

DEFERRAL OF CIL

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The draft Community Infrastructure Levy (Coronavirus) (Amendment) (England) Regulations 2020 (“the Coronavirus Regulations”) is a rather clumsy mouthful which is reflective of the character of the CIL regime. It is needed because without it the CIL regime will continue even during these difficult times to operate in a rigid manner with no ability to relax or waive CIL liabilities. Under the regime CIL liabilities will remain payable in accordance with the authority’s instalments policy and late payment interest will continue to accrue with the possibility that late payment surcharges can be imposed. This has been a cause of concern to both developers and local authorities. It puts at risk important developments and the ability of developers to survive.

Currently changing an authority’s instalments policy will only provide relief to future developments yet to be commenced. Although authorities have a discretion as regards the imposition of surcharges and enforcement the accruing of late payment interest is mandatory at the rate of 2.5% above the Bank of England base rate.

The aim of these amendments is to ease the financial pressure on developers by allowing the CIL bill to be deferred by the collecting authority for a period of up to six months (reg. 72A), introduce special rules as regards the imposition of late payment surcharges and interest accruing (reg. 72B), and confer special powers to request information (reg. 72C). These regulations will apply only in England and not in Wales.

It will not be until later this summer before these draft regulations are brought into effect. In the meantime the government guidance issued on 13th May 2020 and updated on 30th June 2020 (“government guidance”) states that:

- “CIL charging authorities are encouraged to consider making use of the ability to introduce an instalment policy (or amend an existing instalment policy); and
- noting the provisions in the draft legislation which are explained below, CIL collecting authorities are encouraged to use their discretion in considering what, if any, enforcement action is appropriate in respect of unpaid CIL liabilities; and
- CIL authorities should take a positive approach to their engagement with developers, to ensure CIL liabilities do not cause undue burdens over the period of disruption caused by the coronavirus”

Once the Coronavirus Regulations come into force developers will be able to make deferral requests in accordance with the provisions discussed here.

1. Persons qualifying to request deferral of CIL – the deferral is not available for all. Four conditions contained in reg. 72A(1) have to be satisfied before a request for deferral can be validly made. These conditions are:

- (a) the person must have an annual turnover not exceeding £45,000,000 – this coincides with the eligibility test for the CBILS. It is implicit in this requirement that the person must be carrying on a business. It will not apply to a person who is carrying out a chargeable development but not commercially. However, it appears that a commercial concern carrying out a chargeable development but not in the ordinary course of that concern's business will qualify if the concern's turnover does not exceed £45 million.

A person's annual turnover is a matter on which the authority can seek further information under reg. 72C (see section 3(ii) below). It is suggested in the government guidance that evidence be provided by a responsible person or organisation such as a chartered accountant or auditor who may give evidence as to the latest turnover and whether the business is a sole enterprise or part of a linked business or has partners. The rules for determining a sole enterprise, linked business and partner business are described in the government guidance and set out in the schedule. Alternative evidence can be taken from information in documents registered at Companies House such as annual returns.

These draft regulations do not provide guidance as to how the annual turnover is to be determined or by reference to which period. However, it is covered in the government guidance issued which states that if "it is a sole enterprise it is the turnover of the applicant only, as shown in the latest set of accounts. For applicants acting as part of a group, that have partners or linked enterprises, the turnover assessment should take the latest turnover of the applicant, as shown in their accounts, together with the turnover of any linked enterprises, any partners of any linked enterprises, any enterprises linked to any of the applicant's partners and any enterprise linked to the applicant's linked companies." The rules for determining a sole enterprise, linked business and partner business are described in the government guidance and set out in the schedule below.

It is suggested that there be early engagement between the authority and the person intending to make a deferral request with regard to the evidence needed to satisfy the authority on eligibility. In reality this mean joining a fairly long queue.

- (b) a Demand Notice has been served under reg. 69 – although a liability notice must be served as soon as practicable after the day on which a planning permission first permits development there is no explicit time limit imposed by reg. 69 as regards demand notices. It is not explicitly stated that the demand notice must have been served during the material period and the government guidance makes it clear that demand notices served before the material period begun will be taken into account. Before a demand notice is served by an authority a commencement notice will normally have been served unless the planning permission is a retrospective under section 73A. This will make it very difficult for a developer to ascertain whether the CIL liability will be deferred ahead of the development commencing which for many developers will be a vital piece of financial information. There is no statutory procedure for obtaining an answer ahead of commencement.

- (c) the person is required “to pay an amount of CIL in respect of a chargeable amount (whether by instalment or otherwise) during the material period”. The material period runs from the date that the Coronavirus Regulations comes into force until midnight on 31st July 2021. What is not make clear from the regulations is whether the amount has to fall due for payment during the material period or includes amounts which fell due for payment before the commencement of the material period but are still outstanding in the material period. The time limits as regards the making of a request (see section 2 below) might suggest that it is not intended to cover a CIL liability which has fallen due for payment before the commencement of the material period but the government guidance explicitly states that CIL due for payment prior to the commencement of the material period is covered.
- (d) the person is experiencing financial difficulties for reasons connected to the effects of coronavirus resulting in difficulty in paying that amount and for these purposes “financial difficulties” includes such difficulties which would be likely to have an unacceptable impact on the economic viability of the person (reg. 72A(9)(c)). These difficulties may have started before the commencement of the material period. In many cases it is to be expected that the adverse effect of the coronavirus will be readily apparent. Nevertheless it will need to be explained and shown by the person making the request for deferral. There may be some cases where the financial difficulties have another cause. For instance, an offer of funding may have been lost for other reasons. What if the financial difficulties pre-date the impact of the covid virus? Such cases will not be easy for the authority to determine.

2. Request for deferral – there is no automatic deferral of CIL. A written request has to be made to the collecting authority by the eligible person in order to obtain a deferral and it is at the discretion of the authority whether deferment is granted. Apart from being in writing there is no particular form required.

Such a request cannot be made more than 14 days before the relevant CIL amount falls due for payment and must not be later than on or as soon as practicable after the falling due of the CIL amount (reg. 72A(2)). In cases in which the CIL amount is outstanding at the commencement of the material period a deferral request must be made as soon as practicable after the Coronavirus Regulations come into force. This is likely to result in a rush by developers eager not to miss the opportunity to defer payment.

More than one request can be made in respect of the same CIL amount so that if the period of deferment expires during the material period a further deferral request can be made in respect of that amount which could result in the period of deferment running pass the expiry of the material period on 31st July 2021.

3. Consideration by collecting authority –

- (i) Authority’s obligation - reg. 72A(3) imposes an obligation to consider and decide a request for deferral as soon as practical and in any event to make a decision within 40 days of the making of the request. This is a longer than the normal time limits for CIL matters but possibly reflects the administrative difficulties currently faced by authorities. For London Borough Councils the timing obligation is qualified. Such councils act as the collecting authority for the Mayor of London’s CIL and can only grant a request for deferral in respect of the Mayor’s CIL if the Mayor considers it appropriate to do so (reg. 72A(6)).

Any decision on a request has to be in writing. It is not expressly required that the collecting authority give a reason for a refusal but the government guidance indicates that in accordance with good administrative practice one should be given if practical. In reaching a decision it is stated in the government guidance that the “government expects collecting authorities to take a positive approach when considering a deferral request. This new regime is intended to be a quick route to allow developers more time to make CIL payments for a limited period of time. The government expects this regime will be administered quickly and fairly in everyone’s interests.”

- (ii) Request for further information – as part of the process of considering a deferral request a collecting authority is given the power by regulation 72C to request further relevant and specific information in the event of a deferral request or an interest request (as to which see section 5(iv) below). This is for the purpose of either carrying out its functions under reg. 72A and 72B or assisting the authority to decide either such request (reg. 72C(1)).

Such information as in the possession or control of the person making the request must be provided within 14 days of the authority’s request (reg. 72C(2)). Failure to do so will justify the authority in refusing the deferral request or interest request (as appropriate) (reg. 72C(3)).

- (iii) Effect of deferral request - whilst the deferral request is being considered no late payment surcharge can be imposed and no late payment interest accrues or is payable (reg. 72B(1)). This will encourage developers to make deferral requests as there is a financial advantage for them in doing so.

4. Deferral granted – the relevant collecting authority does not have an absolute discretion as to whether to grant a deferral nor is a such a grant mandatory. The authority may grant a deferral if it considers that “it is appropriate in the circumstances” (reg. 72A(4)(a)). Having decided to grant a deferment of CIL it is for the collecting authority to decide how long the deferral period should be with a maximum deferral period of six months from the date that the request is received by the authority (reg. 72A(4)(b)). The expected period of financial difficulty facing the developer should be a factor in determining the deferment period. As stated above when the deferral is coming to an end or has ended a further deferral request can be made provided that the material period has not expired.

5. Effect of grant of deferral request - once a collecting authority has granted a request to defer CIL:-

- (i) a revised demand notice must be served by the authority as soon as reasonably practicable stating the full CIL amount due including surcharges and interest and the date on which this is payable taking account of the deferral period (reg. 72A(5)). The person requesting the deferral must then pay the CIL amount in accordance with the revised demand notice (reg. 72A(7)).
- (ii) if the CIL is payable by instalments then these provisions will apply to instalments falling due individually rather than the whole CIL liability. Similarly if the planning permission authorises a phased development these deferment provisions apply separately to each phase.
- (iii) interest shall not accrue during the deferral period. This is not spelt out in the Coronavirus Regulations but under reg. 87 of the 2010 Regulations late payment interest runs from the date that a CIL payment is due.

- (iv) any late payment interest which has accrued from 21st March 2020 prior to the deferral request may be credited against the CIL amount at the request of the person making the deferral request (reg. 72B(3)). The collecting authority may grant such an interest request "if it considers that is appropriate in the circumstances" (reg. 72B(4)) but if the interest request relates to the Mayor's CIL then such an interest request can only be granted if the Mayor considers it to be appropriate in the circumstances (reg. 72B(5)). In the event that an interest request is refused then the interest must be paid in accordance with regulations 87 and 88 of the 2010 Regulations (reg. 72B(6)).
- (v) late payment interest which accrued prior to 21st March 2020 will remain payable and is not waived or credited against the CIL amount.
- (vi) there is nothing provided as regards late payment surcharges and so the position is not clear if the CIL amount had fallen due for payment prior to the deferral request. Does the deferment of the payment of the CIL amount reset the running of time for the purposes of regulation 85 or is the period of deferment disregarded or does the time still continue running? I consider that it is the second option but it may be that a statutory appeal decision expected shortly will provide some guidance on that point. In the event that these provisions operate so as to prevent a CIL liability falling due for the first time until the expiry of the deferment period then this will push back the date at which late payment surcharges can be imposed at the discretionary of the authority by the period of deferment.

6. Rejection of deferral request - the making of a deferral request even if rejected will still have an effect on the operation of the CIL regime:

- (i) there is no statutory appeal procedure against a refusal but a refusal will be capable of being challenged on the Wednesbury principle.
- (ii) reg. 72(8) confirms that the CIL amount must still be paid in accordance with the demand notice served prior to the deferral request or any revised demand notice served after the request but not as a result of a grant of deferral under reg. 72A(5).
- (iii) but the person making the request for deferral has seven days from the date of the refusal to pay the CIL amount before a late payment surcharge can be imposed or late payment interest accrues or is payable (72B(2)). This combined with reg. 72B(1) means that if a request for deferral is made there is an interest free period from the date of the request until seven days from the refusal of the request and no late payment surcharge should be imposed during that period.
- (iv) any late payment interest accruing prior to the making of the deferral request cannot be the subject of an interest request as reg. 72B(3) will not apply as there will have been no revised demand notice pursuant to reg. 72A(5). Such interest will be payable as will any interest accruing after the expiry of seven days from the refusal.

7. Concerns for authorities

- (i) a practical concern is that there will be a rush of deferral requests in relation to outstanding CIL when the Coronavirus Regulations come into force which will place pressure on collecting authorities.

- (ii) these requests may be the harder ones to determine if CIL has been outstanding for some time.
- (iii) there should be a reasoned decision for refusing to defer CIL and this may provide an opportunity for the refusal decision to be challenged by judicial review.
- (iv) requests for further information by the authority do not cause an extension of the 40 day time limit in which a decision is to be made.
- (v) the imposition of late payment surcharges will require more care if a deferment request has been made.

8. Points for developers

- (i) Requests for deferment can be made in respect of CIL amounts which have fallen due for payment prior to the commencement of the material period or even lockdown.
- (ii) Care needs to be taken in cases in which the CIL is outstanding when the Coronavirus Regulations comes into force that a deferment request is made as soon as possible so as not to be out of time.
- (iii) With all deferral requests care needs to be taken to ensure that satisfactory evidence is provided to the authority relating to the eligibility conditions discussed in section 1 above.
- (iv) with developments which have not yet commenced there will be no certainty if a commencement notice is served by the developer because only then will the authority serve a demand notice and it is unlikely that an authority will give an indication of how it will decide a future deferral request.

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