# 39 CIL TEAM BRIEFING NOTE 2: DISCRETIONARY RELIEF FROM & DEFERRAL OF CIL PAYMENTS

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Welcome to the 39 CIL Team's Briefing Note 2 about exceptional times, and in which we look at Reg 55, the new CIL deferral guidance, and how to keep open those options to ensure development fiscal flexibility.

This 39 CIL Team's CIL Briefing Note looks at potential relief from CIL payment, but with an important anomaly.[1]

Financial relief for businesses and individuals has been key during lockdown but perhaps more so as we emerge blinking into the Post C-19 Dawn to ensure future economic survival and recovery.

As noted in the 39EC PEP newsletter *MHCLG published "Coronavirus (COVID-19): planning update"*[2] (13th May2020) and *"Coronavirus (COVID-19): Community Infrastructure Levy guidance "* ( 'C19 CIL Guide').[3] The latter encourages charging authorities ('CAs') to apply **Community Infrastructure Levy Regulations 2010** (as amended) ('the CIL Regs') powers on payment timing and surcharging flexibly *"to ease the burden on developers"* and foreshadows future amendments enabling payment deferral, disapplication of late payment interest and return of charged interest.

The exemptions and relief available under Part 6 of the CIL Regs e.g. social housing relief are not the focus of the C19 CIL Guide but the administration and enforcement provisions under Parts 8 and 9.

Reg 69B empowers a CA to allow CIL payments in instalments instead of one payment within 60 days from commencement.[4] This is subject to the CA having a Reg 69 "instalment policy" in place. The C19 CIL Guide encourages CAs to *"take advantage of this provision to introduce new instalment policies"* (i.e. first time or revised policies) notwithstanding these would apply only to *"as-yet uncommenced chargeable development"*.

The Guide highlights Part 9 enforcement powers and use of penal late payment surcharges as well as charging interest (see Regs 85; 87 and 88) too. It notes also the power to issue Stop Notices under Regs 89-94 ordering ongoing development to stop pending due CIL payments and backed by criminal sanctions (Reg 93).

Like a planning enforcement notice under TCPA 1990, a CIL Stop Notice must be expedient (Reg 89 (1)(b)). Similarly, the power to impose surcharges for late payment (Reg 85) is discretionary. The charging of interest for late payment is however not. Reg 87 confirms that the charge of late payment interest is mandatory and accrues automatically, starting from the day after the day payment was due (see CIL 87).[5]

There are no doubt current cases where development has had to commence (e.g to preserve a planning permission) but then paused in order to comply with the C19 lockdown and with no clear idea when building could (or still can) safely start again.

Issues over timing of CIL payment difficulties for developers are self-evident. The prospect of having to pay a higher sum due to interest or from a surcharge when the developer is not at fault or without sufficient resources, will have a chilling effect on construction progress and the industry.

The C19 Guide anticipates CIL Reg amendments to give *"more discretion"* to defer CIL payments *"without having to impose additional costs"*. These seem directed at the interest provisions alone with reference to a proposed power *"temporarily [to] disapply late payment interest"* and a *"discretion to return interest already charged where"* considered *"appropriate"*. This ***"may** include interest…accrued in the period between the introduction of the lockdown and the regulatory changes coming into effect"*.

But, these new powers will **only** be available for developers with *"an annual turnover of **less than £45 million**"*, described as *"small and medium sized developers"*.

The Guidance also encourages CAs to use existing powers to ease pressure on developers in light of the proposed amendments.

There is, though, an existing power whereby relief from **any** payment of CIL may be granted not mentioned in the C19 CIL Guide. Under Reg 55 CAs can *"grant…("relief for exceptional circumstances") from liability to pay CIL in respect of a*

1 With thanks to my former pupil Oliver Lawrence for raising this with me.

2 https://www.gov.uk/guidance/coronavirus-covid-19-planning-update#compulsory-purchase

3 https://www.gov.uk/guidance/coronavirus-covid-19-community-infrastructure-levy-guidance

4 See CIL Reg 70(7)

5 Calculated at an annual rate of 2.5% above the Bank of England base rate.

*chargeable development"* ('EC Relief') post permission and prior to commencement. This too requires a test of expediency and is dependent on criteria and limits in Regs 55 and 58.[6] These include, on a claim for EC Relief, that it *"appears"* to the CA *"there are exceptional circumstances which justify"* the relief (Reg55 (1)(a). The CA has to have *"made relief for exceptional circumstances available in its area"* by way of publication of a statement in accordance with Reg 56 and notably *"a planning obligation under section 106 of TCPA 1990"* must have been *"entered into in respect of the planning permission which permits D the chargeable development"* (Reg 55 (3)(b)). The fourth and key requirement is for an independent viability assessment showing that *"to require payment of the CIL charged by [the CA] in respect of D* ***would have an unacceptable impact on the economic viability of D****"*. The fifth requirement is that the relief must not *"constitute a State aid which is required to be notified to and approved by the European Commission"* (to be amended).[7]

The Reg 55(3)(b) requirement for a s.106 is interesting as it is unclear why it is there (it may just be a 'loose thread' from the numerous CIL Reg amendments). It is also not clear whether any form of s.106 suffices.

Up until 2014 Reg 55 included as part of the viability test at Reg 55 (3) (c ) (i) that the *"cost of complying with the planning obligation is greater than the chargeable amount payable in respect of D"*[8] as well as the *"unacceptable impact"* test at (c) (ii) but this is no longer the case. Thus, on the face of it now, the s.106 terms are not essential to viability assessment and justifying EC Relief but the mere existence of a s106 is.

Under Reg 55 (3)(b)), a s.106 must have *"been entered* ***into in respect of the planning permission*** *which permits D"* by contrast Reg 122 and the legal tests reflected in Reg 122(2)[9] applies to s106s which *"constitute a* ***reason for granting planning permission****"*.

To that end, an obligation *"entered into* ***in respect of****...a permission"* (Reg 55(3)(b)) may be far wider and not the same as a s106 which *"****constitute(s) a reason for granting****"* permission.

CIL was aimed at replacing s.106s and there are many current permissions granted without one. Such a scheme though would not be eligible for EC Relief, even if the impact of the relevant CIL charge *"would have an unacceptable impact"* on its economic viability.

Therefore, to ensure the option to claim EC Relief remains open, developers will need to have some form of valid s.106 that has been *"entered into in respect of"* the permission – this will need careful attention.

Whilst MHCLG encourages CAs to 'go easy' on developers, the amendments aimed at relief from interest may only benefit smaller volume developers. EC Relief from CIL was not highlighted but all developers should be alive to it and the requirements, especially the need for a s.106.

6 Including an exclusion from eligibility if other CIL exemptions and relief have been granted (CIL Reg 58 (11)).

7 Which will be considered in a forthcoming 39 CIL Brief by Kelly Stricklin-Courtinho

8 Deleted by Community Infrastructure Levy (Amendment) Regulations 2014/385 Reg. 7 Amendment to Part 6 – exemptions and reliefs (11)

9 Where *"a relevant determination is made which results in planning permission being granted for development"* (CIL Reg 122(1)) and where (a) necessary to make the development acceptable in planning terms (b) directly related to the development; and (c) fairly and reasonably related in scale and kind to the development.

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