WHITE & CASE

Insight: Real Estate

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Community Infrastructure Levy ("CIL")

An Overview

The Community Infrastructure Levy ("CIL") is a new planning charge, often referred to as a land development tax, which applies to commercial and residential property. It will come into effect for the first time in all London Boroughs from 1 April 2012, and other local authorities nationwide are likely to implement the CIL in the near future (to the extent they have not done so already). The CIL is a charge on new buildings above 100 square metres, based on the size and character of the development. It can be imposed at the discretion of local planning authorities. It is designed to sit alongside Section 106 Agreements, to help fund local infrastructure (and only infrastructure) identified in a local planning authority's development plan.

White & Case's View

Although discretionary, we believe that the majority of local planning authorities will implement the CIL in order to provide additional funding for a wide range of infrastructure projects, which will in turn support growth and benefit the local community. At present, developer-funding of infrastructure relies on Section 106 Agreements, which are negotiated between the local planning authority and the developer on an ad-hoc basis, and are therefore subject to inappropriate variables, such as the skill and experience of the planning officers and developers involved. This can often lead to a developer paying a disproportionate levy in order to facilitate a particular development. Because CIL is based on the size and character of a development, this should promote a more transparent levy for all. However, if a particular development requires specific infrastructure, without which the development would not proceed, it clearly makes sense for the developer in question to fund a larger proportion of that infrastructure. On this basis, it seems likely that Section 106 Agreements will continue to remain in place as the legal underpin for negotiated financial contributions. There is provision in the legislation for CIL relief to be granted to developers who are subject to Section 106 obligations, in order to mitigate the risk of double charging.

Frequently Asked Questions

On the basis that the CIL is only to be used by local authorities to fund "infrastructure", how is this defined?

"Infrastructure" includes roads and other transport facilities, flood defences, schools and other educational facilities, medicinal facilities, sporting and recreational facilities and open spaces. Affordable housing cannot be funded through CIL.

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How will the CIL be set?
CIL rates must be set out in a charging schedule, based on the net internal area of the development. The charging schedule will be index linked.

Charging authorities may set different rates of CIL, set either on a geographical basis, or by reference to the intended use of the development. For example, the Mayor of London will charge £50 psm for "Zone 1" boroughs, including City of London, City of Westminster and Islington; £35 psm for "Zone 2" boroughs, including Hillingdon, Harrow and Tower Hamlets; and £20 psm for Zone 3 boroughs, including Newham and Croydon.

How do charging authorities calculate their CIL rates?
Rates are based on the total cost of infrastructure requiring funding from CIL, other sources of available funding (eg government grants), and the potential effect of CIL on the viability of development of the area.

The Planning Act 2008 allows charging schedules to operate by reference to "values or expected values". Concerns have been raised that this could allow a charging authority to base its charges on a percentage of the value uplift in the land. It remains to be seen whether this will be implemented.

Any existing floor space that will be demolished before completion of the development, which has been in continuous lawful use for at least 6 months prior to planning permission being granted, will be taken into account when calculating CIL and will reduce the CIL liability. We will watch with interest to see whether this will put developers off developing vacant buildings, given vacant buildings will not benefit from the CIL liability reduction.

What is "CIL liable development"
CIL liable development is "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". The definition is deliberately very wide to catch as much as possible, although "building" does not include a building into which people would not normally go (such as an electricity substation).

Any development that is not a "building" will not be chargeable to CIL. Therefore, developments such as roads, railways, pipelines, overhead cables and wind turbines will not be liable to pay CIL.

Who is liable to pay CIL?
The person who "assumes liability" to pay CIL, assumed by submitting an "assumption of liability notice" to the collecting authority. Liability can be held by multiple parties, who will assume joint and several liability.

Where no-one assumes liability, liability will be apportioned between those persons having a "material interest" in the land at the commencement of development (ie owners of the freehold estate, or those with a lease with a term of more than 7 years after planning permission has been granted).

Enforcement
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. Collecting authorities can impose surcharges, charge interest, recover CIL through asset seizure, issue a stop notice, commit a person to prison, and recover their money through a power of sale.

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