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Property Taxation Specialists

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Private and Confidential
Department for Levelling-up, Housing & Communities
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For the attention of The Rt Hon Simon Clarke MP

BY EMAIL ONLY

19 October 2022

Your ref:
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REGULATED BY RICS

Dear Sir/Madam,

PROPERTY TAXATION – LEVELLING-UP & REGENERATION BILL
COMMUNITY INFRASTRUCTURE LEVY PROPOSALS

I am writing to highlight our very serious concerns we have about the proposed changes to the current Community Infrastructure Levy (CIL) to become an Infrastructure Levy (IL) in England, outside of Greater London (and Wales) where the existing CIL regime is proposed to remain in place – as set out in the clause 113 (and Schedule 11) of the Levelling-up and Regeneration Bill 2022.

ABOUT E³ CONSULTING

This response is from E³ Consulting, an organisation founded in 2003 and regulated by the Royal Institution of Chartered Surveyors (RICS). The firm is registered with HMRC for money laundering purposes as an Accountancy Service Provider. Our response is drawn on a mix of our own views and client comment and feedback, via our extensive consultancy work in the area of property taxation and specifically capital allowances, land remediation tax relief, CIL and repairs & maintenance. We have accumulated various comments and feedback from our clients and wider business contacts in formulating this letter. These clients are drawn from a wide range of property developers, planning consultants, architects, solicitors and homeowners. My experience in property tax dates back to 1994 having worked within a range of businesses large and small, including large global consultancies as well as independent niche firms, I have also represented a number of industry bodies (Chambers of Commerce and Professional Institutions) to contribute, advise and comment on tax policy and am a CEDR accredited mediator. We have advised on CIL since 2014 and have a broad range of experience of dealing with many Local Planning Authorities (LPAs) across England & Wales.

SKELETAL FRAMEWORK – INSUFFICIENT DETAIL

Our key concern is that the proposals set out via Clause 113 and Schedule 11 are at a very high framework level only with too little detail as to enable any real scrutiny of the proposals or draft Regulations and thus how IL might operate. Nor do these skeletal outlines allow any parties; government, LPAs, landowners and their advisers to scrutinise or consider if these will in any way improve the situation from the current CIL regime that has operated since 2010.

CIL is by no means perfect. But the existing CIL legislation has been refined, amended and improved by regular updates and Statutory Instruments since its implementation and many practitioners and advisers now have a good understanding of the rules. Furthermore, the many decisions from Valuation Office Appeal (VOA) and/or these Appeals via Planning Inspectorate (PINS) – albeit heavily redacted such that it can be difficult to understand the true decision clearly – have also helped many involved in planning and development understand the regulatory regime. Without clear draft regulations to read and consider it is to us, impossible to consider if these proposals have any potential to improve the current position and process for funding the requisite infrastructure from 'developer contributions'.

GLOBAL, ECONOMIC & ENVIRONMENTAL CONTEXT

The 'Cost of Living Crisis' and particularly the extreme pressure on both households and businesses from significantly increased energy prices and wider economic uncertainty in financial markets and interest rates has further heighted the levels of risk and urgency that we all now face in addressing the UK's resilience.

Tax policy has an important role to support businesses in facing these challenges and protect the overall economy in these uncertain times. A swift resolution of the conflict between Russia and Ukraine would undoubtedly help massively. The pandemic experience must educate Government to the importance of better investment and longer-term planning to build resilience at all levels of the economy and maintain high levels of education to underpin productivity and growth.

Net Zero and wider 'Green' incentives need to be reinstated to accelerate the progression of UK to a low carbon or net zero economy. To truly achieve 'Levelling-up' of opportunity across the country, including Devolved Administrations, the Government needs to reduce barriers to regeneration, housing and development. CIL or IL can clearly add a level of complexity, uncertainty and cost to any project and a mandatory adoption by all LPAs in England potentially creates additional costs to some regions that may be already difficult to regenerate on viability grounds. The proposals suggest, without substantive regulatory wording, to replace s.106 too, effectively bringing some £7bn[1] of developer contribution (for England) into the remit of CIL. This will create viability issues in certain areas of the country and for difficult/challenging sites that may also involve contamination or long-term dereliction. Viability is further exacerbated by the s.106 & CIL receipts being skewed to development across the South East of England (including London) and no mechanism for 'redistribution' between LPAs and/or wider regions.

GREATER LONDON & WALES

Whilst we act on project across the country, the majority of LPAs that we deal with on projects are within Greater London where CIL is proposed to stay in place and continue to be operated under the current Regulations by the various London Boroughs involving both 'Borough CIL' (BCIL) and 'Mayoral CIL' (MCIL) that is collected on behalf of the Greater London Authority and hypothecated to fund Crossrail.

[1] From The Incidence, Value and Delivery of Planning Obligations and Community Infrastructure Levy in England in 2018-19, August 2020, p.8.

Additionally, many of the LPAs across London have now operated CIL for many years becoming more adept at understanding the Regulations, thus providing robust application of the law in a consistent manner. Furthermore, the architects, planning advisers and CIL advisers that are active in this area all have a good understanding of the Regulations and well placed to advise those undertaking one-off projects.

If the current regime is 'good enough' for London and Wales to retain – where in our experience the majority of CIL cases operate currently – why does the rest of England have to face a completely new, mandatory and currently ill-defined IL regime? Government is proposing radical change without any real transparency as to the proposed outcome and benefits over the exist regime, which is being retained for London and Wales – thus introducing further complexity to the current regime.

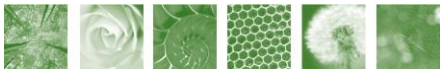
SPECIFIC AREAS

Reliefs from IL

The draft legislation as above is very limited in detail, yet only references Charities (Clause 204F) and social housing (Clause 204G) as areas that may involve some relief/exemption or to maintain levels of contribution. This could mean that private residences are to be entirely withdrawn from IL and thus no longer require any self build exemption process, or that no exemption is envisaged for self build homes. Again, the lack of detail is a huge barrier to enable proper consideration of the proposals.

Compensation is a good area covered by clause 204T and seems to provide a clear route that if a LPA's actions seriously disadvantage the CIL payer, then they can potentially seek some recompense from the LPA. We see this as an important area to try to 'level up' the playing field as currently CIL largely places significant discretion in the hands of LPAs throughout the Regulations to opine various matters as they see fit with little consequence if the CIL payer hasn't followed the limited and very prescribed steps, whilst giving LPAs few matched or time limited requirements to work within. For example, LPAs only have to issue the Liability Notice *"as soon as practicable after the day on which a planning permission first permits development"* and many take weeks and months to issue these with no follow up for months and sometime years. Yet the CIL payer to seek a Review under Reg.113 must lodge this with 28days of the date of the Liability Notice and similarly an Appeal under Reg.114 must firstly have complete as valid review, as well as making the application for the Appeal within 60 days on the Liability Notice. We regularly see owners that have failed to act within these relatively short time scales, and LPAs that then refuse to action the Regulations, deeming them to have 'timed out'. Hence a clearer ability to seek compensation from LPAs will no doubt help focus their attention in applying the regulations fairly and consistently.

We would further flag a grave concern for the levels of surcharges proposed within IL which instead of the current lower of 20% of CIL or £2,500 is proposed in clause 204S as being no more than 40% (200% of current) or £50,000 (2,000% of current). Whilst we would accept that a capped figure of £2,500 is hardly an incentive for a developer and a large scale project to comply with elements of the regulations, our experience is that mostly it is the individual families and small scale developers (building 5 to 75 housing units) that are failing to take timely and appropriate advice and thus incurring these surcharges – mostly due to ignorance of the regulations or through the lack of contact



from the LPAs in enforcing the payment - then encourages them to have a 'false belief' that CIL is not valid on their scheme – until the LPAs chase the payment months or years later. At £50,000 this would be catastrophic to some, resulting in loss of the scheme or even bankruptcy/insolvency of the family/developer. Hence the scale of penalties to me is best referenced as a percentage of the potential CIL applicable – thereby large projects would have a great surcharge than smaller projects, but perhaps caps in place for self build, charity and where social housing is part of the scheme – as the reality is any surcharge removes project cash flow and impacts viability.

FIXING CIL – SELF BUILD EXEMPTIONS

Currently, self builders (those commissioning a new house (Reg.54A-D), extension or annexes (Regs.42A-C) are allowed to seek a self build exemption to mitigate the CIL liability arising from their projects, where creating a new dwelling or over 100m^2 in net new GIA.

However, these regulations have some idiosyncrasies that have languished from poor drafting or naïve understanding of how planning and development operates in reality, if not a blend of both! Not least that many projects have multiple planning consents.

Self Build Extension Appeal

Whilst Reg.116A facilitates an Appeal via the VOA as to the amount of a self build annex exemption and Reg.116B facilitates an Appeal as to the amount of a self build housing exemption. There is no ability anywhere within the Regulations to challenge a self build exemption on an extension. This means that any over-zealous LPA refusing to grant a self build extension exemption has no scrutiny, nor oversight and the homeowner no option but to pay the CIL determined. This is clearly a gap in the drafting and seriously disadvantages homeowners seeking to extend their own home. Creating a Reg.116C that addresses self build extensions (similar to Regs.116A and 116B) would ensure greater fairness – particularly in conjunction with the following issue.

Self Build Extensions – only if currently occupied

Another serious gap (or lazy drafting) in the regulations is caused by the wording of Reg.42A(1) that requires that the homeowner "*occupies the main dwelling*" as their sole or main dwelling at the time of the self build application. We have regularly seen cases that should otherwise meet the requirements for self build exemption being denied relief by this presumption of occupation – that applies to Extension and Annexes. Most frequently where families acquire an old or rundown property with the intention of extending it and significantly redeveloping it before occupation and sale of their current home. The legislation for housing – is drafted with a future centre understanding – as will become the sole or main residence but LPAs are regularly relying on this seemingly innocuous difference to deny exemption to extensions where the family are not already in occupation. This could be very simply resolved by amending Reg.42A(1)(b) to *"P occupies <u>or intends to occupy</u> the main dwelling as P's sole or main residence; and…"* and so ensuring that these projects are not unduly denied the exemption, that was clearly intended to apply to private homeowners.

Self Build Exemptions – complex rules, inexperienced & unaware

Furthermore, we see a great number of cases where self build exemptions are denied or withdrawn because of relatively minor infringement(s) of the procedures set out by the Regulations and now enforced by the case decision in *Nathan Gardiner v Hertsmere Borough Council [2022] EWCA Civ 1162*. Hence simplifying the procedure for homeowners that are irregular developers and thus less likely to have taken advice or to be aware of the complex CIL Regulations and thus fall foul of them too easily. Might there be a reasonable option to introduce a new Appeal option that allows a late appeal (outside of the 60 days norm) but only for self builders that meet certain other criteria and BEFORE completion of the development.

We have additionally seen some LPAs take rather 'odd' views as to the nature of the projects - deeming some extensions to be new build dwellings and thus requiring any exemption as a self build housing exemption, contrary to the construction reality that is clearly 'an extension' to an existing family home. Others have deemed extensions as annexes, and annexes as extensions – so there is some inconsistency in the approaches taken by LPAs and their respective CIL personnel in certain situations.

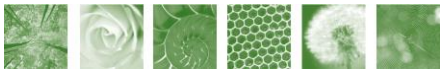
Timescales & Delays in Resolving Issues

One further considerable issue is that Reviews or Appeals or any other negotiation of the CIL position with the LPA typically requires that no works commence prior to the resolution of the issue. This significantly delays projects from starting on site and slows the entire development cycle and incurs considerable extra cost that in turn increases rents and sale prices – making homes less affordable. Might it be possible to introduce a mechanism that enables the CIL amount to be discussed and agreed whilst the project proceeds – so long as some criteria are met – e.g. the LPA has a charge over the site, and/or a proportion of CIL is paid on account (say 25%-40%) and held by the LPA, pending the outcome of the matter. This would enable developers to progress with works and again help expedite resolution of the issues and ensure the LPA are proactively addressing the points in a timely and consistent manner.

Level Playing Field

As detailed above some of the lack of awareness is made worse by slow actions by LPAs in addressing CIL and progressing Liability Notices or seeking payment. By 'pairing up' the CIL-payer time frames – such that LPAs must act within a required time scale - 30/60days – otherwise their ability to pursue the CIL amount lapses. We believe too many issues are caused by slow and ineffective action by LPAs which currently face little or no sanction; where CIL-payers face loss of any relief/exemption and/or significant charges for relatively minor indiscretions or errors! A more balanced process would ensure timely consideration that should improve awareness and encourage all to seek appropriate and timely advice if necessary.

We hope that we have conveyed the clear need to remove private homeowners from the CIL system, whilst protecting revenues from small-scale developers. The current self build process is still complex and convoluted and too many 'innocent parties' are bearing significant CIL charges against projects that should be exempt, bar for ill-defined and poorly drafted legislation and forms that impose extra-statutory requirements and the complex realities of planning, property and construction.



Any reform – whether within IL or CIL, must consider improving these issues to create fairer and more transparent legislation that householders can understand and not unwittingly land themselves a CIL liability of £30K, £50K or £130K – all of which we have seen on numerous occasions – some from poor advice (including via LPA) and/or physical condition – such as unintended building collapse, that lead to a new but retrospective planning permission – denying self build exemption!

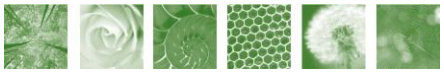
EXPAND CAPITAL ALLOWANCES INTO LARGE SCALE BUILD TO RENT (BTR)

E3 Consulting has previously urged Government to consider extending capital allowances for large scale residential development. Whilst we appreciate that expenditure within dwellings is excluded from general capital allowances, we believe that the changing scope of residential development and specifically expanding investment in 'build to rent' (BTR) schemes from large scale corporate landlords are key to delivering on the urgent need to boost housing numbers each and every year – irrespective of the long-standing target of 300,000 remaining in place. Without a target – no one will be measuring their performance to achieve housing growth and reduce pressure on supply and affordability.

Such a relief could be applied to 'large housing' projects perhaps those with more than 25, 50 or 100 units, whilst carving out low level projects, ensuring buy to let landlords are not entitled to allowances on individual dwellings (or small scale schemes below the chosen threshold) of assured short-hold tenancies. We believe such a new large scale housing specific allowance could considerably help the investment into these BTR schemes across the country and help the Levelling-up and Regeneration agenda and deliver on the requirement for both more, but also quality housing accessible to all.

LAND REMEDIATION TAX RELIEF (LRTR)

LRTR is an important aspect of regeneration and Levelling-up. Difficult brownfield sites can have a disproportionate cost burden to be overcome before regeneration can occur, whether for commercial schemes that may enjoy capital allowances support or residential use that most likely, excluding our above BTR proposal, will not be eligible for capital allowances relief. The principal barrier we observe within the LRTR rules is the anachronistic date from which the long-term dereliction is considered applicable – specifically CTA2009 s.1147(3)(b) which has remained static at 01 April 1998 since the introduction despite the legislation at s.1147(3A) providing a mechanism to update and change this date. Failure of Government to adjust this date over the years requires taxpayers to 'prove dis-use' over 24 years and is effectively rendering the long-term dereliction relief impossible to achieve in all but a very limited number of projects – inhibiting redevelopment and regeneration of many blighted sites across the country. Accordingly, we urge you to carefully consider how LRTR can be expended under this Levelling-up and regeneration initiative to boost housing growth and further erode the barriers to quality and affordable housing across the UK.



CIL – EXEMPTION IN INVESTMENT ZONES/FREEPORTS

Remediation measures are all the more important for brownfield sites where a new Infrastructure Levy (IL) to potentially replace the existing Community Infrastructure Levy (CIL), could reduce the economic viability of many of these sites further, leading to stagnation and long-term blight. Hence boosting the economic viability in these areas by perhaps creating a CIL exemption/relief for schemes within these designated areas, or that address contaminated or long-term derelict sites – all of which would again help to accelerate growth in housing numbers.

SUMMARY

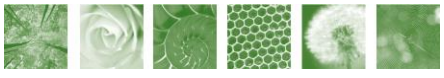
We consider the planning system is ill-prepared for the radical changes announced for CIL and the fragmentation of this in a new and mandatory IL for the rest of the country. Nor is PINS (with its significant backlogs) able to cope with the rate of adoption required with this mandated IL across England – in processing the necessary charging schedules etc. on top of its other pressures to support the planning system.

We would strongly advocate, as a practice that deals with multiple CIL projects day in, day out, maintaining the existing CIL regime (as accepted fit for use across London and Wales) but with some adjustment to fix the limited difficulties (highlighted above). After ten years - and after considerably time, effort, adjustment via regular Statutory Instruments and case law and decisions which have begun to clarify the remaining 'grey' areas – many are gaining the necessary familiarity and experience of the Regulations to avoid the worst of the issues faced in the early years of CIL. A new regime for IL could take us back ten years – if it is not carefully drafted to improve upon CIL!

There is a clear need to reform the CIL process and particularly to help private individuals to avoid life changing cost impacts on their private homes and specifically those undertaking extensions on houses yet to be occupied.

I hope that you and the committee will be very cautious – not least in the aftermath of the Mini-Budget - not to 'throw out the baby with the bath water' and commit to a new IL which has no clarity, nor certainty and in its current form must be further scrutinised in great detail on the substantive measures and draft Regulations - long before passing these into legislation that could further paralyse the planning system, extend delays and further reduce housing numbers.

We hope the committee find these comments and insights into these particular areas impacting property and construction of interest and use in their deliberations. Tax is an important factor in any economy, and we consider the existing CIL Regulations have many merits, but focussed attention to improve its short comings – via simplification or longer-term stance so that homeowners, developers and advisers can better understand and manage their activities – mindful of the fiscal consequences and contribution to the wider economy – but with simplicity, transparency and certainty.



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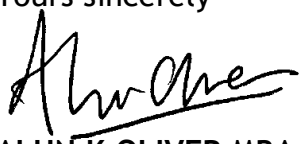
I would be very happy to discuss further any of these issues with DLUHC, HM Treasury, HMRC and/or the Committee team as may be relevant.

Yours sincerely



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MANAGING DIRECTOR
FOR & ON BEHALF OF E³ CONSULTING

c.c. Levelling-up and Regeneration Bill Committee members