

CIL Indexation and pre-CIL planning permissions

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Indexation was a means by which the Community Infrastructure Levy ("CIL") pot could be increased automatically without effort and quietly. It was an encouragement to local authorities to elect to introduce CIL. The importance of its role is illustrated by the reason for the proposed change to link the index to house price inflation rather than build costs. It is hoped that this will reduce the need to review an authority's Charging Schedule.

1. Index – Currently the indexation element is to be determined by the national All-in Tender Price Index which has increased each year. The expectation was that indexation would increase the CIL bill as the years went by and that expectation has been met.

2. Operation - the manner in which it operates is governed by reg. 40(5) of the Community Infrastructure Levy Regulations ("2010 Regulations"). The formula used to calculate the amount of CIL chargeable included a fraction I_p/I_c in which I_p represented the index figure in which the relevant planning permission was granted and I_c the index figure in the year in which the authority introduced the CIL Schedule providing the CIL rates by reference to which the calculation was made.

3. Pre-CIL planning permissions - what this does not allow for is cases in which the original planning permission was granted before the introduction of CIL. Under the original 2010 CIL Regulations this was not an issue. A pre-CIL planning permission could not give rise to a CIL charge even if the development commenced after the introduction of CIL. A post-CIL section 73 permission which varies a pre-CIL parent permission is an independent planning permission and under the original CIL regime was subject to a separate CIL charge regardless of whether the parent permission was granted before or after the introduction of CIL.

This clearly resulted in unfair outcomes. A variation by a section 73 permission could be very minor and have no CIL consequences such as a change in the exterior of the building or in trading hours. Notwithstanding this there would be a full CIL charge on the section 73 permission if the parent permission was not subject to a CIL charge. If the parent permission had been granted after the introduction of CIL and itself was subject to a full CIL charge there would be a double charge to CIL.

With a section 73 permission which increased the gross internal area of the development this did not give rise to a CIL liability related to that increase but rather by reference to the whole gross internal area of the development.

4. 2012 amendments – in order to remedy this unfairness amendments were introduced by the 2012 Regulations. A new regulation 128A was introduced to deal with a pre-CIL parent planning permission and a section 73 permission chargeable to CIL. This regulation reduces the CIL arising on the section 73 permission by the CIL which would have been charged on the parent permission if it had been subject to the CIL regime using the CIL Charging Schedule in force at the time of the section 73 permission.

The general objective with the amendments was set out in the Second Delegated Legislation Committee debates on 12th November 2012 by the Parliamentary Under-Secretary of State for Community and Local Government (Mr. N. Boles) when he stated:

“Section 73 consents are regularly used for very minor changes, such as a small change to a building appearance or a change to the opening hours of a retail unit. These amending regulations are quite clear that when the change does not alter the liability to CIL, only the original consent will be liable. They will ensure that when planning permission is granted under section 73 that introduces a more substantial change, such as by adding floor space to the building, the developer will pay CIL only on the permission that is actually implemented. The regulations also allow payments made in relation to a previous planning permission to be offset against the liability on the section 73 permission.

In transitional cases when the original planning permission was granted prior to a CIL charge being brought in, but when the section 73 application is granted following the introduction of CIL, the section 73 consent will trigger CIL only for any additional liability it introduces to the development. These changes ensure CIL works fairly and does not hold back development when conditions have changed.”

In order to achieve this general objective when calculating the hypothetical CIL charge it sought to equate the circumstances taken into account with those prevailing on the grant of the section 73 permission. It is provided that the CIL rates are determined by the Charging Schedule in force at the date of the grant of the section 73 permission. It is further provided that the parent permission is treated as first permitting development on the same day as the section 73 permission. This is important as regards the deductions permitted in respect of the demolition of “in-use buildings”. The area of a building demolished after the grant of the parent permission but before the day on which the section 73 permission first permits development will not be taken into account when calculating the actual and notional CIL charges. In contrast to those deductions what is not specifically dealt with in reg. 128A is the indexation element of the reg. 40(5) formula.

5. Alternative views on indexation after 2012 amendments – there are two sharply different views as to how the indexation element operates when there is a post CIL section 73 permission relating to a pre-CIL parent permission.

One is that when calculating the notional CIL attributable to the pre-CIL parent permission the Index figure used for Ip is for the year in which the parent permission is granted even though the grant is before the introduction of CIL in the area. This may be a number of years before that in which the section 73 permission is granted with the inevitable consequence that there will be a CIL liability relating to the section 73 permission will be greater than the notional CIL liability relating to the parent permission. This will be solely due to the application of the indexation element in the CIL formula. It means that it is probable that there will be a CIL liability when reg. 128A applies which is contrary to the government statement quoted earlier.

The alternative view is that the Ip figure for the pre-CIL parent permission is the same as for the section 73 permission because the provisions in regulation 40 only apply to planning permissions granted after the introduction of CIL in the area. To use an Index figure for a year prior to the coming into force of CIL is to introduce an element of retrospectivity. It does not accord with the rationale for the amendment.

6. CIL appeal – these two views were considered in a CIL appeal to an Appointed Person. The decision dated 6th March 2017 (available on the government webpage relating to CIL appeals) held in favour of determining Ip for the pre-CIL parent permission by reference to the date of the grant of the post CIL permission. This decision has now become the subject of judicial review proceedings in which the hearing was adjourned to 2018 to permit an amendment to be made to reg. 128A.

7. Proposed amendment - on 15th December 2017 draft Community Infrastructure Levy (Amendment) Regulations 2018 were published which contain two amendments to reg. 128A. Firstly, it is expressly provided that the Ip figure to be used for calculating the notional CIL liability in relation to the pre-CIL parent permission will be that for the year in which the section 73 permission is granted. That clarification is helpful as it avoids on-going issues over the point. It removes the possibility of authorities seeking to use the Ip figure for the year in which the pre-CIL parent permission is granted. Secondly, it provides that the Charging Schedule to be used in relation to the pre-CIL parent permission is that in force on the date when the post-CIL section 73 permission first permits development rather than the date of grant. This brings that aspect of the calculation into line with reg. 40. Often these two dates will be the same but not always.

8. Taking effect of amendment - this change will apply to any CIL Liability Notice or revised Liability Notices issued on or after the date that these 2018 regulations come into

force. This means that it can apply to planning permissions granted before these regulations came into force.

It is disappointing that this amendment has only now been made public. It is to be hoped that CIL Liability Notices issued before the regulations come into force will then be revised to give effect to this clarification but authorities are not compelled to do so by these regulations. There is a CIL appeal decision which is to the same effect as these regulations as regards the Index figure. This is being challenged by the judicial review proceedings and it will be interesting to see whether these continue.

A number of large developments may have paid CIL bills which were calculated using the index figure of the pre-CIL parent permission. In the light of these developments efforts may be made to have these bills reconsidered. This could be complicated by the existence of section 106 agreements which took into account the higher CIL bill. If a development authorised by such a section 73 permission has yet to commence then it is to be expected that the developer/owner will press for a revised CIL Liability Notice.

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