

## Community Infrastructure Levy

### Advice for landowners and developers

#### April 2010

#### **1 When does CIL take effect?**

The new regulations come in to force today, 6 April 2010. But CIL is not payable unless on the day planning permission is granted for the development in question a charging schedule is in effect in the area. The position is slightly different where the development is commenced pursuant to a “general consent” ie, a development order (permitted development rights), local development order or enterprise zone.

This does not however mean that we can ignore CIL until charging schedules are in force. The regulations immediately affect new planning permissions with s. 106 agreements. And options and conditional contracts, because they may complete after a charging schedule comes in, will need to address CIL. There are also effects which will be relevant to planning applications made at any time.

#### **2 The “scaling back” of s. 106 agreements**

From 6 April 2010 a planning obligation which does not comply with three tests cannot be taken into account in the decision to grant planning permission. If this new rule is breached the planning permission will be highly vulnerable to successful judicial review. The planning obligation can only be taken into account if it is (a) necessary to make the development acceptable in planning terms; (b) directly related to the development; (c) fairly and reasonably related in scale and kind to the development. These are three of the five tests in Circular 5/2005.

The advantage of this for developers and landowners is that they can argue with a planning authority which seeks the obligation which goes beyond those tests. The disadvantage is that an obligation which accidentally goes beyond the tests makes the permission vulnerable to successful judicial review. There will also be the potential for the issue to be raised by what is known as a collateral challenge – when the permission is considered in other related matters, such as enforcement. This hands a considerable weapon to objectors. It will be important to be careful therefore to stay within tests (a) –(c) above.

Where it is desirable to go outside those tests, different legal mechanisms will be necessary. We have proposals which we can develop in appropriate cases with any client. In the case of controversial planning applications it may be worth examining them in any event.

The scaling back of planning applications does not apply to s. 73 permissions.

There are further limitations which were not in the consultation. Where a local authority has brought in CIL, planning obligations cannot be a reason for granting planning permission to the extent that the obligation provides for the funding or provision of “relevant infrastructure”. This is any infrastructure which the authority lists to be wholly or partly funded by a CIL or, if

they have not published a list, then any infrastructure. The meaning of infrastructure is very open ended.

Secondly there is an anti-tariff provision. A planning obligation cannot constitute a reason to grant planning permission if it provides for the funding or provision of an infrastructure project or type of infrastructure and there have been five or more separate planning obligations which relate to planning permissions granted for development within the charging authorities area which also provide the funding or provision of that project or type of infrastructure. This does not affect determinations made before 6 April 2014 or, if earlier, the date on which the authority's first charging a schedule takes effect. There are a number of issues about this which are too detailed to explore here, such as how to ascertain how many previous obligations there have been.

### **3 Who is liable?**

There are complex provisions for the assumption of liability. However, these should not obscure the fact that ultimately landowners are liable. They are responsible where no other person has assumed liability, and where someone has assumed liability but the collecting authority has been unable to recover CIL from that person. We are talking here about the landowners of the land to which the planning permission relates. Where there is a phased outline permission it is the owners of the land to which the phase relates.

There are special provisions where a general consent is implemented. Before commencing development authorised by a general consent, notice of chargeable development must be submitted to the collecting authority. This suggests that every time permitted development rights are exercised a notice must be given, despite the fact that there is no liability for CIL if the chargeable development does not result in a creation of 100 or more square metres, gross internal area, of new build<sup>1</sup>.

It is open to anyone to assume liability to pay CIL. The idea is that developers will do this. There are formalities for assuming liability and having done so the person is liable on the commencement of the chargeable development. Before commencement however the notice can be withdrawn.

It is possible to transfer assumed liability, for example where the developer sells a phase to another developer. Again there are formalities which must be complied with. Transfer is the only way in which liabilities can be assumed after commencement of the development.

Death will cancel an assumption of liability where the person dies before commencement of development. In those circumstances the landowner will become liable.

There are special rules for trusts.

Landowners entering into options, conditional contracts, long-term contracts and development arrangements will need to address the CIL position with their purchasers and consider what arrangements, which may include security, are necessary.

Landowners also need to be aware that where their land is included in a planning application made by somebody else, they will be liable for CIL if there is no assumption of liability, if CIL is not paid where liability has been assumed, or if the person assuming that liability dies. It is difficult to see what can be done about this and it is likely that the Government has not taken this on board although it was raised by us and the Law Society in our comments on the draft regulations.

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<sup>1</sup> It will however be chargeable development if a new dwelling is created, regardless of size.

Because landowners are ultimately liable for CIL developers may find it advantageous to include within the planning application area the landowners who are unwilling to sell. Faced with the prospect of a CIL liability where the developer does not assume it or where the developer fails to pay the owner may be more willing to negotiate. Of course this does mean that the developer will have to bear the risk of the landowner implementing the permission and thereby triggering the CIL liability if the developer had assumed liability but the answer there would be not to assume liability.

#### **4 Exemptions and reliefs**

There are elaborate reliefs for charities, the investment activities of charities and social housing. Relief can also be claimed for exceptional circumstances where there would be an unacceptable impact on the economic viability of the project.

There are important formalities which must be followed and if development is commenced before a decision has been given the claim is deemed to be abandoned.

#### **5 When is CIL payable?**

Surprisingly the regulations are not obvious about when CIL is payable. It is due in full on the intended commencement date if nobody has assumed liability to pay CIL, the collecting authority have received a commencement notice and they have not determined a deemed commencement date. If the authority does determine a deemed commencement date then CIL is payable in full on that date. If a person has assumed liability but the collecting authority has been unable to recover CIL and it then transfers the liability to the landowner(s) payment is due on the deemed commencement date. Payment is due in full immediately where a disqualifying event occurs (this is relevant to the reliefs). CIL is also payable in full immediately unless the disqualifying event is notified to the collecting authority in which case it is payable seven days after their demand notice. It might be thought that by not serving a commencement notice one could avoid liability. This would be unwise however as the authority must determine a deemed commencement date if it does not receive a commencement notice or if it has reason to believe that development was commenced earlier than the intended commencement date.

If a person has assumed liability for CIL, a commencement notice is served and the collecting authority does not determine a deemed commencement date, then there are provisions for payment by instalments. Where the chargeable amount is £40,000 or more the instalments are due 60, 120, 180 and 240 days after the intended commencement date. For lesser amounts there are fewer instalments.

#### **6 Phased developments**

This only applies to outline planning permissions. If the permission permits development to be implemented in phases then the "relevant land" is the land to which the phase relates. The default provisions which make landowners liable, transfer the liability to the owners of the "relevant land". So it would appear that the liability to CIL on a phased development is divided amongst owners of the phases and that an owner of say just phase one is not liable for CIL in phase three.

#### **7 Payment in kind**

Normally CIL is payable in cash. However, it is possible to transfer land where the CIL exceeds £50,000. The land has to be valued of course and the charging authority must aim to ensure that it is used for a "relevant purpose". The transferor of the land must be a person who has assumed liability to pay CIL. Developers and landowners will need to note this when structuring land acquisitions.

## **8 Participating in the CIL setting process**

Before a local authority can charge CIL it has to draw up the charging schedule. This is a public process with opportunities for objections and independent examination. The process will be described in our next note on CIL. The first opportunity to comment is on the preliminary draft. A full draft is then published together with the supporting evidence and details of the procedure for making representations. This must give at least four weeks for representations. Any person who makes representations has a right to be heard by the examiner carrying out the independent examination.

The examiner is in charge of the hearing and it is likely that it will be similar to the existing LDF hearings. After the examination the examiner makes recommendations. The charging authority can only adopt the charging schedule if the examiner has recommended approval and must do so subject to any modifications he has recommended.

Charging schedules will deal with the rate of CIL and differential rates for different zones or different uses. Rates must balance the desirability of funding infrastructure and the effects of CIL on economic viability. The schedule may also include a list of infrastructure upon which CIL is to be paid. Representations can obviously be made about any of these aspects.

## **9 Appeals and enforcement**

There are provisions for appeals against the calculation of CIL, the apportionment of liability, reliefs and stop notices. Costs orders can also be made.

The charging authorities have a panoply of enforcement provisions ranging from surcharges to criminal liability, imprisonment and recovery by distress. It is worth mentioning in particular a stop notice can require relevant activity to cease if CIL has not been paid. It binds not only the person who has not paid but all other owners of the relevant land.

If you would like to know more about CIL then please do not hesitate to contact [David Brock](#), [Beverley Firth](#), [Rebecca Carriage](#), [Caroline Bywater](#), [Oliver Ennis](#) or the partner with whom you normally deal.

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