Devonshires

IT'S THE LAW:
Community Infrastructure Levy: Still with us

The Government announced last year that it is considering the abolition of the Community Infrastructure Levy, and possibly replacing it (and s106 (Planning) Agreements) with a nationally set Infrastructure Levy. But who knows when, or if, that will come to pass. So the Community Infrastructure Levy is what we have now and, in this edition of ITL, we take a 'back to basics' look at it.

The law

The Community Infrastructure Levy, or CIL as it is pretty universally referred to, is a planning charge (also known as a tax) introduced by the Planning Act 2008. That Act doesn't really go into much detail. Instead, it gives the Secretary of State the power to design and impose the system by way of Regulations. The first set of those Regulations came into force on 6 April 2010 and have been amended on a number of occasion since.

The basics of back to basics

CIL is charged on new buildings being built. It's up to Local Planning Authorities to decide whether to charge it in their area, with CIL rates for the particular area based on the up to date development plan. They can, but they don't have to. Around two thirds of them either do charge CIL or have advanced plans to do so. The money raised is used to fund local and sub-regional infrastructure. Even in an area where CIL is chargeable, there are a number of exemptions and reliefs which may be available.

Who?

CIL is charged by what are known as **charging authorities**. They are the same authorities as prepare development plans (which are a key component of our planning system). They include:

- District and unitary authorities (like Hartlepool Borough Council and Blackpool Council)
- London Boroughs (like the London Borough of Islington)
- The Mayor of London (Sadiq)

How?

If a charging authority wishes to charge CIL they must produce and adopt something called a **charging schedule**. That is a document which sets out the rates of CIL they will charge in their area. CIL rates have to be expressed in 'pounds per square metre of chargeable

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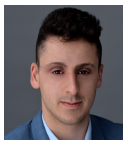

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development'.
Charging authorities can, and do, set different rates:

- on a geographical basis (e.g. one set of rates for the town centre and another elsewhere)
- by reference to the intended use (e.g. a rate for residential development and other rates for other uses such as retail)
- by reference to the intended gross internal area of the development (e.g. different rates for large and small projects)
- by reference to the intended number of dwellings or units to be built (e.g. again, different rates for large and small projects)

The charging authority has to balance raising the funding required for the infrastructure needs of the area which are to be paid for from the CIL revenue as against not putting at serious risk the overall development of the area.

Charging authorities are required to apply annual inflation indexation to the rates they set so that those rates are not eroded over time as prices rise. The measure of inflation used now is the Royal Institution of Chartered Surveyor's CIL Index. It used to be their All-in Tender Price Index.

Usually CIL is paid in money (i.e. £s). But charging authorities and those paying CIL can agree to give land or infrastructure instead of money. But that can get complicated.

Simples

Broadly speaking, whether or not CIL may be chargeable on a development will depend on quite a simple question: *on the day that planning permission was granted, did the charging authority have a formally adopted charging schedule?*

If it had one, then the CIL regime applies. If it didn't, then it doesn't.

As referred to above, a number of charging authorities are in the advanced stages of the process of adopting a charging schedule. If a developer has a planning permission in the works in one of those areas, it will want to keep a close eye on where things stand. In particular, it needs to make sure that negotiations for a s106 (Planning) Agreement don't drag the date that planning is formally granted until after the adoption has taken place.

What?

So now we have a charging schedule that sets out the rates that apply to every square meter of chargeable development. The next question is: *what is chargeable development?*

- it includes anything done to create a new building
- it includes anything done in respect of an existing building
- it does not include development that is not a building

That means roads, gardens and wind turbines do not amount to chargeable development. If you develop a new golf course then the fairways, greens and rough do not amount to chargeable development and can be safely ignored. But the clubhouse, on the other hand, will fall squarely within the ambit of CIL.

There are some other fiddly rules in this area. For example:

- buildings into which people don't normally go are excluded. That might, for example, include a freestanding electricity substation.
- development within a building which is above ground, which only affects the interior and does not materially affect the external appearance is excluded. That might mean you can install a mezzanine floor to an existing building, thereby adding significant floorspace, without triggering CIL.
- development which is less than 100 square meters is not chargeable unless it amounts to a whole new home

When?

There are a number of whens that are relevant when it comes to CIL. One when is when CIL is payable. But first, we need to look at when CIL is calculated.
In connection with a development, CIL is calculated when planning permission 'first permits development'.

Usually that's as soon as planning permission is granted. That's not when the committee votes, nor when the Judicial Review period expires. It's the date stamped on the written planning permission. But nothing is that simple so…

- an outline permission 'first permits development' once all the reserved matters have been approved;
- for planning permissions which refer to phases 'first permitting development' is assessed on a phase by phase basis based on the approval of reserved

matters for a particular phase or the clearing of pre-commencement conditions;
- not all development requires the grant of a specific permission. For example, s59 of the Town and Country Planning Act 1990 enables the Secretary of State to make what are known as development orders. When made, a development order acts a general planning permission for the type of development described in the order. In these cases, development is said to be 'first permitted' when a chargeable development notice is served – see below.

Existing buildings

If a site has an existing building on it which is going to be demolished to make way for the new development then, in certain circumstances, you can take the square meterage of that building into account when calculating how much CIL is to be paid on the new development (i.e. you only pay CIL based on the additionality). The 'certain circumstances' are that the old building has been lawfully used for a continuous period of at least 6 months at least once in the previous 3 year period. Other, similar, rules apply where an old building is to be incorporated into a new development.

Who?

The collecting authority is usually the same as the charging authority. But not always. In London, Sadiq gets his CIL collected by the London Legacy Development Corporation (at the Olympic site), by the Old Oak and Park Royal Development Corporation (out in west London) and by the London Boroughs.

How?

The detail of the collection process is set out in the Regulations.

Applicants for planning should submit an Additional CIL Information Form with their planning application form. This form provides the collecting authority with the information it will need to calculate how much CIL is payable.

If the development doesn't need a specific planning permission (e.g. because it's covered by a development order issued by the Secretary of State) then the developer is to submit a Notice of Chargeable Development before it starts the development. This too provides the collecting authority with the information it needs to calculate how much CIL will be payable.

Usually, the developer or landowner will lodge an Assumption of Liability Form – which mean that that person is assuming liability to pay the CIL. Failing to file such a form doesn't mean no CIL is payable. They've thought of that. If no Assumption of Liability Form is lodged then the collecting authority will apportion the liability between those with a material interest in the land. That's a freehold or leasehold (exceeding 7 years) interest in the land. That is known as default liability. Default liability will pass to new owners if the interest in land is subsequently transferred. So it's something to be wary of when buying land.

The collecting authority issues a Liability Notice which sets out how much they calculate is due. That is sent to the person who applied for planning or for reserved matters approval, the person who has assumed liability, the person who served a chargeable development notice (if the development didn't require specific planning permission) and the owner of the land.

The developer then serves a Commencement Notice setting out when development is to start. This must be served no later than the day before the day that the development commences.

The Collecting Authority then issues a Demand Notice setting out the payment due dates

Following commencement of the development, the person liable to pay CIL should then follow the payment procedure.

When? (another one)

The liability to actually pay CIL is not triggered by the grant of planning nor by the service of any of the notices referred to above. What actually triggers the requirement to pay CIL is the commencement of development. That usually occurs when the first material operation in carrying out the development takes place. Material operation is defined by reference to section s56(4) of the Town and Country Planning Act 1990 and includes:
- Work of construction of a building
- Work of demolition of a building
- Digging a trench which will contain foundations of a building
- Laying an underground main or pipe to the foundations of a building

Charging authorities are allowed (but not required) to have a policy of accepting the payment of CIL in instalments. In addition, where a planning permission formally divides a large development into phases, then each phase is treated as a separate chargeable development and so the

requirement to pay CIL, in relation to each phase, is not triggered until a material operation in relation to that phase occurs.

How appealing is CIL?

The Regulations include various avenues to appeal a number of the decisions that get made by the charging and collecting authorities in the process of setting, calculating and collecting CIL. The details are detailed and beyond the scope of a note of this nature but there are two common themes that are worth bearing in mind.

Firstly: there are short and strict time periods within which appeals can be made. So, if there is a decision of a collecting or charging authority that you don't like, then contact us straightaway. Not tomorrow, not next week – straightaway.

Secondly: in many instances, appeals need to be made before development is commenced. So, if you are unhappy with a decision of a collecting or charging authority, you can't just 'get on with the development' and sort out CIL later.

Nearly at the end. What a relief.

So, now we have looked at the who, how, what, when, who, how and when of CIL. We hope you are still with us. The last and final section of this note looks at the reliefs that may be claimed to reduce the amount of CIL that would otherwise be payable. The detail in the Regulations around reliefs and exemptions really is detailed. You'd be wise to treat the next section as a bit of a taster. Look on it as the tip of the iceberg. If you need to consider the reliefs in respect of any project you are working on, you should get in touch, so we can help in applying the detailed details to the actual detail of your project. Before we get started there are some common themes:

Firstly: the exemptions only apply if the obligations imposed by the Regulations, such as the giving of notices, are followed. Those wanting to take advantage of an exemption need to make sure that they follow the CIL requirements to the letter.

Secondly: exemption applications must be made and determined before development commences. Don't get caught out.

Thirdly: the exemptions can be withdrawn in certain circumstances. And that will require the CIL to be paid.

So, on with the exemptions…

Exemption for minor development

- New buildings (or enlargements to existing buildings) below 100 square metres of gross internal floor space are exempt, unless the development creates a whole new dwelling.
- This exemption is automatic (i.e. it doesn't actually need to be claimed).
- If the development is 101 square metres, then all 101 square metres are liable for CIL, not just the additional 1.

Exemption for residential annexes or residential extensions

- For this exemption to apply the following conditions must apply: Firstly, the claimant must have a material interest in a dwelling (the main dwelling). Secondly, that claimant must live in the main dwelling as their sole or main residence. Thirdly, the development must be a residential annex (which means it is a whole new dwelling and is within the curtilage of the main dwelling) or a residential extension (which means that it is an enlargement to the main dwelling and does not comprise a new dwelling).
- A claim must be made (and determined) before development is commenced.
- This exemption will be withdrawn if, within 3 years of completion of the works, the main dwelling ceases to be used as a single dwelling, or the annex is let or the main dwelling or annex are sold separately from each other.

Mandatory exemption for charitable institutions

- A charitable institution will be exempt from CIL on a chargeable development if, firstly, it owns a material interest in the land, secondly, it doesn't own that interest jointly with a non-charity, thirdly, the development will be wholly or mainly for charitable purposes and, fourthly, the part of the development used for charitable purposes is occupied or controlled by that charity.
- To secure the exemption the charity must submit a claim with its planning application (or Notice of Chargeable Development) and ensure that its claim is determined before the development is commenced.
- This exemption will be withdrawn if, within 7 years after commencement of the development, the charity ceases to be a charitable institution, the building is used for a non charitable use, the interest in the building owned by the charity is sold to someone who isn't a charitable institution or a lease owned by the

charity comes to an end (if their landlord isn't also a charity).

Discretionary relief for charitable purposes

- Mandatory charitable relief, referred to above, requires the development in question to be used, itself, for charitable purposes. Charging authorities also have a discretion to allow relief where a development is used as an investment by a charitable institution. This exemption applies if, firstly, the relevant charging authority exercises its discretion to apply this exemption in its area, secondly, the charging authority follows a procedure prescribed by the Regulations, thirdly, the land is owned wholly, or in the main, by a charitable institution (and if owned jointly the other owners are also charitable institutions) and, fourthly, the development is not used for trading activities (other than a charity shop)
- To secure exemption, the charity must submit a claim with its planning application (or Notice of Chargeable Development) and ensure that its claim is determined before the development is commenced.
- This exemption will be withdrawn if, within 7 years after commencement of the development, the charity ceases to be a charitable institution, the building is used for ineligible purposes, the interest in the building owned by the charity is sold to someone who isn't a charitable institution or a lease owned by the charity comes to an end (if their landlord isn't also a charity).

Reliefs for social housing

- Social Housing Relief is a mandatory relief that applies to most social rent, affordable rent and intermediate rent provided by a local authority or private registered provider and shared ownership dwellings. Subject to meeting other conditions, social housing relief can also be claimed on discounted rent products provided by other bodies. In addition charging authorities have the discretion to widen social housing relief to additional tenures.
- To claim social housing relief, the claimant must make the claim and ensure that it is determined before development commences.
- Social housing relief will be withdrawn if a disqualifying event occurs within 7 years from the commencement of the development. A disqualify event is helpfully described as an event causing the dwelling no longer to be eligible for social housing relief. The sale of a dwelling is not a disqualifying event if the proceeds are reinvested in another dwelling that qualifies for relief.

Exemption for self build housing

- Self-build housing (which is housing built by or commissioned by the occupant) or self-build communal development (development for the benefit of occupants of one or more self-build dwellings) is eligible for exemption from CIL.
- Any claim must be made and determined before the development commences. There are requirements to complete and submit further forms within 6 months of completion of the works.
- The self-build exemption will be withdrawn if, within 3 years of completion of the works, anything happens to the dwelling which means that the development ceases to be a self-build dwelling or self-build communal development or the development is let out or the development is sold.

Discretionary relief for exceptional circumstances

- This form of relief only applies if the charging authority exercises its discretion to implement it. It applies where a development is subject to a s106 (Planning) Agreement and the charging authority considers that the payment of CIL would have an unacceptable impact on the economic viability of the development.
- Broadly, this relief is to provide help if the application of CIL, alongside a s106 (Planning) Agreement, results in 'double charging'.
- This relief may be withdrawn if charitable or social housing relief is claimed or if the land is sold.

Find out more

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