Amendments to Community Infrastructure Levy – work in progress or overload?

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The fourth set of amendments to the CIL regulations has been laid in draft before the House of Commons with the intention that they will be in force by the end of January. In part they represent a compromise between the general principles underlying CIL and political expediency. Are these amendments another step along the road leading to a fair and properly functioning tax or is it further tinkering which ultimately will lead to the collapse of the tax? So far only about 22 authorities have introduced this tax although many have entered the time-consuming process of establishing it. This staggering of CIL's implementation makes it hard to assess the full impact of the tax and means as more amendments are introduced to deal with the flaws in CIL that come to light that areas are affected differently.

In this paper I will run through the changes and highlight come concerns that I have. I will start with the new self build exemption which most definitely does not accord with the underlying principles of the tax.

1. Self-build – a principal justification of the tax is that it extracts a contribution towards local infrastructure based on the impact of the proposed development. In this respect there is no difference between the impact of a self-build new house and one built by a developer. Yet the cost for a purchaser of a new home from a developer will be greater as CIL will be payable whereas with a self build it will not.

1.1 Self-build Exemption – there is surprisingly little guidance in the new regulation 54A as to what constitutes self-build housing. It must be a dwelling which is built or commissioned by the person who is going to occupy the dwelling as that person's sole or main residence. Nothing is said about the ownership of the dwelling nor occupation with others. A person presumably is regarded as building a dwelling if the actual work is carried out by others under contracts with that person and there is not going to be a need for a detailed analysis of how the work is arranged. There is no explanation as to what constitutes the commissioning of a dwelling. If the owner of a plot of land contracts with a builder to have a dwelling constructed that presumably will be covered. There is nothing in the regulations which requires the contractor with the builder to actually own the land at the time or to have obtained the planning permission nor on the wording is the exemption excluded if at the time of the contract the builder owns the land. What is to stop a purchase off plan qualifying as a self-build? Does commissioning mean that the initiative has to be taken by the person whose home it is going to be when built?

If a developer has a site and offers a number of different plans will a purchaser who selects a plot and the house plan be any different from a person who acquires land and then contracts with a builder for a house to be constructed opting for one of the builder's plans? Will this mean that instead of building and selling residential developers will seek to arrange matters so that there are sales off plan before the development commences. Any sales off plan after the development has started would be a complication as it would involve claims for repayment of CIL.

The scope of this exemption is going to cause trouble. Not only is it not clear what constitutes commissioning but attention has also already been drawn to the difficulty of determining what constitutes a sole or main residence particularly in the context of high value individuals.

1.2 <u>Self-build communal development</u> – I find the provisions relating to this concept unhelpful. The meaning has to be teased out because there is no comprehensive statement of what is to be covered. It is said to be for the benefit of more than one dwelling which is self-built housing. The wording is similar to that with regard to communal developments associated with social housing. Presumably it envisages a group enterprise. There are a number of types of development are excluded by reg. 54A(5) including those for use by the general public or for commercial purposes.

1.3 <u>Traps</u> – the exemption has traps for the unwary which are a common feature of the CIL regime. If one or both of these exemptions is to be relied on then care must be taken to ensure that

(i) there has been an assumption of liability by the person intending to occupy the new dwelling as a home. This requires a service of an assumption of liability notice before the commencement of the development;
(ii) Claim for exemption must be made to the collecting authority (which may not be but usually will be the charging authority);
(iii) Claim must be made before the commencement of development;
(iv) Claim must be in accordance with specified form or substantially to same effect with all required particulars;
(v) The development must not be commenced before authority's decision is notified;
(vi) A commencement notice must be served no later than the day before the development actually commences.
(vii) Once the development has been completed confirmation in the required form must be given that the completed development is self–build housing or self-build communal development.

1.4 Withdrawal - a sale or letting of the dwelling within three years from the date of the compliance certificate will cause the CIL liability previously avoided by the exemption to be payable. Similarly the exemption is withdrawn if the dwelling ceases during the three year period to be occupied or alternative to be the sole or main residence of the person who claimed the benefit of the exemption.

2. Residential annexes and extensions – creating the self-build exemption has meant logically that an exemption has had to be conferred in relation to the building of annexes and extensions to houses. Certainly as regards new houses this also runs counter to the underlying justification for the tax and is an act of expediency.

The exemption can only be claimed by the person who is occupying as a sole or main residence the house which is to be extended or in the curtilage of which the new house is to be built. The construction of one new dwelling in the curtilage of the house will be covered regardless of whether it is strictly an annexe. Curtilage has been used as a means of limiting the scope of the exemption. The concept of curtilage cropped up recently with the transfer of private drains and sewers into public ownership. It is centuries old and judges have shied away from providing a comprehensive definition. It is a subject worthy of an article to itself. This uncertainty seems to attract the legislators. How authorities will cope in practice with administering this exemption will be interesting. It will now be worthwhile developers arguing over what constitutes the curtilage of a particular building and it is to be expected that there will be disputes. Interestingly there is a specific right to appeal a decision that a development is not wholly on the cartilage of a house.

For an extension to qualify for the exemption it must not create a new dwelling. However, a conversion of a house into a number of dwellings will already not be a chargeable development.

There are similar traps and provision for withdrawal of the exemption to those applicable to self-build housing.

3. Phased developments – whether a planning permission is caught by the CIL regime is determined by the date that it is granted and that has not been changed. The date at which it first permits development determines the set of CIL rates applicable and the scope of the development by reference to which each liability is calculated. As regards phased developments the previous beneficial treatment applicable to outline planning permissions is now to be extended to all planning permissions. Each phase of development under a phased planning permission is treated as a separate chargeable development. A new definition of "phased planning permission" has been introduced which requires that the planning permission must expressly provide for development to be carried out in phases. It covers all types of planning permission. From the point of view of CIL planning it will be important to consider whether the overall development is to be carried out in stages and if so to ensure that the planning permission provides for a phased development. This would

seem to require a permission which does not authorise the development to be carried out without phases.

With a phased outline planning permission each phase will first permit development on the day of the final approval of the last reserved matter associated with that phase but with a new option. If earlier and prior to the commencement of development it is possible to elect in writing that the development shall first be permitted on the day that final approval is given on any pre-commencement condition associated with the phase. This draws a distinction between conditions which must be satisfied before development can lawfully commence and those that may be satisfied later. This reflects the approach adopted by the Courts. Previously any operation contravening a condition attached to a planning permission could not constitute the commencement of development (FG Whiteley & Sons v CC for Wales [1992] 3 PLR 72). However, a more flexible approach has been developed so that the Courts now determine whether "a condition is in truth a condition precedent" (Mr. Stuart Isaacs QC in Glenmere plc v F. Stokes & Sons Limited [2008] AER (D) 92 applying Hart Aggregates Limited v Hartlepool BC [2005] EWHC 480). With a phased planning permission other than an outline one it first permits development on the day when final approval for any pre-commencement condition associated with the phase is given but if there are none it will be the day of grant even if there are conditions which are not pre-commencement conditions.

Any planning permission which is not a phased one will be treated as first permitting development on the day when the grant is made regardless of any conditions.

4. Differential rates – there has been a dispute as to whether differential CIL rates can be fixed by reference to the size of developments. It has been argued particularly by large food retailers that this is not permitted as any differential has to be by reference to the official Use classes. Notwithstanding this some charging authorities have already successfully steered through the examination stage rates which distinguish between superstores and smaller retail units. One of the features of CIL is how it significantly varies from area to area. The definition of superstore is a small example. Dependent on the area that has introduced it the size limit can be 280, 500, 1000 or 2000 square metres.

It is now to be expressly provided that differential rates can be based on the gross internal area of the development or the number of dwellings or units to be constructed or provided. This not only removes any possible challenge for the future but may encourage those authorities that previously failed to achieve a differential rate applicable to retail developments to try again.

5. Calculation of chargeable amount – the third version of the formulae to be used for calculating CIL is being introduced in regulation 40 because the amended formulae did not operate properly in certain circumstances. Hopefully this version will work properly in all circumstances. It allows a set off in respect of buildings part of which has been in continuous

use for a period of six months in the last three years rather than the last six months. This set off is extended to include an existing building which would not require planning permission to be used "lawfully and permanently" as part of the development. There has also been added the ability to carry forward in certain circumstances credit for existing buildings that are demolished in an earlier phase to later phases using yet another formula.

6. Social Housing relief – regulation 49 has been replaced so that it extends the rental housing covered to housing let at no more than 80% of market rent. The relief is also extended to include communal areas (such as passageways and car parking) so that the relief is no longer limited to just the internal areas of the dwellings. Rather clumsily it seems that such relief relating to qualifying communal development has to be claimed separately but at the same time as the claim for relief in respect of the qualifying dwellings. It seems that it is not to be included as an overall calculation.

A new discretionary relief in relation to certain dwellings sold at a discounted market price not exceeding 80% of the market value provided that the sale is in accordance with the authority's published policy.

7. Exceptional circumstances – this is a discretionary exemption which may apply if there is a planning obligation and it is considered that the cost of compliance is greater than the CIL liability. That requirement has been removed and not replaced by any other requirement. In consequence it will not be available if the CIL liability is considered to have an unacceptable impact on the economic viability of the chargeable development. It is thought that there have been few cases of this exemption being applied. It will be interesting to see whether there will now be an increase.

8. Infrastructure in lieu of payment – this could be a very significant change for developers. At present although compelled to make a contribution to infrastructure there is no guarantee that it will be delivered. Now that it is possible for the developer to provide infrastructure either on or off the development site it will give the developer certainty with respect to the local infrastructure around the site. It is a matter of discretion for the authority whether it permits satisfaction of CIL liabilities by such a means. It is not possible to avoid planning obligations by substituting the making of such provision. There has to be a written enforceable agreement relating to the infrastructure provision before the development commences. This agreement must satisfy a number of requirements and must be backed by cash so that to the extent not applied in providing infrastructure it will be paid to the authority.

9. Abatement – previous amendments have in a tortuous fashion mitigated the adverse CIL consequences of a section 73 planning permission following an earlier planning permission for the same site. This relief continues but in addition a new relief is added which applies when there are two planning permissions relating to the same site and the second is not a section 73 planning permission. This will not be welcomed by charging

authorities because it increases uncertainty with regard to the infrastructure budget due to the possibility that the CIL liability arising from the commencement of the development authorised by the second planning permission may be less that that triggered by the first planning permission.

The relief operates by taking the amount of the CIL liability due as a result of the commencement of the development authorised by the first planning permission ("the first development") and using it to abate the amount of the CIL liability arising when the first development is stopped and a development authorised by the second planning permission commenced ("the second development").

In order to qualify for such an abatement

(i) notice must have been given assuming liability in respect of the second development and that the first development will cease whilst the second will be commenced;

(ii) it can only apply to unfinished buildings when the request for an abatement is made;

(iii) it will not apply to existing buildings taken into account when calculating the CIL liability;

(iv) the request for an abatement must be made prior to the commencement of the second development; and

(v) proof of the amount of the CIL already paid must accompany the abatement request.

Abatement can be claimed any number of times for a planning permission. It is possible to revert to a development earlier ceased but such re-commencement will cause an earlier abatement to be lost.

When calculating the CIL liability for the second development it is possible to take into account any parts of buildings demolished as part of the first development if they would have been taken into account when calculating the CIL liability in relation to the second development had they not been demolished. This is only possible if the request for abatement is made within three years of the grant of the first planning permission.

10. <u>Highway agreements</u> – a restriction is now being introduced with regard to highway agreements. This is due to the concern that double contributions to highway infrastructure could be sought from a developer first by the CIL liability and second by a highway agreement. Now it will not be possible to require a highway agreement if such infrastructure is on the authority's reg. 123 list of infrastructure. This does not apply to highway agreements to be made with the Minister or Transport for London. This is a

significant change but the drawback for developers is that it means that in many cases the certainty given by a highway agreement will be lost and the only means of recovering this would be to agree that the developer should provide the highway infrastructure in satisfaction of the CIL liability.

11. Pooling restriction – the application nationally of the pooling restriction on planning obligations has been deferred until April 2015 to enable more authorities to

12. Appeals – it will be possible to appeal with regard to the chargeable amount after the commencement of the development if the relevant planning permission was granted after commencement. Comments on representations must be received within 14 days of the end of the representation period rather than sent within those 14 days.

13. Draft reg. 123 infrastructure list – this will now form part of the evidence to be presented by the charging authority as part of the examination process.

14. Transitional provisions - as always these will need to be checked carefully to ascertain which are retrospective. For example, the change regarding the inclusion of the communal parts of social housing will not apply if a liability notice has been issued before these regulations come into force. With some developments it will, therefore, be better to wait until they come into force.

These amending regulations will merit further more detailed consideration. Some are undoubtedly beneficial to developers. The trouble is that this is not an end of the changes. More must come. Such a regularly changing regime is not good particularly with a tax which varies very significantly from charging area to charging area.