

City of London Law Society Land Law committee's suggested community infrastructure levy drafting and explanatory notes

These notes and this drafting were produced on 5 June 2014.

Explanatory notes

The Land Law committee of the City of London Law Society has produced the following drafting to cater for the community infrastructure levy ("CIL") for different property documents in relation to which CIL is most commonly encountered. Clearly, this is not the only way to draft for CIL and the drafting may not be appropriate on every occasion and may need to be varied to reflect the circumstances of the particular situation or transaction. There may of course be other documents not mentioned in this note that may require drafting to cater for CIL.

The following notes provide a basic explanation of the CIL regime and the capitalised terms used in the drafting, which terms are defined in the 2010 Regulations as amended.

The governing legislation for ("CIL") is contained in Part II of the *Planning Act 2008* and the *Community Infrastructure Levy Regulations 2010* as amended ("2010 Regulations"). CIL was brought into force on 6 April 2010. The most recent changes to the 2010 Regulations were made by the *Community Infrastructure Levy (Amendment) Regulations 2014* ("2014 Regulations") and came into force on 24 February 2014.

CIL is a fixed levy on new development, calculated by reference to the net increase in the gross internal area after allowing for any demolition. CIL will apply to most new buildings, which involve an increase in floorspace. A planning permission for a change of use will not trigger CIL, since there is no floorspace increase. However, planning permission, for example, to install a new mezzanine floor in premises, potentially, gives rise to CIL.

There can be no CIL liability if no CIL charging schedule is in effect on the day the relevant planning permission is granted for the development. The charging authority (usually, the local planning authority) approves and publishes the charging schedule, which sets out CIL rates for its catchment area at pounds per square metre of chargeable development. The "collecting authority" (referred to in clause 1.2 of the Licence to alter drafting and equivalent clause in the other drafting) calculates and collects CIL and while the collecting authority will, usually, be the same entity as the charging authority, it could be different.

The relevant rates are the rates at which CIL is chargeable in respect of the chargeable development from the charging schedule in effect at the time the planning permission first permits the chargeable development. The "chargeable development" (referred to throughout the drafting) is defined as the development for which planning permission is granted and in the case of a grant of phased planning permission, each phase of the development is a separate chargeable development. This change, effected by the 2014 Regulations, helps to mitigate the impact of CIL

on the economic viability of the development. If the development is phased, the drafting may need to be amended to cater for this.

Before chargeable development is commenced, an “assumption of liability notice” and a “commencement notice” (referred to in clause 1.2 of the Licence to alter drafting) must be submitted to the collecting authority in the prescribed form. The person who submits the assumption of liability notice assumes the CIL liability. The commencement notice states the intended commencement date of the development.

If the chargeable development commences without an assumption of liability notice having been submitted, the collecting authority must apportion the CIL liability between the holder of every “material interest” in the land (to which the relevant planning permission relates), based on the value of the respective interests. A material interest is a freehold or a lease for more than seven years.

The drafting obliges the party carrying out the chargeable development to assume the CIL liability and such party is not permitted to withdraw the assumption of liability notice, nor transfer any CIL liability, without the prior written consent of the landlord or other relevant party. It is crucial that a holder of a “material interest” in the land, who is not carrying out the chargeable development, should not be exposed to CIL liability and clauses 1.3, 1.5, 1.7 and other provisions of the Licence to alter drafting are there to protect such a party. However, if those clauses are not complied with and the CIL is not paid by the tenant, the landlord will be exposed to a claim for the CIL and may have no redress if the tenant has no money.

CIL liability arises on commencement of the development, which is the earliest date on which any “material operation” begins to be carried out. This is defined by legislation to include demolishing a building, digging foundations or laying pipes. There were concerns, prior to the coming into force of the 2014 Regulations, that CIL could fall due, even though construction of the buildings had not yet started, which could impact on the scheme’s viability. The 2014 Regulations address those concerns by allowing each phase of the development to be a separate chargeable development.

Drafting

Licence to alter

["CIL" means any tax, tariff or charge introduced by the local planning authority [the Mayor of London] or any other person pursuant to the Planning Act 2008, the Localism Act 2011 and regulations made thereunder (including the Community Infrastructure Levy Regulations 2010) and/or pursuant to any subsequent legislation or provision to fund the delivery of infrastructure;]

1. [This clause 1 applies to CIL which is or becomes payable in respect of the Works and assumes that the Works qualify as a Chargeable Development.
- 1.1 The Tenant shall be liable for such CIL as is payable in respect of the Works.
- 1.2 The Tenant shall submit to the Collecting Authority before Chargeable Development is commenced:
 - 1.2.1 an Assumption of Liability Notice, which may not be withdrawn without the Landlord's prior written consent; and
 - 1.2.2 a Commencement Notice;and shall provide to the Landlord copies of those notices.
- 1.3 The Tenant may not commence Chargeable Development if it has not complied with clause 1.2.
- 1.4 The Tenant may not transfer the liability that it has assumed to pay CIL without the Landlord's prior written consent.
- 1.5 The Tenant shall pay any CIL as it falls due for payment and any interest, surcharge or penalty which it incurs for default.
- 1.6 The Tenant shall comply with all statutory requirements in relation to CIL.
- 1.7 The Tenant shall indemnify and keep indemnified the Landlord against all costs, expenses, claims, liabilities, proceedings and demands whatsoever arising out of or in relation to CIL.
- 1.8 In this clause 1, words and expressions, not otherwise defined in this Licence, but which have capitalised first letters, have the meaning given by the Community Infrastructure Levy Regulations 2010 (as amended from time to time).]

Note: If there is a CIL provision in a licence to alter, there will not usually need to be CIL drafting in a lease, because of the normal controls on alterations. However, consideration should be given to inserting CIL drafting in a long lease where no licence to alter is required.

Contract for sale conditional on planning

"CIL" means any tax, tariff or charge introduced by the local planning authority [the Mayor of London] or any other person pursuant to the Planning Act 2008, the Localism Act 2011 and regulations made thereunder (including the Community Infrastructure Levy Regulations 2010) and/or pursuant to any subsequent legislation or provision to fund the delivery of infrastructure;

2. This Clause 2 applies to CIL which is or becomes payable in respect of the Development and assumes that the Development qualifies as a Chargeable Development.

2.1 The Buyer shall be liable for such CIL as is payable in respect of the Development.

2.2 The Buyer shall submit to the Collecting Authority before Chargeable Development is commenced:

2.2.1 an Assumption of Liability Notice, which may not be withdrawn without the Seller's prior written consent; and

2.2.2 a Commencement Notice;

and shall provide to the Seller copies of those notices.

2.3 The Buyer may not commence Chargeable Development if it has not complied with Clause 2.2.

2.4 The Buyer may not transfer the liability that it has assumed to pay CIL without the Seller's prior written consent.

2.5 The Buyer shall pay any CIL as it falls due for payment and any interest, surcharge or penalty which it incurs for default.

2.6 The Buyer shall comply with all statutory requirements in relation to CIL.

2.7 The Buyer shall indemnify and keep indemnified the Seller against all costs, expenses, claims, liabilities, proceedings and demands whatsoever arising out of or in relation to CIL.

2.8 In this Clause 2, words and expressions, not otherwise defined in this Contract, but which have capitalised first letters, have the meaning given by the Community Infrastructure Levy Regulations 2010 (as amended from time to time).

Note: Even if the sale contract does not allow access to the site to commence works between exchange and completion, it remains important to include the above drafting. The concern is if the buyer delays in registering the transfer to the buyer at the Land Registry, but commences the development immediately after completion. In that situation, the seller will still have a "material interest" (since it retains the legal interest until the buyer is registered) and could be liable if the buyer defaults. This provision could go in the transfer to the buyer, but it could equally go in the contract with the contract's non-merger provision in standard commercial condition 9.4.

Forward purchase contract

["CIL" means any tax, tariff or charge introduced by the local planning authority [the Mayor of London] or any other person pursuant to the Planning Act 2008, the Localism Act 2011 and regulations made thereunder (including the Community Infrastructure Levy Regulations 2010) and/or pursuant to any subsequent legislation or provision to fund the delivery of infrastructure;]

3. [This Clause 3 applies to CIL which is or becomes payable in respect of the Development and assumes that the Development qualifies as a Chargeable Development.

3.1 The Seller shall be liable for such CIL as is payable in respect of the Development.

3.2 The Seller shall submit to the Collecting Authority before Chargeable Development is commenced:

3.2.1 an Assumption of Liability Notice, which may not be withdrawn without the Buyer's prior written consent; and

3.2.2 a Commencement Notice;

and shall provide to the Buyer copies of those notices.

3.3 The Seller may not commence Chargeable Development if it has not complied with Clause 3.2.

3.4 The Seller may not transfer the liability that it has assumed to pay CIL without the Buyer's prior written consent.

3.5 The Seller shall pay any CIL as it falls due for payment and any interest, surcharge or penalty which it incurs for default.

3.6 The Seller shall comply with all statutory requirements in relation to CIL.

3.7 The Seller shall indemnify and keep indemnified the Buyer against all costs, expenses, claims, liabilities, proceedings and demands whatsoever arising out of or in relation to CIL.

3.8 In this Clause 3, words and expressions, not otherwise defined in this agreement, but which have capitalised first letters, have the meaning given by the Community Infrastructure Levy Regulations 2010 (as amended from time to time).]

Agreement for lease

Consider adding CIL as a Landlord's onerous condition. Tenant's advisers may wish for a landlord's indemnity against CIL arising from the Landlord's works. As to the tenant's works, a CIL clause along the lines of the above may be inserted, but will be unnecessary if there is a licence to alter including a CIL provision for the tenant's works.

Option agreements

Consideration should be given to including a CIL clause along the lines of the above in an option agreement that includes a planning provision.

Forward funding, development management and profit sharing agreements

CIL should be included as a development/project cost-

"the cost of CIL which is or becomes payable in respect of the [Development]"