

“39 from 39”

Episode 4:

CILs ‘n’ Spills

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10th June 2020

CIL: the Treasury's Development Tax



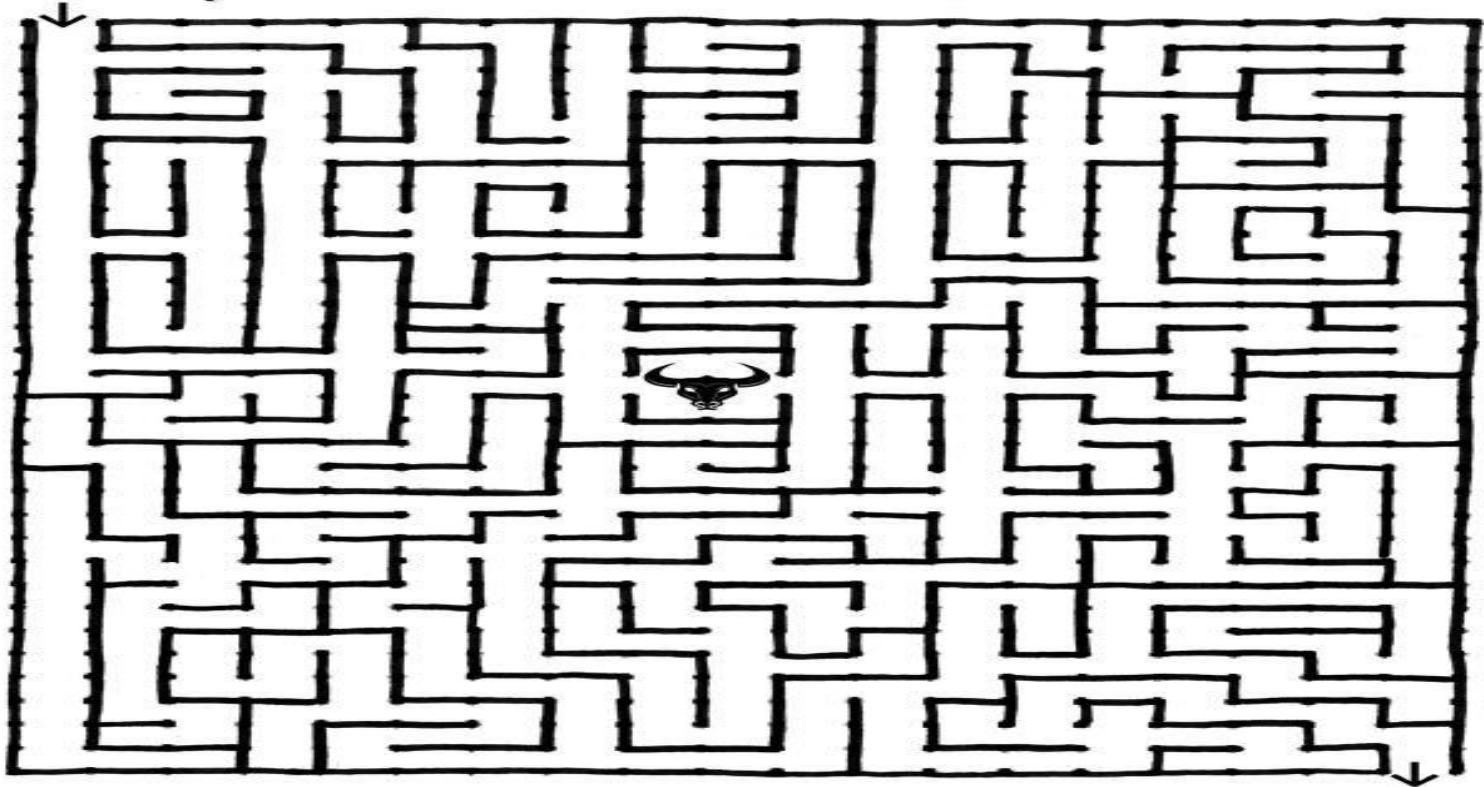
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10th June 2020

CIL is Complex. Why so?

THE MINOTAUR'S MAZE

Go through the maze, defeat The Minotaur, and find your way out!



Taxing Development Hope Value

- Well, now, two routes to ‘taxing’ development hope value
- Section 70(2)(c) TCPA 1990:
 - “Any other material considerations”
 - e.g. once upon a time - only Planning Obligations
 - CIL Reg. 122 regulates section 106
 - Planning judgements in (2)(a)-(c)
- Since 2010, now also section 70(2)(b):
 - “any local finance consideration”
 - Subsection (4)(b): = SoS funds & CIL
- So, Parliament has made *finance* material to planning
- But need to keep (2)(c) and (b) separate.
- Assess *weight* of ‘lfc’ CIL estimate? A new skill?
- CIL Regulations - regulate CIL - expressly
- CA have few discretions under Regs. & apply it



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CIL = a local revenue raising mechanism for “infrastructure”

CIL: Core Genesis & Purpose

- And, ... back to basics: CIL is a levy or tax on 'net new' "development"
- Part 11, Planning Act 2008 (not TCPA 1990 or one of the "Planning Acts")
- S. 205(1) SoSCLG – a reminder of complexity from 'joint' authorship:
*"The Secretary of State may **with the consent of the Treasury** make regulations providing for the imposition of a charge to be known as Community Infrastructure Levy (CIL).*
- Therefore – approach CIL Regs interpretation as a Tax (see the *Orbital* case).
- Section 205(2) purpose:
"In making the regulations the Secretary of State shall aim to ensure that the overall purpose of CIL is to ensure that costs incurred in supporting the development of an area can be funded (wholly or partly) by owners or developers of land in a way that does not make development of the area economically unviable."
- Statutory definitions – wide definitions & different definitions of familiar terms:
 - S.216(2) "infrastructure" – inclusive & wide – see pictures
 - s.208 & s.209(1) "development" is wide too (not TCPA meaning) – premature commencement easily done now
 - (in the CIL Regs.) "commencement".
- Same words – 'development' - but different meanings = recipe for confusion.
- Daughter CIL Regulations 2010 (now September 2019)
 - Part 2 definitions & discrete purpose for certain Regs.



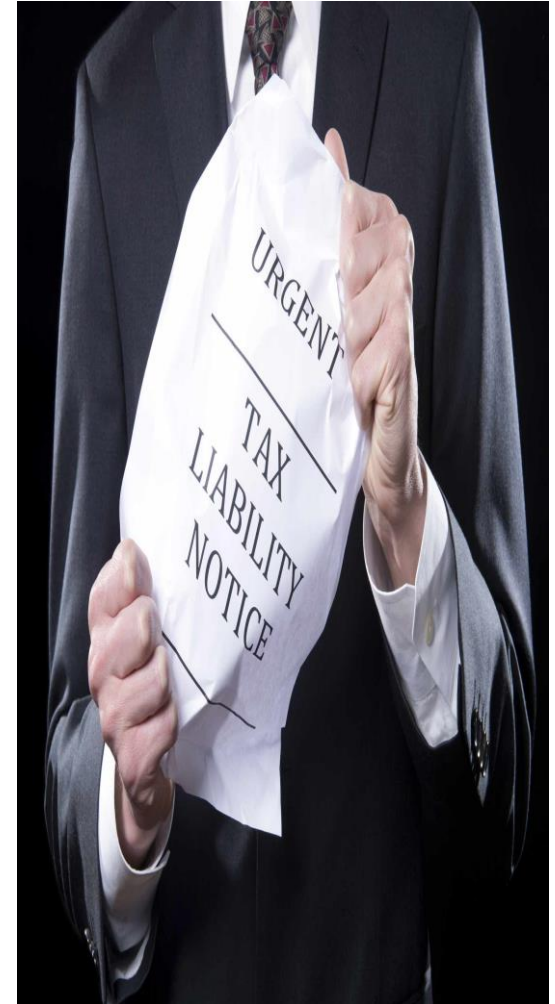
CIL Update Overview: Financial Planning

- June 2019 consultation on refinements to make CIL “fairer” (i.e. ever more refined **operability** for “net new” tax collection):
 - Reducing consultation rounds from two to one on schedules
 - Minimum of 28 days consultation
 - Retain Regulation 123 list – gone but see Regs. 121A & 73A(12)
 - Removal of CIL Regulation 123 pooling restriction on use of planning obligations to allow use of obligations & CIL to fund same infrastructure type or project – see now Reg. 121A reporting
 - Lower surcharges to 20% or £2,500 for exemptions
 - Remove “commencement notice” for residential extensions
 - Carry over of exemption or relief to ‘amended’ permission (S73)
 - Extending abatement to pre-CIL phased planning permissions
 - Indexation to be applied to section 73 permissions
 - Building Cost Information Service’s All-in Tender Prices Index
 - Reporting requirements for infrastructure funding statements
- Now, 1st September 2019 (resulting amendments)



CIL Basics: Liability: Who & how pinned

- “**Chargeable development**” defines scope of liability to the tax (see e.g Reg. 31(3)).
- Can have one or more CD in a planning permission (Oval)
- Reg. 33 default liability for “chargeable development”
 - each freehold or lessee of the land
 - person carrying out causative commencement works
- Reg. 38(3) trustees
- Reg. 34 apportionment to owners
- Reg. 31 assumption of liability for “chargeable development”
 - Objective liability audit trail engendered by notices including for transfer of liability
 - CIL liability sticks
- Reg. 32 transfer of assumed liability
- Reg. 36(2) CA can determine to transfer liability to owner of relevant land
- But: note Reg. 51(2)(a) (liable) &(b) (owner) relief & Reg. 32(3) last date for transfer = last due date



CIL Basics: Commencement

- Commencement is a VERY IMPORTANT Regs' staging post.
- PA 2008 defines "development" – widely (not exclude by S.106)
- Reg. 7(1) & (2) defines "commencement"
- Reg. 7(6) – by ref. to s56(4) (only) TCPA
 - "a) any work of construction in the course of the erection of a building;*
 - aa) any work of demolition of a building;*
 - b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building;*
 - c) the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b);*
 - d) any operation in the course of laying out or constructing a road or part of a road; ..."*
- Premature ACTUAL commencement:
 - triggers CIL liability & then payment
 - Rescinds exemptions & relief entitlements
 - Rescinds review & appeal rights (but see *Oval*)
- Take care on site



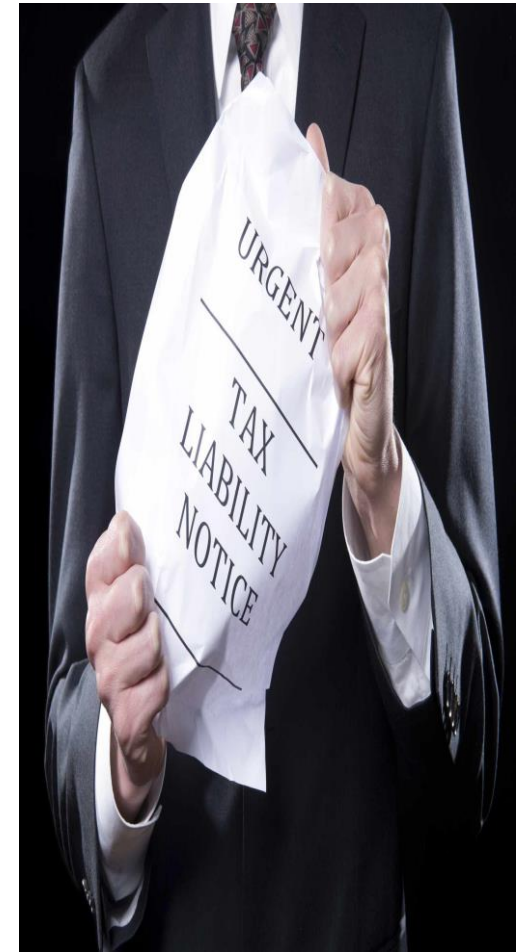
CIL Basics: 'first permits': Reg. 8

- Crystallisation of financial liability & timing
- Reg. 31(3) establishes liability & Reg. 65 & 69 notices scope **chargeable amount** & then when “**due**”.
- Reg. 65(1): charging authority must issue **liability notice** as soon as practicable after the day on which permission first permits development
- Reg. 8(1) “first permits when ..”
- Reg. 8(2) first permits = day permission granted
- Reg. 2(1) “phased planning permission means a planning permission that expressly provides for development to be carried out in phases”
- But “relevant land” too – land of *the* phase
- “first permit” can change if a Reg. 8(3) ‘cases’
 - (3A) “a phased planning permission”
 - CIL - “pre-commencement condition” & timing of phase
 - (4) “outline planning permission”
 - (7) “general consent”
- **PPG 006**: can have phased “full permission”
- **Seek to draft phases with care if to align with Regs.**



Payment Step 1: Liability Notice

- Reg.65(1) engages obligation to issue LN
- Reg.65(2) prescribes LN content incl. **“chargeable amount”** & reliefs e.g. SHR
- Reg. 65(5) allows re-issue of LN
- Reg. 65(8) results in cessation of effect of any prior LN
- Reg.65(4) requires revised LN issue where chargeable amount of same chargeable development changes
- Reg. 65(10) payment of all “due” CIL results in LN cessation of effect
- Reg. 69: DN states CIL “due”.



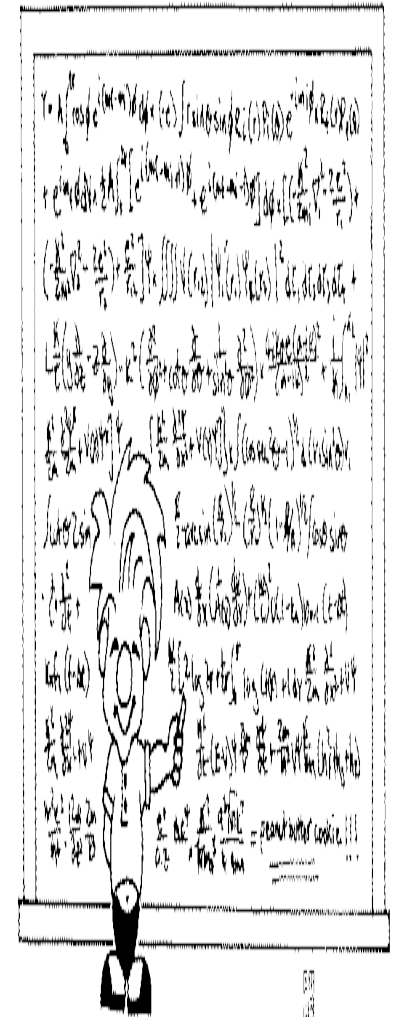
Update 1a: What to Pay: Reg.40 & Sch.1

- Reg. 31(1) engenders liability for the “**chargeable amount**”
- Reg.65(2)(d) requires the “chargeable amount” to be stated
- How to establish the scope of **net new**?
- (Former Reg.40) Reg. 40 – **Schedule 1**, 5 Parts
- collecting authority must calculate the CIL amount on **chargeable development** as set out in relevant Part
- Part 1 – Standard cases (like the old Reg. 40)
- Part 2 – ‘Amended’ planning permissions
 - Section 73 situation – net new – CIL same/up/down
- Part 3 – Calculation of Social Housing Relief (Regs. 50 & 51)
- Part 4 – Pre-CIL permissions ‘amended’ when CIL in effect
- Part 5 – Pre-CIL permissions ‘amended’ when CIL in effect:
Appeal



Update 1b: What to pay? Formulae

- CA mandated to collect: Reg. 40 applies Schedule 1 Pt 1
- e.g. Part 1, “Standard Cases”, paragraph 1(4) applies formula:
 - $R[\text{ate}] \times A[\text{rea}] \times I_p / I_c$
- Paragraph 1(6) defines A by further applied formula:
 - $Gr - Kr - (Gr \times E)/G$
- Paragraph 1(6):
 - G: gross internal area (“GIA”) – in square metres
 - Kr: Aggregate retained parts of “in-use buildings” ... able to be carried on lawfully & permanently
 - E: aggregate of in use buildings to be demolished
- Paragraph 1(10): “In-use building”:
 - “Building” ?
 - “Relevant building”
 - “contains a part ... in lawful use”
- *Hourhope* [2015] EWHC 518 – pub “in lawful [actual] use”
- Focus on actual occurrence of permitted use (not ancillary use)
- NB: Sch.1, Pt 1, paras (8) & (9) CA “sufficiency” discretion



Payment Step 2: When to Pay

- Tax must be paid when “due”
- Reg. 70: general instalment policies position
- Reg. 70(8): if an amount of CIL not received on when it “is due”, then unpaid balance becomes payable in full immediately
- Reg. 69(1) demand notice must be served on each liable person
- Reg. 69(2) prescribed content
 - Identify related LN
 - State amount payable
 - State “day on which payment of the amount is due”
- Reg. 69(3): CA can re-issue DN
- Regs 69(4) & (5)



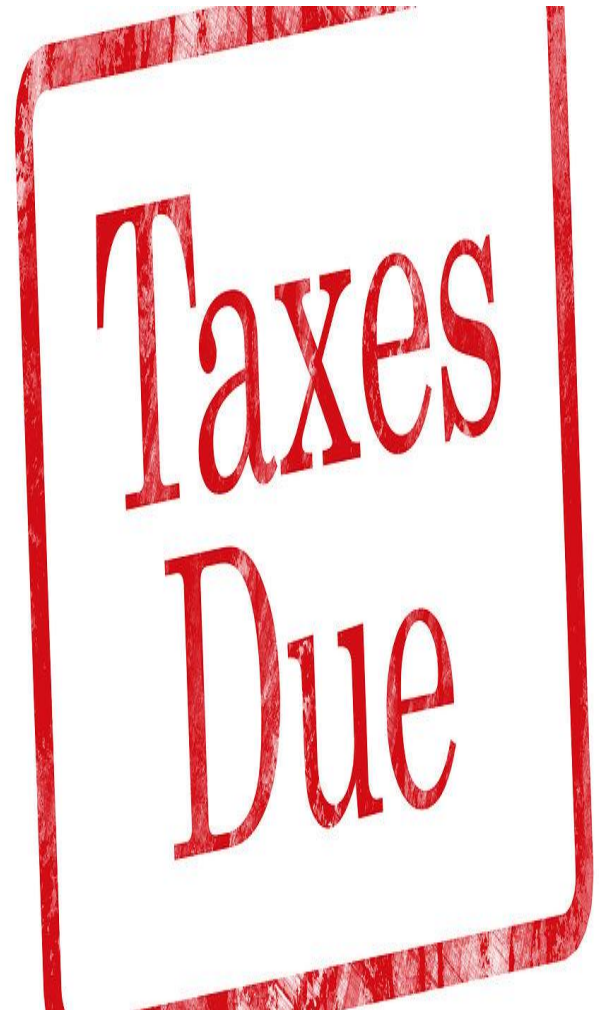
Financial Planning: timing risks

- Plan early or risk development timetable consequences
- Real potential to affect development execution
- Reg. 113 Review rights? – quite punitive process
 - (2)(b): 28 days
 - (10) review lapses if development *commenced*
- Reg. 114: (one per chargeable development) appeal:
 - (2) 60 days
 - Only available if requested review (if not, not)
 - (4) appeal lapses if development *commenced*
- Reg. 117 Surcharge appeal
 - (3) 28 days
- Reg. 118 deemed commencement
 - (2) 28 days
- Reg. 119 CIL Stop notice
 - (3) 60 days
- PPG



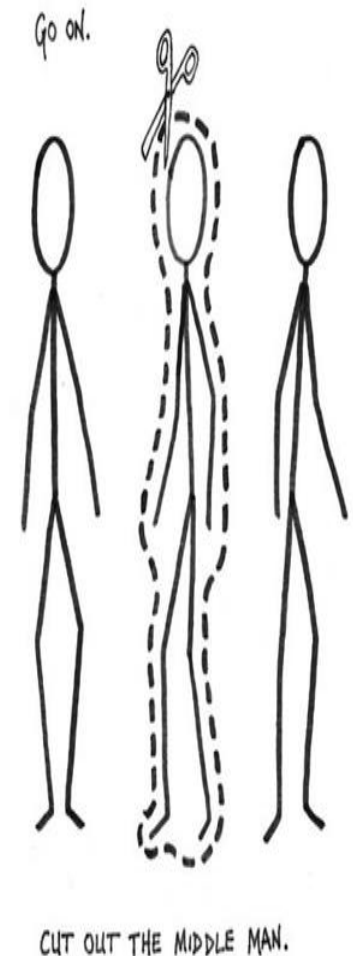
Update 2: Abatements: cash flow alleviation?

- Part 8, Administration, includes Abatement
- Reg. 71 – payment in full
- Reg. 72 – payment “in money”
- Reg. 73 – payment in kind
 - Land payment equal to CIL
- (“Reg. 123 list” now appears within) Reg. 73A - infrastructure payments
 - Payment towards “infrastructure or types of infrastructure listed”
- Reg. 73A – Infrastructure payments – “satisfactor
- Reg. 74 - Section 73 abatement – if CIL paid, the overpayment credited
- Reg. 74B - Different planning permission abatement – must serve notices, then paid CIL is credited
- Reg. 75 - Overpayment – CA required to repay with interest (less administrative costs)



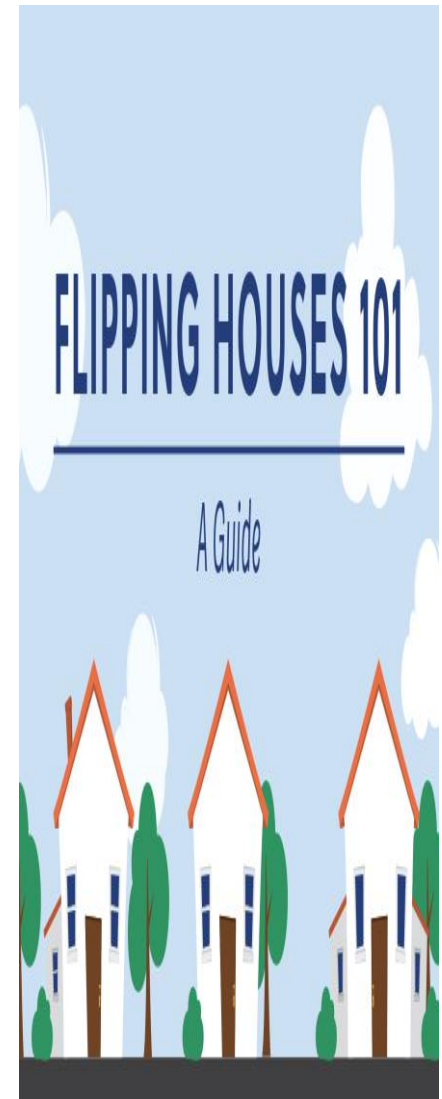
Update 2a: Particular Abatements: Reg. 73A

- Reg. 73A – “Infrastructure payments” – cut out middle man?
- Timing – must be secured BEFORE “commencement”
- Once chargeable amount “due” established, CA entitled to “accept” one or more “infrastructure payments in satisfaction of the whole or part” of due CIL
- “Infrastructure payment” is “the provision of one or more items of infrastructure” - & “infrastructure” is wide term
- The purpose of a payment is to “aim to ensure” that the provided infrastructure supports development of CA area
- The vehicle for a payment is an “agreement”
- Reg. 73A(7) conjunctive criteria whereby CA satisfied:
 - Sufficient control of land & statutory authorisations likely;
 - Infrastructure is “relevant infrastructure” – the “infrastructure list” (Reg.123 shadow);
 - “not necessary to make the development” “acceptable” in planning terms (i.e. the mirror to Reg. 122(2) where a s.106 must be necessary
 - Pre-commencement agreement executed.
- Reg. 73A(8), the agreement must state the “value” of the infrastructure (independently assessed). “Value” is wider than “price” – what price accelerated or fulcrum provision?



Update 2b: Particular Abatements: Reg.74B

- What about sites with multiple permissions? CIL Flipping?
- Section 73?
- Reg. 9(6) “chargeable development” is the most recently granted section 73 permission
- Reg. 9(9) (7-8 gone) machinery bites on the most recently commenced/re-commenced auto-flipping.
- Section 70?
- Reg. 74B – non-section 73 permissions only (Reg. 73A?)
- Reg.74B only engaged if permission A commenced; different permission granted on overlapping land; notice of proposed flip received by CA. Then:
- Reg.74B(2), the assumed liable party paying B can request CIL credit of A against B, if (3): B not commenced, and proof of CIL for A paid.
- But – Reg. 74B(6) credited CIL only against incomplete buildings permitted by A & not those used to *reduce* A CIL. Quite careful drafting to avoid double counting.
- **Complex machinery to maintain “net new” CIL paid.**



Update 3: Reg. 123 & 121A: Reporting

- Reg.123 barred pooling & now applies in Wales only.
- Instead, its “infrastructure list” provision re-appeared in Reg.121A – a new reporting obligation on the CA & **LPA**.
- Reg.123 was used as preference towards use of CIL.
- Reg. 121A(1): “Annual Infrastructure Funding Statement” must be published annually by end of calendar year by:
 - CA issuing a liability notice; AND
 - LPA receiving non-financial planning obligations;
- AIFS comprises:
 - The “Infrastructure List” (“infrastructure types or projects” intended to be funded in part/whole by CIL);
 - “CIL Report” – see Sch. 2, paragraph 1;
 - “Section 106 Report” – see Sch. 2, paragraph 1;
- Sch. 2 – an account - receipts; allocations; spent/unspent; borrowings; expenses.
- Reg. 121B(1) – Parish Councils must report on CIL receipts.
- Reg. 121C - annual CIL rate summary now publishable annually & state CIL rate & indexation for Sch.1, para1(5).



Surcharges

- Part 9: surcharges: small to large sums
- Criteria & discretionary (“may”)
- Summary:
 - Reg. 80 - not assume liability? £50
 - Reg. 81 – apportionment process? £500
 - Reg. 82 – no notice of PD chargeable development? Lower of 20% or £2,500
 - Reg. 83 – no commencement notice? Lower of 20% or £2,500
 - Reg. 84 – disqualifying event? Lower of 20% or £2,500
 - Reg. 85 – late payment? For each of 30 days, 6 months & 12 months, the **greater** of £200 or 5% of the amount due under the Regs. – could be big sum
 - Reg. 86 – non-compliance with information notice? Lower of £1,000 or 20%
 - Reg. 87 – daily mandatory interest – 2.5% over Base from date “due” – soon adds up.



VOA Appeals & Cases

- VOA appeals: small scale, fact sensitive, written reps. From June 2013, web published & redacted.
- (Unsurprisingly) few CIL High Court cases.
- Early cases:
 - *R (oao Fox Strategic Land & Property Ltd) v Chorley Borough Council* [2014] EWHC 1179 (Admin): hopeless (long) *Wednesbury* challenge to charging schedule process & adoption
 - *R(oao Hourhope Ltd) v Shropshire Council* [2015] EWHC 518 (Admin): “in lawful use”
 - *R v Orbital Shopping Park v Swindon BC* [2016] EWHC 448(Admin): 2 planning permissions (internal mezzanine & external works) – permissible to avoid the CIL tax
- More recently, others – including strict approach to CIL notices
- *R(oao Oval) v Bath & North East Somerset* [2020] EWHC 457 (Admin): grant of outline planning permission confined to initial decision notice...



Practical Points

- Viability:
 - “Buy in at the right price. Sell at the right price”
 - CIL enables some approximated £ liability **before** a planning determination (& also pre-purchase)
 - CIL informs viability process & PPG Viability
 - Start consideration of CIL early, not late
- Conclusions:
 - Do not execute CIL Forms – lay client should do so
 - Get organised pre-commencement
 - Wider meanings of “development” & “infrastructure”
 - Aka. Arthur Dent: Don’t panic, but get a (cold) towel.



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Ariadne's Thread: Find Early Lawful Route to Least CIL "Due"

