

Community Infrastructure Levy and Section 106 Agreements – New restrictions come into force

As from 6 April 2015, new limitations will apply to contributions levied by new Section 106 Agreements which are pooled for infrastructure provision. A number of authorities are in the process of finalising their Community Infrastructure Levy (CIL) regimes which should take over from this type of pooled Section 106 funding. This briefing gives a reminder of the new restrictions and sets out, in the Appendix, a "primer" describing key aspects of CIL.

Currently an authority can pool funds from Section 106 Agreements associated with an unlimited number of development schemes to fund, for example, a key school project even once its CIL regime is in place, as long as that project is not contained in the authority's list of infrastructure to be funded through CIL¹

A new restriction will apply as from 6 April 2015: an authority will **not** be able to pool funds received under Section 106 Agreements associated with more than 5 planning permissions, where those funds are to be used for any one infrastructure project or type of infrastructure (counting those permissions granted since 6 April 2010)². This will apply irrespective of the projects or types of infrastructure an authority will fund through CIL, and even if it has no CIL in place.

As a result, any authority which does not have a CIL Schedule which provides for all relevant major infrastructure in its area will be disadvantaged. Authorities have therefore been rushing to implement their CIL Schedules before 6 April 2015³. In London for example, CIL Schedules for the London Boroughs of Southwark, Camden and Tower Hamlets all come into effect on 1 April 2015. Kensington & Chelsea's CIL regime comes into effect on 6 April 2015. By contrast, Westminster CC is still in the process of implementing its CIL. Developers should note that CIL will be chargeable on planning permissions granted after CIL Schedule comes into force in the area, even where the planning application and committee resolution to grant were made before the CIL Schedule comes into force.

Key issues

- From 6 April, new prohibition on pooling Section 106 funds from more than 5 developments
- The Appendix contains a primer setting out key aspects of the Community Infrastructure Levy regime

¹ This type of agreement would include the so-called "Milton Keynes" tariff that is currently used in certain areas to pool infrastructure funds from multiple developers.

² In technical terms, the prohibition works by preventing the Section 106 Agreement for the 6th planning permission being used as a reason for granting that permission if the funds are to be pooled for the same infrastructure project or type of infrastructure as the first five permissions.

³ The original deadline was moved back on successive occasions from 2012 due to concerns that authorities were insufficiently far forward with their local plan preparation and CIL strategy to meet the earlier dates.

Once a CIL Schedule is in place in a planning authority area, Section 106 Agreements will broadly be restricted to affordable housing and other site-specific obligations to deal with direct impacts of the development. The real tests of the CIL regime and altered planning obligations regime will then begin:

- Will authorities still seek to include planning obligations for infrastructure in Section 106 Agreements (or highways agreements) that should be funded by CIL (the "double-dipping" question)?
- How will payments-in-kind (in the form of Infrastructure Payments and Land Payments, see the Appendix) be taken up by developers to offset their CIL liabilities?
- Will authorities provide the infrastructure that has been funded by CIL on a timely basis.
- Will Section 106 Agreements take any less time to negotiate where CIL is in place?
- Will CIL reduce the amount of development in the relevant area, as recent evidence in relation to housing applications reportedly suggests?

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Appendix – How CIL works – Key Points

The regime for CIL is provided under the Planning Act 2008 and the Community Infrastructure Levy Regulations 2010 (as amended) and applies in England & Wales.

How will CIL be set by charging authorities?

Charging authorities will set CIL based on the amount of infrastructure required to support development in the area concerned. Differential CIL rates can be charged for different types or sizes of development or for development in different zones (but must consider the impact on development viability). Tariffs must be set as [X] £ / sq m gross internal floorspace. Payment of CIL is then subject to indexation.

In London, development may be subject to Mayoral CIL⁴ as well as CIL imposed by the local authority where the development is located.

Responsibility to pay CIL

Which Developments?

Subject to a few exceptions, discounts and a threshold of 100 sq m of development, CIL will be chargeable on the development of most types of buildings (whether express permission is required or not).

CIL is only chargeable on the net increase in floorspace although there are complicated provisions to identify whether existing floorspace can count to reduce CIL liability.

CIL will only be chargeable on development under planning permission granted after a Charging Schedule has come into effect.

When is CIL on a development valued?

CIL, index-linked from the time the Charging Schedule was put in place, will be applied to a development based on the date it is "first permitted". For a full permission, this is the later of the grant of planning permission and satisfaction of the last remaining condition needing to be satisfied before commencement of development. For an outline permission it is the grant of approval in relation to the last remaining reserved matter. Where permissions are phased, this results in separate CIL charges for each phase of the development.

Developers relying on Permitted Development rights will be required to serve a "Notification of Chargeable Development" before they carry out the development. This will crystallise the CIL charge.

Who is liable?

Anyone can assume liability for CIL but where no party does so (or there is default), the owners will be liable based on the value of their land interest (and surcharges may be applied). The owner is any freeholder and any leaseholder with over 7 years of the lease term remaining at the time the development is first permitted. A person who has assumed liability can transfer liability to another person at any time before the final CIL payment becomes due.

Reliefs

Various reliefs exist for charities, social housing provision and exceptional circumstances.

Where charging authorities choose to adopt it, "exceptional circumstances relief" is a discretionary relief from CIL based on evidence being provided that the development would not be viable if full CIL payment was made.

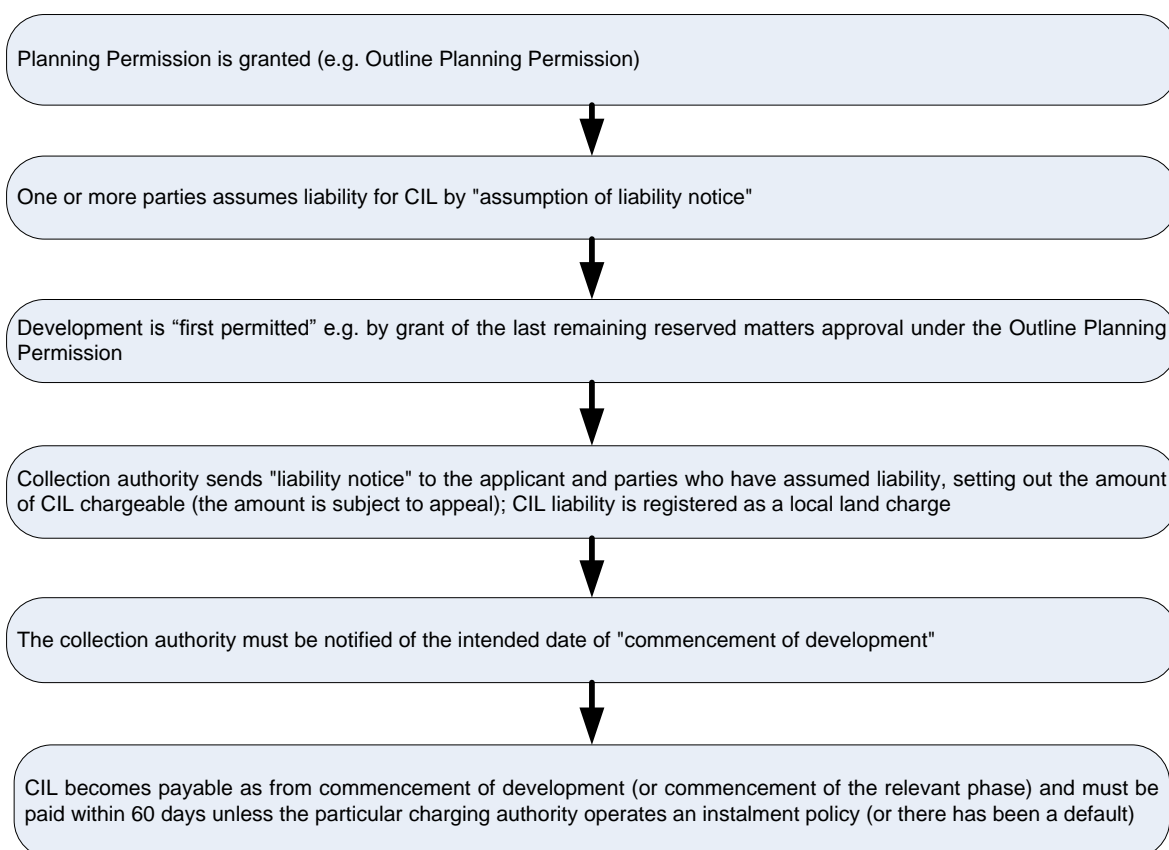
⁴ Mayoral CIL is imposed to help fund the Crossrail project.

Social Housing Relief applies for the development of qualifying social housing. This includes: social rented housing; intermediate rental housing (up to 80% of market rent); and shared ownership lease arrangements where the initial premium payable does not exceed 75% of market value, with limits on further rent. Social Housing Relief is subject to clawback if, within a 7 year period, dwellings cease to be qualifying social housing. Clawback is from the original applicant for relief except where the housing has been sold before occupation in which case the clawback is from the buyer.

There are complex provisions relating to entitlement and procedures for applying for such reliefs.

The CIL payment process

Broadly speaking, CIL payment works as follows:



Where a planning application has been made in relation to a site incorporating several plots (such application requires no ownership interest), commencement of development on one plot could cause CIL to be imposed on other plot owners without their consent. A "suspension of demand notice" procedure may help to prevent an innocent plot owner having liability unknowingly imposed on them.

Payment in kind

CIL can be satisfied (in whole or part) by payments-in-kind in two ways.

Land Payments

A payment can be made through the transfer of land to the authority (or to a third party nominee) to be used for infrastructure purposes, a so-called "land payment".

There are various conditions including that the amount credited against CIL liability is the independently assessed market value of the land.

Infrastructure Payments

A payment can be made through provision of infrastructure, and the amount credited against CIL liability will be the cost of the infrastructure provided. However, infrastructure cannot be accepted as payment if it is necessary to overcome a planning objection to the scheme as this should properly be provided through a Section 106 Agreement or planning condition.

General

An agreement to make a land payment or infrastructure payment must be made before the development is commenced. Although this cannot be a Section 106 planning obligation, it is as yet unclear whether, for convenience, the relevant provisions could still be contained within a Section 106 agreement as a standalone provision.

Enforcement

Various new powers are given to collecting authorities to deal with non-payment of CIL and other breaches of the provisions. These include, in particular, surcharges on late payment and a CIL Stop Notice which can require development to stop if CIL has not been paid. Failure to comply with a CIL Stop Notice would be a criminal offence.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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69697-5-1648

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