

Continuing issues with CIL

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Developers and owners continue to have difficulties getting to grips with CIL. Worryingly there is a continuing failure to comply with the statutory requirements and to understand that it is an inflexible regime which is unforgiving of mistakes. Separate from this is the unwelcome complexity of the regime. The former is resulting in a regular stream of appeals to the planning inspectorate against surcharges whilst the latter is producing a significant number of appeals to appointed persons by the VOA. This article will consider those CIL issues and in a later article the failures leading to surcharges will be considered.

1. CIL issues

- (i) Conversion of single dwelling to two flats – a change of use from a single dwelling to two or more separate dwellings is not a development for the purposes of CIL even though it is under planning law (reg. 6(1)(d) of the 2010 Regulations). A recent appeal has emphasised the care that needs to be taken when seeking to rely on this provision. In the appeal planning permission had been obtained to convert a dwelling to two flats and for the building to be extended. The appointed person considered the terms of the permission and concluded that the development was not just a change of use but involved substantial alterations to the building as well as extensions. Consequently, the provision did not apply to exclude the building from the scope of the chargeable development. The minor development exemption did not apply because the development involved two new dwellings.

- (ii) Lack of warning from charging authority - in that appeal the appointed person also made a point which needs to be taken on board by all developers. The absence of a response from the authority until the service of a CIL Liability Notice is not a ground of appeal and will not be taken into account in an appeal. There is no obligation on the authority to explain or

advise on the application of the CIL regime. The responsibility lies on the owner and developer.

(iii) In-use buildings – a deduction of the internal area of an in-use building can be made from the GIA of the chargeable development which will remove or substantially reduce the CIL liability. Not surprisingly there are disputes over whether a building has been in lawful use for a continuous period of six months in the three year period ending with the day the relevant planning permission first permits development. A number of points have come out of the appeals:-

- (a) the onus of proof is on the owner/developer. If, as is happening, the evidence is not conclusive then the claim for a deduction fails. This is reinforced by the authority being authorised to treat the area as zero if the evidence is insufficient.
- (b) incorrect information given in the Additional Information accompanying the planning application can be corrected later.
- (c) what is needed is proof of use or occupation for the appropriate period. For instance a licence by itself will probably be insufficient without evidence that the licensee actually went into and remained in occupation for the requisite period.
- (d) service bills are a valuable item of evidence.
- (e) the internal area of outbuildings should be included even if difficult to access or in a poor state of repair.
- (f) an area between the eaves of the roof and an internal wall was included because it could be accessed and had been used by a previous owner for storage.
- (g) a frame erected as part of building works will not by itself constitute a building.
- (h) not only must there be a continuous period of use but it must have been a lawful use. Often this will be proved by an express planning permission but this will not always be the case. In one appeal the appellant sought to deduct the area of barns been converted to holiday accommodation.

Reliance was placed on ten years storage use of the barns even though described as redundant in previous planning applications. Such period of use meant that the use became lawful and so justified taking the area of the barns into account.

(i) even if there has not been the requisite period of use a deduction may be permissible because the authorised use of the part of the building continues to be the same.

(iv) Scope of development – a crucial element to many cases is to determine the scope of the development from the terms of the planning permission. This will for instance determine the extent of a building which is the subject matter of the development. It may affect whether the development is more than just a change of use. The answers to these points will in turn determine whether a need to consider the making of a claim for a deduction in respect of an in-use building. In one appeal the development was claimed by the appellant to relate only to the change of use of the ground floor. However, this was not accepted by the appointed person who considered that because of the building works involved in the plans authorised by the planning permission the whole building was the subject of the development. As a result it was necessary to consider whether there had been prior occupation of the first floor of the building permitting a deduction of that space.

(v) Indexation

(a) section 73 permissions – a previous article has considered the successful appeal against the date of the grant of a pre-CIL parent permission being used for the indexation element when calculating the CIL liability arising from a post-CIL section 73 permission. This appeal decision is the subject of judicial review proceedings and discussed in an earlier article on this subject.

(b) published figures – an appointed person accepted an appellant's contention that a more recently published index figure should be used (even though still a forecast) rather than the Council's approach which resulted in the same index figure being used for all planning permission during the

relevant year. This could result in more challenges to the CIL amount calculated by authorities with regard to indexation.

(vi) Retrospective planning permission – the redaction of decisions makes it difficult to follow some appeal decisions and in particular those with a relevant planning history. Despite this a number of points have come out from the appeals:-

(a) in one appeal in relation to a retrospective planning permission the Council had argued that an appeal was not valid because the development had commenced. This was rejected because such an appeal is allowed under reg. 114(3A) when the permission is granted after the commencement of the development.

(b) the appellant argued in that case that the CIL regime applied only to the works to be carried out after the grant of the retrospective permission. This was rejected on the basis that CIL is charged on the development for which planning permission is granted (reg. 9(1)).

(c) buildings started under a pre-CIL permission but which require a post-CIL retrospective permission under section 73A continue to give rise to serious problems. It is not just that no self-build exemption is available because the development started before the retrospective permission but no advantage is gained from the development commencing under a pre-CIL permission and no deduction of area is permissible in relation to any building demolished between the grant of the pre-CIL permission and the grant of the retrospective permission. In an appeal it was argued that account should be taken of the earlier permission. The difficulty is that unless there is an express provision justifying such a step each planning permission has the CIL regime applied independently to it. What has been built prior to the grant of the retrospective permission will not qualify as an in-use building because until the retrospective permission is granted it does not have a lawful use so no reg. 40(7) deduction is available. In a second appeal relating to this area the appointed person found that in any event as building had been carrying on

the building could not have been in lawful use as a residence. This strikes me as more contentious. When there is a need for retrospective permission there will be a need to advise of the adverse CIL consequences. These have been considered earlier in an article on this subject.

(vii) CIL Rates –

(a) Residential - an appeal against charging a holiday home at the CIL rate applicable to residential development failed. The appellant argued it was not within Use Class C3 but the appointed person held that it was sufficient that it was a dwelling which could reasonably be described as a building that provides facilities for day-to-day private domestic existence regardless of whether it is occupied as such permanently or only for a limited time. In a second appeal on this point it was held again that no distinction should be drawn between holiday accommodation and C3 use. In that appeal the appointed person applied a dictionary definition of residential which is “designed for people to live in”. In each of the appeals the authority’s Charging Schedule had not imposed a CIL rate by reference to C3 use. If it had the outcome would have been different.

(b) Builders merchant - planning permission was granted for a builders merchant (Use Class B8) with an ancillary use which was retail. The appointed person applied the rate applicable to Use Class B8 notwithstanding that there was an ancillary retail element contrary to the Council’s argument in favour of the CIL rate for retail use.

(viii) Gross internal area – inevitably there will be differences over what area should be included in the determination of the GIA (see (iii)(e)/(f) above). The issue may arise in the context of a reg. 40(7) deduction. Should the deduction be greater because the authority has incorrectly left out part of the existing building? In one appeal this was the question with regard to an existing covered service yard area with hardstanding which was surrounded by a wall but not covered by a roof and was used principally for parking. In that appeal

the Council argued that the definition of building in section 336 TCPA 1990 had been excluded from the CIL regime so the dictionary definition of a structure with roof and walls applied. This was accepted by the appointed person and it was held that the hardstanding areas did not constitute buildings as neither had a roof. The reg. 40(7) deduction in consequence did not take into account those areas.

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