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Community Infrastructure Levy

Inside

Introduction

The Community Infrastructure Levy ("CIL") is a discretionary planning charge which was introduced in 2010 through the Community Infrastructure Levy Regulations 2010. The charge was introduced to allow local authorities to raise funds from developers undertaking new projects in their area in order to fund specific infrastructure schemes.

CIL is intended to address some of the real and perceived unfairness of the Section 106 regime. In particular, it is intended to provide greater certainty and transparency as to the basis and level of developers' contributions.

What is CIL?

CIL is a charge which local authorities in England and Wales are empowered, but not required, to levy on most types of new development or extensions to buildings in their areas. CIL is levied on new floor area above a certain size, to be paid primarily by owners or developers of land. The aim is to help fund the local and sub-regional infrastructure that is required to develop an area, as identified in the local authority's development plans.

Infrastructure that can be funded by CIL includes roads, flood defences, schools and other educational facilities, medical facilities, sporting and recreational facilities, and open spaces. Crucially, affordable housing is not included in this list. The idea is that affordable housing should continue to be delivered under the S106 regime, as planning obligations enable affordable housing contributions to be tailored to the particular site and facilitate the provision of affordable housing on-site.

The CIL charging authorities in England will be District and Metropolitan District Councils, London Borough Councils, Unitary Authorities, National Park Authorities, the Broads Authorities and the Mayor of London.

What developments are subject to CIL?

CIL is chargeable on any new building or extension which is granted planning permission and which creates over 100 m^2 (or less if the development involves the creation of a dwelling) of gross internal floor space if these criteria are met, CIL may be payable even if no express grant of planning permission is required in respect of the scheme. No CIL is levied on a change of use of an existing building unless that results in an increase in floor space or the previous lawful use was abandoned. Furthermore, any existing building on a site which is to be demolished is to be disregarded where it has been in lawful use for a continuous period of at least 6 months the preceding 3 years before planning permission was granted.

The definition of a CIL liable "development" is very wide and includes anything done by way of, or for the purpose of, the creation of a new building or anything done to, or in respect of, an existing building. Anything that is not a "building" will not be chargeable to CIL. However, "building" is not defined in the Regulations, which can lead to some differences in interpretation.

Who is liable?

The responsibility to pay the levy runs with the ownership of the land on which the liable development will be situated. This is to ensure that those who benefit financially when planning permission is given should share some of that gain with the community.

Although ultimate liability rests with the landowner, i.e. those with a material interest in the land (a freehold estate or leasehold estate of more than 7 years), the Regulations recognise that others involved in a development may be the ones who are, immediately going to pay the CIL. To allow for this the person liable to pay CIL is the person who "assumes" liability by submitting an "assumption of liability notice" to the collecting authority. Where no one assumes liability, liability in default will be apportioned by the collecting authority between the landowners at the commencement of development.

Failure to assume liability may incur a surcharge of £50 and if the collecting authority has to apportion liability between multiple parties, each party may be liable for a £500 administrative surcharge.

How much is CIL?

Charging authorities opting to levy CIL must produce a charging schedule setting out the rates in their area. No CIL is payable if planning permission to a scheme is granted before the adoption of a Borough's charging schedule. The formula will be based on the net internal area of the development at the time planning permission first permits development. Collecting authorities may now set different rates by reference to the size of the development, as well as the type of development, which will assist when seeking to differentiate between, for example, smaller convenience stores and grocery supermarkets.

In calculating their CIL rates, charging authorities must have regard to the total cost of infrastructure requiring funding from CIL, other sources of funding available and the potential effect of CIL on the viability of development in the area.

Who collects CIL?

The collecting authority will usually be the same as the charging authority, except that the London boroughs will collect any CIL charged by the Mayor of London. The Mayor of London introduced a CIL in April 2012 to fund the construction of Crossrail. It is charged in addition to any Borough level CIL in London. The Regulations also enable charging authorities to appoint the Homes and Community Agency, an Urban Development Corporation or an Enterprise Zone Authority as the collecting authority.

When is CIL payable?

Liability to pay CIL arises on the commencement of development, which is defined as the commencement of any material operation on the relevant land pursuant to the planning permission. The collecting authority must be notified of any chargeable development and of the anticipated date of commencement of development. There is a surcharge for failure to submit either notice.

There is a standard payment period of 60 days following the intended commencement date of the development. CIL may be paid in instalments where the levy exceeds certain thresholds, subject to conditions.

The ability to apply CIL to each phase of a development as it comes forward has now been extended to full planning permissions. However, to benefit from this, the planning permission whether outline or full must make it clear that the permission is phased.

Sanctions for late payment and appeals

Collecting authorities will be responsible for the enforcement of outstanding CIL debts and any breaches of payment. The power to take enforcement action is discretionary.

Payment of CIL will be late either if payment is not made in the relevant payment window, or if a commencement notice has not been submitted and liability assumed before development commences.

Late payment is likely to result in surcharges and interest. The collecting authority can also issue a CIL stop notice to halt development, apply to a magistrates' court for a liability order to recover CIL debts (by distress or power of sale over land) and, in the worst case scenario, ask a magistrates' court to commit a liable person to prison for non-payment. An appeal mechanism is available in respect of various elements of CIL, including enforcement.

Relief for registered providers of social housing

A CIL liable development is eligible for social housing relief if the development comprises (in whole or in part) qualifying dwellings. A qualifying dwelling is one that satisfies at least one of the following conditions:

Condition 1: the dwelling is let by a private registered provider of social housing, a registered social landlord or a local housing authority on one of the types of tenancy listed. This includes assured tenancies (but not assured shorthold tenancies) and intermediate rent tenancies.

Condition 2: the dwelling is occupied on a shared ownership basis and certain conditions are met as to size of the initial share purchased and the level of rent.

The collecting authority can claw back social housing relief for up to 7 years following the date of commencement of development where a disqualifying event occurs, for example if the dwellings cease to be qualifying dwellings.

The relief is now available on qualifying communal development which may be for the benefit of both social housing and non social housing elements of a development, provided that the main benefit is not for members of the public or non social housing elements. Furthermore, provisions have been made to allow for the recalculation of CIL if the level of social housing provided is varied.

Market housing relief

A discretionary relief has also now been introduced for discounted market housing. This is defined as housing which is made available at no more than 80% of open market value. A collecting authority must have made a prior policy decision to offer such relief and published a notice to that effect.

Exemption for charities

A CIL eligible development is eligible for charity relief if the chargeable development will be used wholly or mainly for charitable purposes. The part of the development that is to be used for charitable purposes must be occupied or under the control of a charitable institution.

CIL and planning obligations

CIL and planning obligations are intended to be complementary. CIL is intended to provide finance for the provisions of infrastructure to support the development of an area, rather than to make individual planning applications acceptable in planning terms. Section 106 contributions will continue to be used to finance those things that CIL cannot, for example affordable housing.

The tests previously set out in Circular 5/05 and now captured in the National Planning Policy Framework (providing CLG's guidance on use of planning obligations under S106) have been put on a statutory footing in the Regulations. It is now unlawful for a planning obligation to be taken into account when determining a planning application if the old policy tests are not met. In other words, by law, the planning obligation must be necessary to make the development acceptable in planning terms, directly related to the development and fairly and reasonably related in scale and kind if it is to be taken into account in the decision to grant planning permission.

Pooling

In order to incentivise the adoption of charging schedules, CIL Regulations 2010 introduced a further restriction on the use of S106 Agreements by local authorities. Since 6 April 2015, even where there is no charging schedule in place, local authorities have been unable to pool contributions in respect of a specific infrastructure project or type of infrastructure where 5 or more specific planning obligations for that project or type of infrastructure have already been entered into counting back to 6 April 2010. Despite this incentive, adoption has been far from universal. So a developer operating in an area without a charging schedule, whose development creates, say, extra demand for school places, and impact that needs to be mitigated by means of a contribution towards funding of a new school if permission is to be granted, could run into problems if 5 or more s.106 contributions have already been required by the authority for the same impact purpose. In such a scenario, the developer would face a refusal as the local authority could not take the contribution into account. This would be the case even where it was prepared to make the contribution and the authority was otherwise happy with the development. Equally some authorities have found themselves with funding gaps in the respect of the provision of the infrastructure where no further funding of it can be lawfully secured through a S106 Agreement.

This and other aspects of the CIL regime were looked at in an independent review of the CIL which reported to government in October 2016. The report concluded that CIL was not as fast, simple, certain or transparent as originally intended. In the housing white paper published in February 2017, the government announced its intention to respond to the review at the Autumn Budget 2017. Watch this space.

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