Community Infrastructure Levy

Further Reforms- April consultation

It was announced that the government would consult on further reforms to the Community Infrastructure Levy. It was publicised as a radical overhaul. A reading of the consultation document suggests that it is a useful exercise but it will be hard put to justify the publicity.

For developers there will be particular advantages in

(i) the ability to offer to provide both off-site and on-site infrastructure. It will offer greater certainty that the necessary infrastructure will be put in place;

(ii) the phasing of developments whether full or outline planning permission has been granted and the neutralisation of site preparation as regards CIL. This will assist with cash flow.

(iii) the changes to social housing relief to include communal areas and to allow for a revision of the CIL liability after the commencement of the development;

(iv) the extension of the social housing relief to include discounted sales;

(v) the deduction of all existing unused internal space without any specific time limits as at present. In a few cases the developer will face problems if the authority is arguing that the previous use had been abandoned.

(vi) changes to development – changes after the start of development will not now require a section planning permission to avoid unfair CIL liabilities.

(vii) the relaxation of the conditions relating to the exceptional circumstances relief so that it may actually operate in a few cases.

(viii) the possibility of an appeal even after the development has started

In summary what is proposed :-

1. Strengthen need to balance CIL rate with potential effect on economic viability of developments in area – reg. 14 requires a Charging Authority to strike the appropriate balance between the infrastructure funds raised from CIL and the potential effect the rate will have on the economic viability of development in the area. It is proposed that this is to be strengthened by imposing a "more evidence-based test" under which the authority justifies its appropriate balance through evidence for examination by the examiner. This may have been prompted by concern that some rates set, or in the process of being set, will affect the financial viability of developments particularly residential developments. However, it is not only when setting the rates that the balance needs to be struck. It is a matter that needs to be continuously monitored. If this results in a change it will not affect authorities which have already published a draft charging schedule.

2. Differential rates (para. 5.4.4 of the Guide) - authorities have made great use of the ability to have different CIL rates for different types of user or different areas. There has been resistance to different rates by reference to different sizes of development. This has been attempted with regard to retail developments. In some cases it has been accepted by the examiner but in some areas the authority has had to withdraw the proposed differential rate. It is proposed to clarify the meaning of "use" to make clear that it does not have the same meaning as the classes of use in the Use Classes Order. This has been the official position and the clarification will remove any argument that differential rates by reference to use have to reflect the uses in the Use Classes Order which had been promoted by the large retailers.

It is also proposed to allow scale of development to be taken into account because it is said that "differential rates cannot currently be set in relation to the size of a development." (para. 21). This last statement needs qualifying. Differential rates have been set by reference to the size of a development because the relevant examiner has accepted the evidence supporting the conclusion that they represent different markets. Presumably this will no longer be needed albeit that evidence is needed to justify this on the basis of economic viability and to show that it does not give rise to notifiable State Aid.

3. Consultation period – the period for public consultation on a draft charging schedule is proposed to be increased from four weeks to six. This will only affect future draft charging schedules and not published schedules.

4. Reg. 123 Infrastructure list (para. 5.5 Guide) –

4.1 Publicity - it is proposed that the draft Infrastructure List be published with the draft charging schedule and that it be available with the evidence during the rate setting process. This is so the effect of the list can be taken into account and there is greater transparency. This will restrict the flexibility of the authority with regard to what appears on the list. However, it has been reaffirmed that there will be no requirement that CIL receipts can only be applied for infrastructure appearing on that list.

4.2 Changes to list – at present there are no specific restrictions on the ability of an authority to change the contents of a list. This has given rise to the concern that it may be used to ensure greater planning obligations are possible with regard to large developments. Such a course has been officially frowned on. It is proposed that before making changes proportionate consultation is undertaken but leaving it to the authority to decide on the correct procedure and without the regulations prescribing what steps have to be taken.

5. Deadline for pooling restriction (para. 20.4 Guide) – reg. 123(3) prevents the use of planning obligations to fund a type of infrastructure or a project of infrastructure when five or more planning obligations have been entered into in the area since 6th April 2010 relating to such a project or type. The deadline for the operation of this restriction is currently 6th April 2014 but it is proposed to move it to 6th April 2015. This restriction will already apply to authorities which have put in place a charging schedule. This will provide a reduction in pressure on authorities

which have not yet introduced a charging schedule and will give each of them more time to bring the CIL regime into their area.

6.Highway agreements – currently there are no restrictions on the number of highway agreements that may be entered into in relation to a public highway unlike the pooling restrictions with planning obligations. The question is raised whether there should be restrictions if the highway project is included on the reg. 123 infrastructure list.

7. Acceptance of provision of infrastructure in lieu of CIL –

7.1 General discretion - currently it is possible in certain circumstances to transfer land in lieu of a payment of CIL (para. 16.3 Guide). It is proposed to extend this to the provision of off-site or on-site infrastructure. The advantage to the developer is that it would be carried out and for the authority the works are carried out on its behalf. It will be necessary for the authority to have published a policy relating to this on its website which will state the type of infrastructure which may be provided by this means. It will have to be infrastructure which is not subject to a section 106 planning obligation or a section 278 highway agreement. To accept such a provision the authority will have to consider that there is a benefit in doing so. It re-introduces an element of negotiation similar to that with section 106 planning obligations.

7.2 Costs of provision – the amount of CIL paid by such a provision would be the cost of providing the infrastructure which would be the actual construction costs and the costs of design. It would exclude legal and administrative costs. An enforceable agreement would be required as with an agreement to transfer land in lieu of CIL and it is suggested a performance bond.

7.3 Thresholds – to prevent challenges based on EU tendering rules it is proposed that the amounts involved by subject to upper limits by reference to the tendering rules. These are currently £173,934 for goods and services and £4,348,350 for works.

8. Phased payments –

8.1 Full planning permissions - currently the CIL regime is applied in phases to outline planning permissions under reg. 8(4). It is proposed to extend this treatment to full as well as outline planning permissions. This would result in the payment of CIL be linked to the phases of the development.

8.2 Site preparation – with phased developments it is proposed that if there is phase which relates just to site preparation then the commencement of that phase should not trigger a CIL payment. None would be payable until the commencement of the phase which involves the construction of a building.

9. Variation of affordable housing on site – it is proposed to change the regulations to account for the case where after the development has started there is a transfer of part of the site to a registered provider such as a housing association and then there is a variation on the amount of affordable housing to be provided. The CIL

liability will already have been calculated based on an estimate of the affordable housing and once the development has started there can be no appeal. It is now proposed that there should be a re-calculation of the CIL liability in such circumstances.

10. CIL trigger – instead of the date on which planning permission first permits development it is proposed that for all planning permissions and not just outline planning permission it should be the date when the last reserved matter is approved. This date is important as it fixes the CIL rate applicable. This change may make it easier for the authorities to administer the charge.

11. Unused existing space - reg. 40 allows a deduction in respect of existing internal space provided that the building has been in lawful use for a continuous period of at least six months in the twelve month period ending with the date that the planning permission first permits the development (para. 14.2.2 Guide). This time limitation has been posing a problem and deterring development. In consequence it is proposed to remove the time limitation so that the existing internal space can be deducted from the area when calculating the CIL. However, this deduction will not be available if the previous use has been abandoned.

This will introduce a planning test which is uncertain. It has been held that the mere interruption of a use will not necessarily constitute abandonment (Fyson v Buckinghamshire CC [1958] 1 WLR 634). Changes of use or the cessation of one use in a mixture of uses can constitute abandonment (Hartley v Min of Housing and Local Government [1970] 1 QB 413). In deciding whether a use has been abandoned account will be taken of (i) the condition of the property; (ii) the period of non-use; (iii) whether there is an intervening use; and evidence regarding the owner's intention (Trustees of the Castlellyn-Mynach Estate v Secretary of State for the Environment [1985] JPL 40). In most case the change will be beneficial but in a few the uncertainty will be a disadvantage.

12. Development changes - when there is a section 73 application to authorise a change in the conditions attached to a planning permission but no increase in internal floor space then an increase in the CIL liability is avoided or if there is an increase in internal floor space the additional CIL liability is limited to that 9ncrease in floor space under reg. 74A (paragraphs 8.4 and 8.5 Guide). It is proposed to extend this to stand alone application for planning permission seeking to make changes to a development which has started. In such cases in which the authority accepts that it is a change to the existing development scheme the earlier CIL payments will be offset against the new CIL liability.

13. Social Housing relief -

13.1 Extension - it is proposed to extend the current social housing relief (applicable to social housing for rent or shared ownership) to include at the discretion of the authority homers for sale at a discounted market price. Such relief should meet EU requirements which are

13.1.1 that there is an obligation that the house is used in a certain way;

13.1.2 the house is for persons who needs are not met by the market which is stated to be “disadvantaged citizens or socially less advantaged groups who due to solvency constraints are unable to obtain housing at market conditions”;

13.1.3 the total aid must not exceed the cost of providing the social housing

13.2 Key national criteria for discretionary relief - it is proposed that the following criteria be applied for this extended relief. These are:-

13.2.1 the housing is provided at an affordable rent or price which must be at least 20% below market level;

13.2.2 it meets the needs of those whose needs are not met by the market taking into account local income levels and local house rent/prices;

13.2.3 the housing should remain at an affordable price for future eligible households or the amount of the relief should be recycled.

13.3 Communal area – currently the area qualifying for social housing relief is the aggregate of the area demised (reg. 49). This can affect the amount of CIL liability because it means that communal areas will not be subject to the relief. It is proposed that communal areas within the building including stairs and corridors should be added to the internal area. The same is proposed for communal ancillary areas such as car parking.

14. Discretionary relief for exceptional circumstances – even with authority’s that have opted to have available this relief it has not been used because of the difficulty of satisfying the conditions. In particular the cost of the planning obligations must be greater than the amount of the CIL liability. It is proposed to relax the conditions and the choice is between:-

14.1 removing the condition that the cost of the planning obligation is greater than the amount of the CIL;

14.2 reducing the requirement so that the cost is greater than a percentage of the CIL such as 80%;

The alternative is to keep the condition as it is.

15. Self–build houses – it is proposed that there be a relief for individuals or groups of individuals building houses for their own use whether by themselves or with builders. To obtain this relief a two–stage approach is envisaged. The first stage is an application for the relief which will involve self-certification that the proposed development is a self-build. This will include a certification that the individual will occupy the house for seven years from completion and that the total amount of State Aid will not exceed the 200,000 Euros limit. Upon completion documentary evidence will need to be produced to establish that it was a self-build project and is owner occupied. In the event that it ceases to be a self-build project then this must be reported and the CIL paid. Failure to notify the authority will result in a surcharge.

16. Appeals –

16.1 Written representations – currently under reg. 120 appeals are by written representation which are sent to all interested persons who have 14 days in which to send back their comments. It is proposed to change this so that comments have to be received within 14 days so that this is more certain but there is power for the appointed person to extend the period.

16.2 Appeals after start of development – at present it is not possible to appeal once a development has started. This is particularly harsh when there is a planning permission granted after the start such as a section 73 permission. It is proposed to allow the review or appeal of the chargeable amount after the start of the development.

17. Transitional provisions – it is proposed that the changes relating to rate setting process and examination will not affect charging authorities who have published their draft charging schedule already.

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