Consultation on the Building Safety Levy

Final Draft, 14th October 2021

Introduction

1. The British Property Federation (BPF) represents the real estate sector – an industry which contributed more than £100bn to the economy in 2019 and directly employed more than 1 million people. We promote the interests of those with a stake in the UK built environment, and our membership comprises a broad range of owners, managers, and developers of real estate as well as those who support them. Their investments help drive the UK's economic success; provide essential infrastructure and create great places where people can live, work and relax.

2. In the context of this consultation exercise we are speaking for two important constituencies in our membership – those members who develop and own Build-to-Rent (BTR) buildings, and Purpose-Built Student Accommodation (PBSA). Both sectors play a vital role in expanding housing supply. Build-to-Rent is a truly additional source of housing supply, attracting new capital investment and developers into the delivery of housing, and accelerating the supply pipeline. PBSA also adds to supply and helps alleviate the pressures on other housing stock in towns and cities with higher education institutions.

General comments

3. The Government's intentions on the Building Safety Levy (BSL) are not as clear as for the Residential Property Development Tax (RPDT). With the RPDT there is a 10-year cut-off and a target to raise £2bn. With the BSL it is not clear whether there is an end point and if not, for what reason? Also, there is no clarity on what the Government is seeking to raise? We suggest there should be a sunset clause in the Building Safety Bill limiting the BSL provisions to ten years - consistent with Government intentions on the RPDT.

4. An important point of clarification for BPF members will be the implementation timeline. Several projects that could be affected by the levy will have passed the stage of buying land and obtaining planning permission (Gateway 1). They could now face an as yet immeasurable cost in the shape of the BSL, impacting viability, and therefore the delivery of affordable housing. We would advocate the BSL only captures buildings that have not passed Gateway 1 at the time of implementation.

5. Finally, it is important to stress that the levy is flowing against the direction and objectives of many other Government policies, for example, creating contradictions in policy between different parts of DLUHC:

    - The Government is proposing that future housing growth should be focused in 20 cities, which will see an uplift in their housing numbers of 35%. That will only be achieved with a significant contribution from higher rise buildings, which the BSL will make more difficult to develop.

- The revival of our town centres will also see a need for more high-rise residential buildings, as vacant retail buildings need to be replaced and districts repurposed.
- It was recognised in the Letwin Review that Build-to-Rent accelerates housing delivery. Any disproportionate impact of the RPDT, or BSL, on rental sectors, will slow housing delivery.
- Any impact on viability is likely to be reflected in less scope for delivering affordable housing and/or increasing Government funding required to support affordable housing delivery.
- Rental products such as Build-to-Rent also serve a vital purpose in the housing market in providing quality homes to people whose access to home-ownership or social housing is limited. Greater taxes on Build-to-Rent homes means the sector can serve fewer people with those needs.
- It is also not clear why the BSL is targeted at HRRBs, and not all new developments? If the idea is to raise funds from those at fault for historic defective buildings then the proposals are not doing that. The consultation paper accepts that the levy will be reflected in land prices, but landowners are about as far removed as can be got from fault for historic defective buildings.
- As our submission highlights in several places, it may be better to draw on existing CIL practices than to invent a new, additional levy, plus a new bureaucracy to service it.

Q1: Do you agree that the Client should be responsible for paying, or ensuring payment of, the levy?

Please let us know of any alternative proposals you consider to be better, and why, or any other factors we should take into account?

We can understand the logic in making the client responsible for the payment of the levy. That does not always mean the client will be easily identifiable. The payee needs to be very clearly defined to deal with situations where there are Forward Fund Agreements, Purchase Agreements, or direct developments with multiple SPVs. As such the client is not necessarily the operator in all cases.

Much depends also on how far the Government wants to align the BSL with the Community Infrastructure Levy (CIL), or any successor. In the case of CIL, the liability sits with landowners and payment becomes due as soon as development commences.

One important design measure Government will need to consider is what happens if Gateway 2 permission is sought, but subsequently the development does not commence. In such circumstances, will the levy paid by the client be refunded?

A further challenge will come with any SME variations in the levy. How will SME be defined? If defined by number of employees, as is normally the case, it will capture almost all clients, who tend to be relatively lean in terms of headcount and contract out much of their activities. There are also ways of structuring developments so that they sit in the name of a smaller entity. Government may need to give further thought to whether many High-Rise Residential Buildings (HRRBs) are built by small businesses? We doubt many are, and therefore any small business payment plans may be totemic, rather than utilised.

Q2: Do you agree that affordable housing should be excluded from levy charges? Please explain.

Call for evidence (A): The government would welcome views and evidence on the potential impacts of either applying the levy to affordable housing or excluding affordable housing from the levy; on how an exclusion for affordable housing might be delivered (including how the levy might be administered for mixed-purpose developments incorporating some affordable housing); on potential market impacts; and on how these impacts and potential "gaming" might be mitigated.

We agree that affordable housing should be exempt from the levy. We would like to see some consistency in definition between the RPDT and BSL regarding what is, and what is not within scope.

There is an important point we would stress regarding purpose-built student accommodation. In London, Mayoral planning policy requires providers to deliver 'affordable student accommodation'. This is not defined in the annex to the National Planning Policy Framework but has the same economic impact on development. Any levy exemptions for affordable housing should therefore also apply to affordable student accommodation.

Q3: Do you agree that hospitals should be excluded from paying the levy?

That would seem logical.

Q4: Are there any other categories of development or developer that should be excluded from the levy? Please explain why you think this and your views on market impacts.

For the same reason as hospitals, it would seem counterproductive to charge the BSL on development by charities, whose products may sit outside the official definition of affordable housing in the annex to the NPPF, but nevertheless are seeking to provide housing that is for social good.

More generally, the Government should weigh up how the Building Safety Levy sits with other key housing policies. In particular, the Government announced in December 2020 that it would focus more housing supply on 20 key cities. Such a policy is going to place a greater reliance on urban, brownfield development, at higher density, and in some cases high-rise. A Building Safety Levy set at a high rate could impact on this policy. About 80 per cent of Build-to-Rent delivery is in these 20 key cities. Any significant impact on Build-to-Rent delivery therefore could have an impact on the Government's housing delivery targets.

There is also an undersupply of Purpose-Built Student Accommodation (PBSA) in university cities and the lack of PBSA impacts on the wider residential sector, reducing the supply of affordable family homes in university cities.

Any refurbishment works or new build projects are finely timed to balance completion of the build and start of the rental period. Works are timed to complete within the summer holidays ready for the start of new terms. Delays associated with the calculation and payment of the BSL will impact on the delivery timescales and ultimately on whether the accommodation will be available to meet the demands of the PBSA market.

Q5: Would the ability to agree payment schedules support SMEs?

It would help with SME cashflow, but we wonder how many smaller SMEs develop HRRBs? As we set out elsewhere in this submission, there may be more sense in providing payment relief based on the amount payable, which is what CIL does.

More generally, there are the makings of a contradiction in policy between an objective of the infrastructure levy in the Planning White Paper, which is to alleviate the cashflow burdens on all developers, and the direction of travel for the BSL, which is to increase that burden.

Q6: Are there other measures that would support SMEs paying the levy?

It is difficult to comment as there is so many details we do not know about the levy in terms of government motivations, rate, etc. An SME in this context is also de facto going to be an organisation of sufficient size to develop a building that is 18m or seven storeys high.

Q7: Do you agree that refurbishments should be excluded from the levy? Are there any types of refurbishments that you consider should be captured and should pay the levy?

We support the exclusion of refurbishments, as again this would disproportionately impact on rental sectors, who will have regular refurbishment programmes to keep their product contemporary to consumer tastes. This is not the case for homes built for sale. There is also again some consistency with CIL if refurbishments are excluded.

Q8: Which option do you think provides the most transparent, simple and objective basis for the levy: floor area or per residential unit? Why?

We support the use of floor area as the basis for calculating the levy. That would be fairer than on a per unit basis. For example, if the levy was calculated on a unit basis, the charge would be the same for a four-bedroom penthouse, as it was on a studio flat. Working on a floor-area basis would not be administratively burdensome as developers currently use floor area for the Community Infrastructure Levy, and there is some logic in being consistent. The only caveat would be if the Planning White Paper proposal for a simplified infrastructure levy was to be calculated in some other way.

We would stress, however, that any calculations for the purpose of calculating the BSL should allow for the deduction of common space. For the sake of a better customer experience the design of BSL should not be discouraging the provision of communal space, which again is more prevalent in rental developments, than those where there are homes for sale. It would be a bad outcome if the amenity space which residents have valued so much in lockdown was discouraged through tax policy.

Q9: Would documentation required for building control approval at Gateway 2 provide accurate evidence of this basis?

Gross Internal Area calculations are used for CIL purposes and are regulated by RICS.

As we have highlighted elsewhere, what happens if Gateway 2 permission is sought, but subsequently the development is not built out? Is there a reimbursement of the levy?

Q10: Do you have an alternative proposal as a basis for the levy? If so, please explain why you consider it better.

Arguably, there are better ways of achieving the Government's objective to recover some of the funding it has provided for building remediation. A small proportionate levy applied to CIL bills, would better reflect development economics than any flat-rate levy, and could be applied to a wider tax base. Regardless, we would strongly urge that Government takes account of the cumulative impact of the RPDT and BSL on different sectors. It is clear the BSL will have a disproportionate

impact on rental sectors, such as Build-to-Rent, whose output is predominantly high-rise. We estimate 89% of the sector's most recent output was over 18 metres (Source: Savills).

It would be a perverse outcome if rental sectors that have no call on Building Safety Funds end up cumulatively paying more as organisations via RPDT and BSL, than those organisations who have sold high-rise homes to leaseholders.

One way of ameliorating the impact of such a scenario would be to have differential rates for rental and for sale products, rather like the differential rates for locations proposed below in Q11. BSL rates could be linked to local CIL rates and therefore reflect the different development economics of different types of asset.

Q11: Do you agree that the levy rate should be varied depending on location, to reflect differing property values? Please indicate any suitable examples of doing so.

This would make sense. We do not know the rate of the levy yet, but it is unlikely to be insignificant. Gross Development Value varies significantly across the country and therefore the levy could have varying impacts, and damage development in more difficult places, in turn hurting levelling-up. For land already bought, the BSL will impact on the viability of projects. For land, yet to be bought, it would come off the land price and disincentivise the supply of land, when land supply is important to the Government's objective of 300,000 homes being delivered a year.

Q12: In seeking to balance revenue generation from the levy and impacts on housing supply, we would welcome views on the levy rate (as a percentage of property value) which would impact viability of housing supply – differentiating between different geographical locations and also property values if possible.

It is worth stressing that this is a levy and not a charge. Building control applications already incur a charge, which can be related back to the work involved. The consultation document makes clear that the new building safety regulator will be applying a charge for its services, in addition to the BSL.

If the BSL were of the order of what is paid for building control services at present that is something that the sector could absorb, but our impression from the consultation is that this is more of a tax, rather than charge to recover the cost of services.

There is no slide rule in respect of what is viable. The experiences of CIL and CIL charging schedules illustrate the variability that is required to ensure that CIL does not impact unduly on development activity. Many local planning authorities in the north of England do not even charge CIL on the basis it will make development unviable. Where CIL is charged it varies by local planning authority, and often has different rates for different asset classes and areas within the local authority.

It is also worth stressing that the value of CIL levied by LPAs was £830 million in 2018/19, with a further £200 million levied by the Mayor of London. So just over £1bn was raised, across hundreds of thousands of developments. The BSL, however, is only targeted at a relatively small number of buildings (MHCLG estimate of 200 new buildings a year) and it is difficult to see how Government will raise any significant sum, without it having severe consequences. At the next revision of CIL charging schedules it will also lead to calls for adjustment to take account of the BSL and could end up depriving local planning authorities of valuable infrastructure funding.

Drawing on the logic of CIL, the BSL would vary by quite small geographical locations and asset types, for the same rationale as CIL, that it reflects the development economics of different asset types and places. Following that logic through, any departure from a levy that is specific to circumstance, would dictate that it should be low, to reflect as many development circumstances as possible, and

not unduly impact on activity. However, a low levy raised on 200 developments is not going to raise significant revenue. The worry will be that the Government sets a high and general levy, which is penal on HRRBs. That in turn would damage other Government objectives, such as more development at higher density on brownfield land, the aim to target a large part of housing supply at 20 major cities, levelling-up ambitions, and town centre recovery.

Q13: How might developers seek to mitigate the impacts of a levy – including adjusting development plans, build out strategy, land acquisition strategy and pricing?

It very much depends on whether the development land on which the BSL is being charged has been purchased or not. If the land has not been purchased, then the BSL should be reflected in land prices. Such a simplification has its nuances though. Firstly, it may prevent land coming forward. Secondly, particularly on brownfield sites, it may turn land values negative. Thirdly, not all buyers of the land will be paying the levy, for example, rental housing providers, student accommodation providers, and hotels often compete for the same sites. As hotel owners will not pay the levy, they will be in a better position to bid a higher price and out-compete on land against the rental housing and student accommodation providers.

If the development land has already been purchased then in some respects that is more problematic, because the levy will have not been accounted for in the land price and therefore will impact on development viability. We cannot say how much without knowing the levy rate. The effort that goes into setting CIL schedules and s106 negotiations illustrates that development activity is quite sensitive to additional cost and nowhere is that truer than in the rental sectors, where returns must remain competitive with other investment assets. Developers therefore will seek to take other mitigating measures. That might mean building at higher density, seeking to renegotiate developer contributions, or repurposing the development into other uses.

There may also be land banking as developers simply cannot make schemes viable and therefore simply wait for conditions to change.

Q14: Is there anything further the government might want to consider in relation to the design of the levy which would help minimise the impact on housing supply?

There is no perfect solution to what the Government is seeking to achieve through the RPDT and BSL. It is understandable that Government wants to raise revenue from the 'sector' in its broadest sense, to help pay for remediation. What would be unfortunate is if those who have contributed to the current building safety crisis are not those who end up making the most significant proportionate contributions via the RPDT and BSL.

Any adverse side-effects will also be more likely and impactful as both taxes are quite concentrated, rather than drawing on a broad tax base.

There is also a feeling that those developers who have done the right thing and funded remediation are worse off than those who haven't, because the RPDT and BSL are so indiscriminate, and therefore that the combined RPDT and BSL system should allow for some form of offsetting of genuine remediation costs met by the developer/operator against the levy.

Q15: Do you consider that the levy would have any impacts on local regeneration schemes? At what rate (as a percentage of market property value) would that impact be seen?

As we have explained in meetings with MHCLG colleagues it is difficult quantify the impact of the levy without knowing a ballpark figure on the rate. We do not want to over or under-estimate the

effects and therefore dramatize the impact. However, without knowing the levy rate we can only speculate.

It is welcome the Government has said it will take account of any cumulative impact of the RPDT, BSL, and new infrastructure levy, but we also do not know what the new infrastructure levy will look like.

What we can say with some confidence is that the levy will impact those sectors of residential development most whose customers have made no call on Government funding, because the responsibility to remediate in the Build-to-Rent and Purpose-Built Student Accommodation sits squarely with the landlord. There is therefore an inherent unfairness in the proposed levy. Government has said it will consider any disproportionate impact, but has not explained how? If that is not dealt with now when thinking is at the policy design stage, then it will be far more difficult to consider at the technical consultation or legislative stage.

It has also been Government policy for several years to promote development on brownfield land, but depending on the rate the levy, this may act as a big disincentive.

As explained elsewhere, it is also Government policy to concentrate more housing in 20 cities in England and therefore balance some of the pressures in the standardised methodology on other places. That will create pressures to build at greater density and more on brownfield land. The levy is unlikely to help those causes. And if not on brownfield land, it will have the negative environmental consequence of more development on greenfield land.

There will also be a consequence for renters, particularly the young, who will have less access to city centre living and quality rental homes.

Q16: Do you anticipate any issues with a self-assessment and payment system alongside the Gateway approvals process, and how might these be addressed?

We have set out elsewhere in this submission that where there are disputes over levy liability, and those have gone to appeal, the developer should be able to pass through the gateway under appeal, providing all other criteria are met.

Q17: How might a payment schedule system be implemented?

There is a question as to whether any payment schedule system should be aimed at SMEs, or determined on the amount to be paid? CIL can be paid in instalments but that is determined based on the amount to be paid. It is difficult to comment more without knowing the rate of the levy, but to us the impact of the levy, and therefore eligibility to pay in instalments may be better determined by what is being required to be paid, rather than whether the payer is a big or small organisation. It is unlikely that very small builders will be building HRRBs, and the better way to aid cashflow would be through targeting payment instalments at those who have large levy payments, as CIL does.

Q18: Do you anticipate that these, or other issues, may occur in operation of the levy? Please provide examples.

In theory this should be one of the easiest levies to collect. The tax base is small, the activity is quite transparent, i.e. tall buildings are easy to spot. The trigger point of Gateway 2 is also one that is obvious and policied. It is possible that any of the scenarios to which this question refers could happen, but the developers of HRRBs are likely to want to develop other HRRBs in the future and

therefore there is some inherent checks and balances in the system, as developers will want to have a good relationship with the regulator.

As the consultation paper explains, for failure to assume liability the project has either not progressed through the higher-risk building control process, and so wider sanctions and enforcement will apply; or else the development is within the Building Safety regulatory system and will fail to secure its building control approval due to non-payment of the levy. In those circumstances, Government will have to consider whether it is appropriate to have a layering of sanctions.

The consultation paper is also proposing a review process at Gateway 3 and whist we understand and sympathise with the principle of that, it is important that developers are not unduly delayed in moving the building to its occupation phase, which may also affect the prospective occupiers. We therefore suggest as at Gateway 2, that where there are disputes over levy payments and an appeal is made, the building owner should be able to move through Gateway 3 under appeal, providing they are meeting all the other criteria of the gateway.

Q19: How might levy design avoid mistakes, gaming and fraud, or else maximise positive incentives?

No comment.

Q20: In what circumstances do you think penalties or surcharges would be necessary, and how might these be applied? Please provide examples.

No comment.

Q21: Are there any other issues that could give rise to disputes in relation to the levy?

We broadly agree with the suggested grounds for appeal:

- determinations on levy adjustments following self-assessments
- determination of exclusions
- imposition of sanctions

There may also be disputes over eligibility for payment plans.

Q22: Do you agree that the approach to resolving disputes outlined in paragraphs 67 to 69 is appropriate? Are there other decisions in the operation of the levy that you consider merit a review and appeal route, and why?

The inability to proceed with development until the levy is paid makes any appeals mechanism relatively worthless, as the costs of not being able to commence development (and knock-on consequences e.g. higher inflation/ expensive team being stood down/remobilised) can be significant and may quickly rise to a level that is more than the levy. The system should allow development to proceed under appeal, so long as all other Gateway 2 conditions are met with the regulator.