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Community Infrastructure Levy

November 2018

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Community Infrastructure Levy 'CIL' is a charge on new buildings and/or floorspace. To charge CIL a Council must have a CIL charging schedule in place. CIL is calculated through complex formulae that relate to the size and nature of the proposed development, indexation and the CIL rate (as set out in the charging schedule). There are several reliefs and other tricks that well-advised developers can use to reduce their CIL bill, as well as many pitfalls to avoid.

In use building credit

Developers can get CIL relief by offsetting the floor space of existing buildings against the CIL liability for new development. To qualify, part of the existing building must have been in lawful use for a continuous six month period in the three years before the 'first permits date'. This credit is available whether the developer plans to demolish or retain the in use building.

The 'first permits date' for an unphased full planning permission is the date the planning permission is granted. For an unphased outline permission it is the date of the final approval of reserved matters. The position is more complex for phased permissions.

The definition of 'In lawful use' was considered in the case of *R (Hourhope Ltd) v Shropshire Council*. The Court decided that a building must be in actual use. It is not enough that the building could in theory be used.

If a developer demolishes the building before the 'first permits date' 'In use' building credit will be lost.

The developer must also vigilantly watch the clock during the application process. The relief can easily be lost where delays in the permission being issued build up and cause the six month period of use to have occurred more than three years before the 'first permits date.'

Retained building credit

Retained building credit is a form of in use building credit. To qualify for this relief the use of a building following completion of a development must be a use that can be carried out on 'lawfully and permanently without further planning permission' in that part on the day before planning permission first permits that development. The meaning of 'lawfully and permanently without further planning permission' is not clear.

The courts have said in other CIL cases that the CIL regulations should be interpreted as they are written. The developer can 'take advantage of the legislative scheme'. This suggests that it is enough that there is an extant planning permission for that use available to the developer.

Some Councils have concluded that it is not sufficient for the building to have the benefit of an extant planning permission. They argue that the premises must be capable of being put to that use without further works, at the time the new development is commenced. This stretches the literal meaning of the regulations. Developers will need specialist advice to argue this point.

Social housing relief

Mandatory social housing relief is available for most social rent, affordable rent, intermediate rent and shared ownership accommodation. Discretionary social housing relief may be available for other types of affordable units if the Council publishes a notice confirming which tenures will qualify for relief in its area. To qualify the Developer must be an owner of the land and:

1. 'Assume liability' for CIL by giving notice to the Council;
2. Submit a 'Claiming for Exemption or Relief Form' which identifies where the affordable dwellings will be built;
3. Agree the quantum of relief in writing with the Council before commencement of the development; and
4. Submit a commencement notice.

If a mistake is made social housing relief will be lost.

Any relief granted must be repaid if the dwelling no longer qualifies for the relief granted within a period of 7 years from commencement of the development. If an affordable housing unit is re-located within a development it is possible that the CIL relief will need to be repaid, even if the overall quantum of affordable housing remains the same. This can be an issue for build to rent developments. Developers must be well advised and prepared to safeguard their entitlement to this relief.

Knotty issues

1. Indexation and minor material amendments

Will the minor material amendment result in an increase in chargeable floor space?

Yes

- Re-run CIL calculation.
- If BCIS index has changed since original permission Council may argue need to pay increased indexation for **whole development**.

No

- No re-run of CIL Calculation.
- No increased indexation payment.

Increased liability for indexation can amount to £100,000s. The regulations need clarifying on this point, but with advice it is possible to engage with Councils on this now to reduce the CIL bill.

2. Double CIL Bill for S73A – Retrospective variation to a planning permission

- No abatement is available for section 73A applications.
- A section 73A permission will result in a second full CIL bill **for the whole Scheme!**
- Developers should take advice on whether they can use an alternative to a section 73A application.

3. Mezzanines

- **No CIL** for retail mezzanines to existing buildings.
- **No CIL** for mezzanines where works are 'wholly internal'.
- **CIL payable** for mezzanine floor space if part of scheme which requires planning permission e.g. when there are external alterations.

Abatement

Developments often change and evolve throughout the construction and letting/occupation process.

If an amendment increases the chargeable floor space, the Council will re-calculate CIL for the entire scheme. Non-material amendments do not require a new CIL calculation. Developers can use abatement to avoid paying CIL on the same floor space twice if they get a new planning permission or a minor material amendment permission when the first development is incomplete.

Abatement is not available as of right. The developer must apply and follow the correct process. The Council can refuse to allow abatement if the developer:

- commences development pursuant to the new permission before requesting abatement from the Council; and/or
- fails to submit proof or a 'receipt' for CIL already paid.

CIL Danger

Failure to follow the CIL procedure correctly can have severe consequences for developers.

The Charging Authority can impose a surcharge equal to 20% of the chargeable amount (or £2500 whichever is the lower) if a developer fails to serve a commencement notice or a notice of chargeable development. This surcharge is also payable if a developer fails to notify the authority that they have been disqualified from an element of CIL relief that has been applied to their property. Where a 20% surcharge is payable the ability to pay in instalments is also lost and all CIL monies become due at once. There are also a large number of smaller surcharges

payable as a result of failure to serve other notices. Failure to serve an assumption of liability notice will mean that the ability to pay in instalments is also lost.

Interest at a rate of 2.5% above base rate is charged for late CIL payments.

Developers must ensure full compliance with the CIL regulations and should seek specialist advice if necessary. Failure to comply with the procedural aspects of CIL can mean that other planning breaches are uncovered and enforced against.



Contacts



Ashley Damiral
Partner
T +44 20 7367 3562
E ashley.damiral@cms-cmno.com



Martin Evans
Partner
T +44 20 7524 6950
E martin.evans@cms-cmno.com



Stephen McNaught
Partner
T +44 20 7367 3887
E stephen.mcnaught@cms-cmno.com



Josh Risso-Gill
Partner
T +44 20 7524 6124
E josh.risso-gill@cms-cmno.com



Chris Bowes
Partner
T +44 114 279 4006
E chris.bowes@cms-cmno.com



Ann Faulds
Partner
T +44 131 200 7452
E ann.faulds@cms-cmno.com



June Gilles
Partner
T +44 131 200 7461
E june.gilles@cms-cmno.com



Robin Hutchison
Partner
T +44 131 200 7553
E robin.hutchison@cms-cmno.com



Rebecca Roffe
Senior Associate
T +44 114 279 4040
E rebecca.roffe@cms-cmno.com



Nicola Insley
Senior Associate
T +44 20 7524 6018
E nicola.insley@cms-cmno.com



Tim Stansfeld
Senior Associate
T +44 20 7524 6475
E tim.stansfeld@cms-cmno.com



Mark McMurray
Senior Associate
T +44 131 200 7860
E mark.mcmurray@cms-cmno.com



Joanna Waddell
Senior Associate
T +44 131 200 7454
E joanna.waddell@cms-cmno.com



Robert Garden
Senior Associate
T +44 20 7367 3546
E robert.garden@cms-cmno.com



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CMS Cameron McKenna Nabarro Olswang LLP
Cannon Place
78 Cannon Street
London EC4N 6AF

T +44 (0)20 7367 3000
F +44 (0)20 7367 2000

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