forms other than money (subsections (2) and (4)). The regulations may also permit or require one authority to collect CIL charged by another (subsection (5)). In addition regulations may replicate or apply enactments relating to the collection of tax (subsection (6)).
356. Finally, subsection (7) allows for CIL regulations to make provision about the sources of payments in respect of Crown interests. For example, under section 8 of the Duchy of Cornwall Management Act 1863 certain capital receipts received by the Duchy of Cornwall may only be spent for the purposes specified there. Subsection (7) allows CIL regulations to provide that CIL which is payable by the Duchy where development takes place on its land, may be paid out of these monies.

Section 218: Enforcement

357. This section provides that CIL regulations must include provision on the enforcement of CIL, including about the consequences of late payment or failure to pay (subsections (1) and (2)). Subsection (3) provides further powers covering, for example, providing for consequences (which might include a penalty or interest becoming payable) where liability is not assumed in accordance with section 208(2).
358. The type of provision which might be made on enforcement is exemplified in subsections (4) to (6) and includes, injunctions and powers to require information and provision to cover cases of death or insolvency. Specifically, subsection (5) relates to the registration or notification of actual or potential liability to CIL and to local land charges. It provides, for example, powers for such liability to be registered by way of a local land charge or in a statutory register (such as the register of planning applications which is maintained by local planning authorities under article 25 of the Town and Country Planning (General development Procedure) Order 1995) (see subsection (5) (b) and (d)). In addition, local land charges may be a device for charging liability to land and for ensuring that successive owners are liable for that charge. Subsection (5) (a) and (c) permit regulations to provide for CIL liability to be a local land charge in this respect or for its enforcement, such as by way of sale with the consent of a court.
359. Also, a power is provided to make regulations creating criminal offences (subsection (4) (g)). However, subsection (11) provides for limits on the exercise of these powers. These relate to the maximum level of fines (£20,000 on summary conviction) and terms of imprisonment (six months on summary conviction and 2 years on conviction on indictment) that can be imposed in connection with an offence created under CIL regulations. These limits may be adjusted by means of an order under subsection (12) (which because of section 222(4) will be subject to the negative resolution procedure) to reflect the commencement of section 283 of the Criminal Justice Act 2003. Section 283 of the 2003 Act allows for amendments to be made by order to pre-existing enactments so that the maximum levels of imprisonment for criminal offences in them can be made 51 weeks in the case of purely summary offences and 12 months, on summary conviction, in the case of indictable offences. The order-making power

in subsection (12), therefore, allows for subsection (11) to be amended so that the restrictions in it are raised to a maximum of 51 weeks imprisonment in the case of purely summary offences and a maximum of 12 months imprisonment in the case of indictable offences, after summary conviction.

360. In addition, powers are provided to make provision in regulations for the imposition of penalties and surcharge (subsection (4)(b)) and conferring powers to enter land (subsection (4)(e)). Like in the case of the power to create criminal offences, the extent of these powers is circumscribed. Under subsection (8) a penalty or surcharge will not be able to exceed the higher of 30% of any outstanding CIL or £20,000. Subsection (9) in effect provides that these limitations do not apply cumulatively but only in respect of each surcharge or penalty provided for under CIL regulations. Subsection (10) ensures that CIL regulations cannot authorise entry to a private dwelling without a warrant from a justice of the peace.
361. Finally, subsection (7) provides regulation-making powers to ensure that regulations on application, collection and enforcement (under sections 216 to 220) can make provision in relation to interest, penalties and surcharges.

Section 219: Compensation

362. **Section 219** allows CIL regulations to require a charging or other public authority to pay compensation for loss and damage caused by enforcement action that has been improperly taken by them (see subsection (1)). “Enforcement action” is defined in subsection (2) to be action taken under regulations made under section 218. It includes the suspension or cancellation of a decision relating to planning permission and the prohibition of development pending assumption of CIL liability or the payment of CIL.
363. Regulations under this section cannot require the payment of compensation to a person who has failed to satisfy their liability for paying CIL (see subsection (3)). In the event of dispute, the quantum of compensation which is payable in accordance with the regulations may be determined by the Lands Tribunal (see subsection (6)). Regulation-making powers are also provided in subsection (4) to deal with the time and manner in which a claim for compensation must be made and how compensation is to be calculated. Powers are provided in subsection (5) to permit or require charging authorities to use CIL receipts to pay for any compensation and other expenditure under this section.
364. Finally, subsection (7) applies sections 2 and 4 of the Land Compensation Act 1961 to determinations by the Lands Tribunal under subsection (6) subject to any necessary modifications and to the provisions of CIL regulations. Sections 2 and 4 of the 1961 Act cover procedures on a reference to the Lands Tribunal and the award of costs by the Tribunal.

Section 220: Community Infrastructure Levy: procedure

365. **Section 220(1)** provides power for CIL regulations to make provision about the procedures to be followed in connection with CIL, with examples of what might be done using this power set out in subsections (2) and (6).
366. For instance, subsection (2)(r) provides power to combine procedures in connection with CIL with procedures for another purpose of a charging authority. An example of the use of this power might be to combine the procedures for producing a draft charging schedule with the procedures for preparing development plan documents under Part 2 of the PCPA 2004. Alternatively, it might be used to require reports on the use of CIL under section 216(7)(c) to be combined with the annual monitoring reports required under section 35 of the PCPA 2004. Subsection (2)(l) to (o) might be used to require in CIL regulations that an examination in public to be held into a list (produced under section 216(5)(a)) of the items of infrastructure on which CIL may be spent. This might be combined with an examination in public into a charging schedule with

connected provision being made on how the costs of the examinations are to be met.. Finally, by way of example, subsection (2)(s) provides a power to make provision about procedures to be followed in connection with actual or potential liability for CIL. Under this provision regulations could prescribe the form and contents of any notice which must be served on a charging authority or another party and the form which service of such a notice may or must take in order for liability to be assumed or transferred under section 208(2) or (5)(g).

367. Subsection (3) provides power to make regulations regarding procedures to be followed in connection with exemptions or reductions of CIL. For example, if a charging authority were to grant any exemption it could be required to keep a record of that and to notify the Secretary of State that it has been granted. Or instead, the power could be used to require potential recipients to provide certain information before they can be granted an exemption.

Section 221: Secretary of State

368. This section provides the Secretary of State with a power to give guidance on any matter connected with CIL to, for example, a charging authority, an authority (other than a charging authority) collecting CIL pursuant to regulations under section 217(5) or to a person appointed to carry out an independent examination under section 212(1). Any person to whom guidance is given under this section would need to have regard to it.

Section 222: Regulations and orders: general

369. **Section 222(1)** provides a number of supplementary powers in relation to the making of CIL regulations. For example, there are powers in paragraphs (c) and (d) to provide for exceptions and to confer discretionary powers. In combining these powers, it would be possible to give charging authorities a degree of discretion in deciding whether to give exemptions to CIL. Paragraph (d) might be used in combination with section 217(2)(b) to allow charging authorities to decide when payment by instalments can be accepted.
370. Subsection (2) provides that CIL regulations shall be made by statutory instrument and shall not be made unless a draft has been laid before and approved by resolution of the House of Commons.
371. Subsection (3) similarly provides that an order under section 218(12) (changing the maximum level of criminal penalties prescribed by section 218(11)) or under section 225(2) (repeal of the Planning-gain Supplement (Preparations) Act 2007) is to be made by statutory instrument. However, either type of order is subject to the negative resolution procedure, in the former case it could be subject to annulment pursuant to a resolution of either House and in the latter case, pursuant to a resolution of the House of Commons only (see subsections (4) and (5), respectively).

Section 223: Relationship with other powers

372. Subsection (1) provides that CIL regulations may include provision about controlling the use of section 106 of the TCPA 1990 (which relates to planning obligations) and section 278 of the Highways Act 1980 (which relates to agreements with highways authorities for highways works). It also provides power to make CIL regulations about the exercise of any other power relating to planning and development (subsection (2)) and for the Secretary of State to give guidance to charging and other authorities on the exercise of such powers (subsection (3)). The purposes to which any of these regulation-making or guidance giving powers may be put are circumscribed by subsection (4). For example, they may be used to enhance the effectiveness or use of CIL regulations (for example, to encourage charging authorities to charge CIL) or to prevent or restrict the entering into of agreements (or the giving of undertakings) under section 106 of the TCPA 1990 or section 278 of the Highways Act 1980 in addition to CIL. Finally, subsection (5) provides powers for CIL regulations to control the exercise of powers to give directions or guidance.

Section 224: Community Infrastructure Levy: amendments

373. Section 224 makes amendments to a number of Acts (which are to be brought into force by an order under section 241(8)). In broad terms the amendments are concerned with the delegation of functions under Part 11 of the Act. In particular, subsection (1) amends section 101 of the Local Government Act 1972 by inserting a new subsection which specifies that Community Infrastructure Levy is not a rate for the purposes of subsection (6) of section 101. Subsection (6) prevents the application of section 101 (which permits, for example, local authorities to delegate their functions to their officers, committee and sub-committees) with respect to functions relating to levying a rate.
374. Subsection (2) amends section 9 of the Norfolk and Suffolk Broads Act 1988. Section 9(8) of the 1988 Act provides, in broad terms, that the Broads Authority may delegate its functions relating to its navigation area only to its Navigation Committee. The effect of the amendment is that this restriction does not apply to functions of the Broads Authority under Part 11.
375. Subsection (3) amends section 71(3) of the Deregulation and Contracting Out Act 1994. Section 71(1)(c) of the 1994 Act prevents orders under section 70 of that Act from being made which would permit a local authority from contracting out “a power or right of entry, search or seizure into or of any property”. Subsection (3) amends section 71(3) of the 1994 Act so that this restriction does not apply in relation to collection and enforcement powers under Part 11 (much like the existing provision in section 71(3) of the 1994 Act relating to, for example, the business improvement district levy and council tax).
376. Finally, subsection (4) amends section 38 of the Greater London Authority Act 1999. Section 38 permits the Mayor of London to delegate his functions to certain persons who include Transport for London, the London Development Agency, the Common Council of the City of London and a local authority. Subsection (4) prevents the Mayor from delegating his functions under Part 11 to these persons (though he would be able to delegate these functions to the Deputy Mayor or any member of staff of the Greater London Authority, the remaining persons in section 38(4)).

Section 225: Community Infrastructure Levy: repeals

377. Subsection (1) makes a number of repeals which will be commenced two months after Royal Assent (see section 241(6)). In particular, sections 46 to 48 of the PCPA 2004 will be repealed (which provide powers to establish, by regulations, a system of planning contributions in England or Wales) and paragraph 5 of the Schedule 6 to the same Act will be repealed (which provides for the repeal of sections 106 to 106B of the TCPA 1990). The system of planning contributions under sections 46 to 48 of the 2004 Act was intended to replace the regime for planning obligations under sections 106 to 106B of the TCPA 1990.
378. In addition, subsection (2) provides a power to the Treasury to repeal by order the Planning-gain Supplement (Preparations) Act 2007. Section 222 deals with the procedure for such an order and in particular subsection (5) there, provides that such an order may be annulled pursuant to a resolution of the House of Commons.