

Action needs to be taken over exemption for residential extension from CIL

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The self-build exemptions from the Community Infrastructure Levy (“CIL”) have caused considerable pain. Many self-builders have learnt to their cost that they did not understand the CIL regime and have unwittingly fallen foul of the stiff requirements relating to eligibility and retention of the exemption. The CIL regime is rigid and local authorities do not have the power to waive or modify compliance. Failure to comply means the loss of the exemption and an unexpected and very unwelcome CIL liability bill. Greater appreciation of the manner in which the CIL regime operates and the consequences of non-compliance is the real answer. Experience shows that though local authorities make significant efforts to warn in the CIL documentation it does not get read.

However, there is one aspect of self-build where the problem is not the failure of the self-builder but the failure of government to operate the CIL regime properly. Central government has failed to make clear whether or not a particular requirement applies and some local authorities are not following the CIL Guidance published by the Ministry of Housing and Local Government.

The problem arises in the context of the exemption for residential extensions. It is a strict requirement of nearly all exemptions from CIL that a commencement notice is given no later than the day before the relevant development commences. This is in line with the general requirement under regulation 67 of the Community Infrastructure Levy Regulations 2010 (“the 2010 Regulations”) that a commencement notice is given no later than the day before the day on which the chargeable development is to be commenced. From the point of view of the local authority this is important as otherwise it will not know when the development has started thereby triggering any CIL liability or the need to monitor in case an exemption is withdrawn.

Not all exempt developments now require a commencement notice to be given before the development is commenced. When the 2010 Regulations were first introduced

reg. 67 required the giving of a commencement notice in respect of all chargeable developments which is widely defined by reg. 9(1) as a development for which planning permission is granted (which in turn has an extended meaning including developments authorised by a general consent). In 2011 reg. 9(8) of the 2011 Community Infrastructure Levy (Amendment) Regulations inserted reg. 67(1A) which provided that reg. 67 did not apply to a minor development exempt due to reg. 42 (GIA less than 100 square metres) or if the chargeable amount of the development calculated under reg. 40 is zero. In neither case did the commencement of such a development trigger a CIL liability or require monitoring to determine whether or not an exemption had been subsequently withdrawn.

The self-build exemptions including the exemption for residential annexes and extensions conferred by reg. 42A were not introduced until the CIL amendments in 2014 (reg. 7 of the Community Infrastructure Levy (Amendment) Regulations 2014). These amendments also by reg. 9(5) added sub-regulation (aa) to reg. 67(1A). This provided that reg. 67 did not apply to a development “in relation to which no CIL is payable because an exemption for residential extensions was granted”. As with the other developments excluded from the operation of reg. 47 no commencement notice would be required as the commencement of the extension would not trigger a CIL liability and once commenced it could not be withdrawn unlike the exemption for residential annexes.

To qualify for the exemption for residential extensions a number of requirements must be satisfied contained in regulations 42A and 42B of the 2010 Regulations. The extension must be an enlargement of a dwelling which is the individual’s sole or main residence and must not comprise a new dwelling. The exemption can only be granted to the extent that it does not constitute State aid. A written claim for the exemption complying with the requirements in reg. 42B(2) must both be made and the decision by the local authority to grant it notified to the claimant before the development commences. As soon as practical after the receipt of a valid written claim for the exemption the local authority must grant the exemption and notify the claimant.

There is no requirement that the claimant must have given a commencement notice before the exemption can be granted by the local authority. However, reg. 42B(6) provides that a “person who is granted an exemption for residential annexes or residential extensions

ceases to be eligible for that exemption if a commencement notice is not submitted to the collecting authority before the day the chargeable development is commenced.”

Does this mean that a commencement notice has to be served by the claimant before the chargeable development is commenced notwithstanding reg. 67(1A)(aa) which provides that reg. 67 does not apply in relation to a development to which no CIL is payable because an exemption for residential extension was granted? If it does and the claimant believes that no commencement notice is needed due to reg. 67(1A)(aa) then the exemption will be lost once the development starts. Local authorities are taking that approach and charging CIL on the basis that the exemption has been lost.

It is not hard to understand why claimants subjected to that approach feel they have entered an Alice in Wonderland world. Having been notified of the grant of the exemption for residential extensions to their development the next communication from the authority is a CIL Liability Notice and CIL Demand Notice claiming significant sums of CIL being due with warnings as to what will happen if the sums are not paid. Few will have the funds to litigate the issue and risk surcharges for late payment. Unfortunately the faster and cheaper option of a statutory appeal under reg. 114 is not available in respect of a claim for an exemption for residential extension.

Yet on the government website in the CIL Guide the claimants will have read under the heading “Exemptions for residential annexes or extensions” that

“In order to benefit from an exemption, the applicant for a residential annex exemption must submit a commencement notice to the authority before starting work on site. This requirement does not apply in regard to a residential extension exemption as set out at in regulation 67(1A). Paragraph: 150 Reference ID: 25-150-20180222”.

Further on in that guide it states:

“Further details

Regulations 42A, 42B and 42C (inserted by the 2014 Regulations) set out the legislative provisions for residential extensions and annexes. Regulation 67(1A) sets out that requirements for Commencement Notices do not apply to exemptions for residential extensions. Paragraph: 153 Reference ID: 25-153-20180222 Revision date: 22 02 2018 See previous version”

The CIL guide carries out the very much needed and important task of seeking to explain the operation of the CIL regime to those affected by it. What understanding can a reader be left with from reading these passages but to believe that if an exemption for residential extension has been granted to the reader in respect of a proposed home extension no commencement notice is needed.

These passages in the CIL guide were revised in February 2018. Prior to that the relevant passages had been introduced in June 2014 when the self-build exemptions had been brought in by the 2014 Amendment Regulations. Until the revision the guidance was that commencement notices had to be given for both exemptions relating to annexes and extensions. It read

“In order to benefit from the exemption, the applicant must submit a commencement notice to the authority before starting work on site. Paragraph: 150 Reference ID: 25-150-20140612 Revision date: 12 06 2014

Regulations 42A, 42B and 42C (inserted by the 2014 Regulations) set out the legislative provisions for residential extensions and annexes. Paragraph: 153 Reference ID: 25-153-20140612 Revision date: 12 06 2014”

Unsurprisingly reliance is placed by local authorities on reg. 42B(6) which provides that the exemption is lost if a commencement notice is not served. By reg. 2(1) a commencement notice “means a notice submitted under regulation 67”. But when an exemption for residential extension has been granted reg. 67 does not apply to a development that only comprises a residential extension. No commencement notice can be given in those circumstances because none can be given under reg. 67. There is no possible commencement notice and so reg. 42B(6) should not be triggered and there should be no loss of the exemption because a commencement notice cannot be given. There is no provision stating that despite reg. 67(1)(aa) a commencement notice must still be given if the exemption is to be retained.

An authority’s response to that is that “commencement notice” in reg. 42B(6) has a different meaning and the definition in reg. 2 does not apply notwithstanding that the definitions in reg. 2 are not qualified as to when they apply but are stated to be the meanings for the regulations as a whole. This approach by the authority means that the

claimant is not obliged to give a commencement notice so no surcharge is levied for failure to do so but if one is not given then the exemption for residential extension is lost.

Why take an extension outside the scope of reg. 67 yet still require the giving of a commencement notice if the exemption is to be kept? There seems to be no logical answer to this. All it would seem to achieve would be to create an elephant trap which will particularly affect those who take the trouble to bone up on the MHLG CIL Guide. The oddity of such an approach is emphasised by there being no requirement to give a commencement notice in respect of a residential extension involving less than 100 square metres gross internal area. It is only extensions exceeding that GIA which will be caught.

The wording of reg. 67(1A)(aa) has been formulated carefully. It takes out of reg. 67 developments "in relation to which no CIL is payable because an exemption for residential extensions was granted". This means that if the scope of the development is exclusively an extension of the claimant's sole or main residence no CIL is payable once the exemption for residential extension is granted by the local authority and reg. 67 does not apply.

On the other hand if the scope of the development is wider than it will not for the purposes of CIL be wholly covered by that exemption. If CIL is payable because of the part of the development which is not an extension then it is not within reg. 67(1A)(aa) and a commencement notice will be required. In those circumstances if the claimant fails to give the required commencement notice then the cost of failure will include the loss of the exemption due to reg. 42B(6). In the event that the development is wider than just an extension but no CIL is chargeable it is not clear whether reg. 67(1)(aa) can be combined with reg. 67(1)(b) to take the development outside reg. 67 or whether a commencement notice would still be needed.

This explains the difference in wording relating to commencement notices in the forms relating to the annexe and extension exemptions. Form 8 concerning annexes contains a declaration that it is understood the exemption will lapse if a commencement notice is not given before the commencement of the development. In contrast form 9 concerning extensions contains a declaration that the claimant "will establish whether the charging/collecting authority require a Commencement Notice to be issued prior to commencing my development". This does not mean that the authority has a discretion but rather acknowledges that under the CIL regime some developments involving extensions will not need a commencement notice and some will not.

It is wrong that the government agency is publicly stating that no commencement notices is required whilst local authorities after granting the exemption for residential extension then charge CIL when a commencement notice is not given. Individuals cannot be expected to take on the heavy burden of litigation through the courts to resolve this conflict. It needs to be resolved by the government which is responsible for the clarity of the legislation it introduces.

This construction issue is similar in character to the indexation issue in respect of section 73 planning permissions and reg. 128A. That was brought to a head because the issue affected not just ordinary individuals but large developers and one took the point using the statutory appeal system which was available to it. With this exemption there is no statutory appeal and it will only affect individuals. Many self-builders have suffered painful and unexpected CIL charges because they have not understood the manner in which the CIL regime operated. There is a case for relaxing the need for strict compliance. However, individuals extending their home charged CIL because no commencement notice has been given are different and have a genuine grievance regarding such treatment.

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