

Community infrastructure levy

Government October 2013 response to consultation

These are the changes which the government propose to introduce:-

1. CIL rate setting – to meet the concern that CIL will deter development it is proposed that when going through the examination process a charging authority will have to show that it has struck an appropriate balance between the funding of infrastructure from the levy and the potential effects of the levy on the viability of development. This will not apply to authorities that have already published a draft CIL charging schedule. Far more authorities will not have reached this stage than will have so this will be an unwelcome increase of costs for many. No change is made to extend the minimum consultation period from 4 weeks thereby leaving it to the discretion of the authority.

2. Differential rates – although it has been common practice to have different CIL rates by reference to different specified areas or types of development there have been attempts to introduce different CIL rates dependent on the size of development. This has been particularly the case with retail developments and attempts to impose different rates on supermarkets. Some attempts have failed at the examination stage whilst others have been successful on the basis that there are different retail markets. The position is to be clarified so that different rates can be introduced by reference to varying sizes of development or numbers of units or houses without the need to prove that they comprise different markets. It means that different CIL rates can apply not just to retail developments but also to residential developments.

3. Reg. 123 list – this sets out the type of infrastructure which is to be funded by the CIL receipts. It is proposed that as part of the process of setting CIL rates a charging authority will put forward a draft reg. 123 list as part of the relevant evidence for consideration and examination. This change will not apply if the charging authority has already published a draft Charging Schedule. The suggestion that requirements be introduced with regard to amendments to the list has not been taken up and the manner of amendment will remain under the discretion of the charging authority.

4. Pooling restriction – One restriction which is intended to encourage the take up of CIL by authorities is the restriction that no more than five obligations can be pooled by the charging authority to provide for the funding of the same item of infrastructure. It takes effect when a Charging Authority introduces CIL but if it does not then at the moment this restriction will apply as from April 2014 to all authorities regardless of whether they are charging CIL. It is proposed to extend this deadline to April 2015 to allow more time for those authorities intending to introduce CIL.

5. Highway agreements – at present there are no restrictions regarding the obligations imposed by agreements pursuant to section 78 Highways Act 1980. This is in contrast to planning obligations which must now satisfy the statutory tests in reg. 122 of the 2010 Regulations regardless of whether or not CIL is chargeable. Planning obligations may be subject to the pooling restriction (see section 4 above) and if the CIL regime has been introduced no planning obligation can be used to fund a project or type of infrastructure

mentioned in the authority's reg. 123 infrastructure list. It is proposed that it will not be possible to obtain contributions to a highway project from both CIL and obligations under a highway agreement. The manner in which the restriction is to be formulated is not indicated. Exempt from this will be schemes relating to trunk road networks drawn up by Highway Authorities, TfL and the Welsh Ministers. Neither the statutory tests nor the pooling restriction will be applied to obligations under highway agreements.

6. Restrictions on funding infrastructure – the question had been raised whether the terms used in the restrictions on funding infrastructure should be clarified. It has been decided not to. There is doubt as to how the boundaries of a project or type of infrastructure are to be determined and this will continue.

7. Payment in kind - it is currently possible to pay CIL by a transfer of land subject to compliance with the various requirements. The authority has a discretion whether or not to accept it. This manner of payment is to be extended to allow an authority to accept in discharge of a CIL liability the provision of infrastructure which may be on the land to be developed or on other site. This could be advantageous to the developer as there is no other method open to it of ensuring that necessary infrastructure is provided by the authority. For the authority it may be attractive by relieving it of an unwelcome burden. There was a suggestion that a ceiling should be placed on the value of infrastructure by reference which could be provided as payment in kind by reference to those applicable to EU procurement rules but this has been rejected. The value of such infrastructure is likely to be the construction costs plus the design fees.

8. Phased developments - currently if an outline planning permissions authorises a phased development then each phase will be treated as a separate chargeable development for the purposes of CIL and so CIL will be payable at the commencement of each phase and the amount of the CIL liability will be determined by the internal floor space attributable to that phase of the development. This favourable treatment is to be extended to all planning permissions whether full or hybrid so that the CIL treatment is the same for all phased developments.

9. Commencement date – a planning permission subject to a pre-commencement condition will not for the purposes of CIL authorise the development until that condition has been satisfied usually by the giving of approval. The date at which a development is first authorised is the date at which the applicable CIL rate is determined and the amount of CIL is to be calculated. This is to be amended so that a planning permission will be treated as authorising development from the date of grant or if subject to reserved matters upon the approval of the last of those matters. This is intended to aid clarity and certainty.

10. Off-setting existing floor space – when calculating the CIL liability it is possible to deduct from the internal floor space of the proposed development the area of the existing floor space but only if it has been in continuous lawful use for six months during the last twelve months. If this deduction is not available then it can result in a greatly increased CIL liability. It has been giving rise to problems. For example if a building is acquired for development but the planning application takes longer than expected it may result in the building being empty for longer than six months in the last year and so the deduction ceases

to be available. Similarly problems can arise if the development is phased and the carrying out is spread over a long period. It was suggested that the vacancy test be dropped and the deduction be available unless the prior planning permission had been abandoned. This suggestion has not been accepted and it has been decided to adapt the vacancy test in cases in which there is a change in use. The deduction of the existing floor area will be available if the building has been used lawfully for a continuous period of six months in the last three years. This should allow for the building remaining vacant whilst planning permission is being sought or for a long term development with a number of phases to be carried out. In cases in which there is no change in use then only an increase in internal floor space will be chargeable unless the former planning permission has been abandoned which requires an investigation of intent and a consideration of the planning authorities on the subject. These changes are welcome and should assist developers. Once the amendment regulations have been enacted it may be worthwhile reviewing sites where the application of the vacancy test had previously caused an increase in CIL. If the development has not been finished and a fresh application is possible whether under section 73 TCPA 1990 or as a standalone application then it may be possible to reduce the CIL liability and obtain an overpayment.

11. Abatement – in 2012 there was much publicity regarding the considerable concerns over double charging of CIL as a result of section 73 permissions. In consequence amendments to the regulations were introduced so that the amount of CIL charged was limited to the appropriate amount for the development finally to be carried out. If the earlier planning permission was granted prior to the issue of the CIL charging schedule then the section 73 permission will only trigger a charge in relation to any increase in floor area. It is now proposed to extend the abatement provisions to second permissions relating to the same development which are not granted under section 73 but are standalone permissions and for this beneficial treatment to operate even after the commencement of the development but before completion. This crediting of the earlier CIL payment will be on a site-wide basis which may have beneficial implications for phased developments. It does not seem that the scope of this change is intended to include pre-CIL planning permissions. Even so this will be a beneficial change for developers and as regards existing developments may provide an opportunity to improve the CIL position. For example, it is proposed that extensions over 100 square metres will be exempt from CIL. If an extension has started but not completed could a fresh planning application be made which will be subject to a nil CIL liability and would this result in the repayment of the earlier CIL liability?

12. Social Housing relief – when determining the area by reference to which this exemption is to be available in a mixed development the social housing element is currently limited to the internal area actually let. This leaves out of account areas exclusively related to the social housing such as communal areas (staircases, passageways and reception) and ancillary areas (car parking) which are, therefore, chargeable to CIL. The result is that the CIL liability is greater than would be expected. It is proposed to include such areas when calculating the area subject to the exemption. It is also intended to allow charging authorities at their discretion to include within this exemption discount market sale homes. If there is a change in the provision of affordable housing prior to completion of the development an ability to re-calculate the CIL is to be included. It has been indicated that the relief may in the future be extended to charities providing affordable housing but which are not registered providers.

13. Exceptional circumstances relief – a charging authority may elect to allow this relief to be available. Few have elected. If available then on an application the authority will decide whether it is expedient to grant it. A requirement that has to be currently satisfied by such an application is that there is an existing section 106 agreement which extracts a greater contribution to infrastructure than the CIL liability. This requirement is to be removed and is not to be replaced by any requirement relating to the size of contribution under the section 106 agreement. There will, however, still need to be such a planning obligation.

14. Self-Build – a relief is to be introduced for self build houses which is where the house has been constructed for personal use by the owner or by a builder organised by the owner or by a communal group. There will be no difference between the demands made on local infrastructure by such houses and those constructed as part of a commercial residential development. The relief is being granted exclusively to encourage such activities. It is said that there will be tough eligibility tests which are robust and simple. The appropriate evidence will be required in support of the self-certification. The relief can be withdrawn if the pre-conditions cease to be satisfied or if owner-occupation ceases within three years of completion.

15. Extension/annexes – there has been considerable agitation that CIL applies to extensions exceeding 100 square metres. With the introduction of the self-build relief any extension or annex will be free of CIL regardless of size but subject to robust and straightforward eligibility tests. As yet the nature of these tests has not been indicated.

16. Appeals – two changes are proposed. First comments on appeals are to be “received” within 14 days rather than “sent”. This is to aid certainty by avoiding disputes as to when comments were sent. There is a discretion to extend this period. Second appeals are now to be allowed in respect of applications for planning permission made after the commencement of development. This will cover not just applications for retrospective planning permission but also section 73 permissions and application relating to new designs.

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