

# CIL: is the self-build exemption achievable?

*Rachael Herbert discusses the CIL regulations' exemption and highlights its deficiencies*



Rachael Herbert is an associate at Dentons

The Community Infrastructure Levy (CIL) regime ushered in by the Community Infrastructure Levy Regulations 2010 has brought more development within the scope of developer contributions. 'Self-builders' – who directly organise the design and construction of their new home – now generate around 10% of new private sector housebuilding (*Self Build Housing Market Report – UK 2016-2020 Analysis*). Their experience of CIL was meant to be straightforward, but regulatory complexity and attitudes to charging have meant that it is anything but.

Here I focus on the procedure for claiming the self-build exemption under Reg 54B of the Community Infrastructure Levy Regulations 2010 (as amended) (the CIL Regs), its many traps, and how there is a need for urgent reform to ensure fairness for people wishing to build their own home.

## Background

CIL was introduced in 2010 through the CIL Regs. Put plainly, CIL is a development charge to fund a wide range of community infrastructure on most forms of new floorspace. Once it has a charging schedule in place, and subject to certain exceptions, a local authority can charge a levy on new buildings granted, or deemed to have been granted, planning permission. Payment of this levy is triggered by commencement of development and the CIL collecting authority (which is usually the charging authority) will issue a demand notice that requests the payment of CIL within 30 days of such commencement date.

CIL was intended to be (May 2011 Department for Communities and Local Government guidance, emphasis added):

*... fairer, faster and more certain and transparent than the system of planning obligations which causes delay as a result of lengthy negotiations.*

It was intended to provide developers with:

*... certainty 'up front' about how much money they will be expected to contribute [and] to create a fairer system, with all but the smallest building projects making a contribution towards additional infrastructure that is needed as a result of their development.*

In 2011 the coalition government recognised that a number of challenges were holding back the potential of the self-build sector and that new initiatives were needed to make it easier for ordinary people to build their own homes (*Laying the foundations: a housing strategy for England* (2011) paras 69-70). In 2014, following considerable pressure, the government introduced the CIL exemption for 'self-build' development through Regs 54A to 54D of the CIL Regs. The requirements to qualify as 'self-build' development, and the conditions which attach to the exemption, can be broadly summarised as follows:

- A self-build exemption is available to anyone who builds or commissions their own home for their own occupation.

**'While an unexpected Community Infrastructure Levy (CIL) liability of tens of thousands of pounds will have serious consequences for most developers, it is exceptionally damaging to a self-builder.'**

- Individuals claiming the exemption must own the property and occupy it as their principal residence for a minimum of three years after the work is completed.
- The exemption application must be made before development has commenced.
- If the exemption application is approved the 'self-builder' will not have to pay CIL on any new floorspace built as part of their house, flat or residential extension development.
- Before commencing the development, the self-builder must submit a commencement notice to the charging authority which states the date on which the development will commence. If the collecting authority does not receive this notice on or before the commencement date the self-builder will lose the exemption and become liable to pay the full levy charge.
- If personal circumstances change and the self-builder wants to dispose of the property before the three-year occupancy limit expires,

they can do so, but they must notify the charging authority and the levy then becomes payable in full.

It is Reg 54B of the CIL Regs that prescribes the detailed requirements for applying for the self-build exemption (see box below).

These requirements can be shortened to the following:

development starts on site otherwise the self-build exemption will be lost.

While these requirements seem straightforward enough at first glance, practice has shown that they are fraught with traps for the unwary. A procedural failure, irrespective of how minor, can provide a local authority

*A procedural failure, irrespective of how minor, can provide a local authority with cause to refuse a claim or decide that a person is no longer eligible to receive the benefit of the exemption.*

- an applicant must first assume liability to pay CIL;
- an applicant must apply using the published self-build exemption form;
- the self-build exemption application must be made and decided before any development starts on site; and
- a commencement notice must be submitted before any

with cause to refuse a claim or decide that a person is no longer eligible to receive the benefit of the exemption (despite it having been granted), resulting in substantial loss for the self-builder. Equally serious, there is a danger that the public at large see local authorities as being ruthless and fixated on maximising their CIL revenue if they refuse an exemption due to procedural non-compliance, particularly if that authority has adopted CIL before 2014, without

## 54B. Exemption for self-build housing: procedure (emphasis added)

- (1) A person who wishes to benefit from the exemption for self-build housing must submit a claim to the collecting authority in accordance with this regulation.
- (2) The claim must —
- (a) be made by a person who —
    - (i) intends to build, or commission the building of, a new dwelling, and intends to occupy the dwelling as their sole or main residence for the duration of the clawback period, and
    - (ii) has assumed liability to pay CIL in respect of the new dwelling, whether or not they have also assumed liability to pay CIL in respect of other development;
  - (b) be received by the collecting authority before commencement of the chargeable development;
  - (c) be submitted to the collecting authority in writing on a form published by the Secretary of State (or a form substantially to the same effect);
  - (d) include the particulars specified or referred to in the form; and
  - (e) where more than one person has assumed liability to pay CIL in respect of the chargeable development, clearly identify the part of the development that the claim relates to.
- (3) A claim under this regulation will lapse where the chargeable development to which it relates is commenced before the collecting authority has notified the claimant of its decision on the claim.
- (4) As soon as practicable after receiving a valid claim, and subject to regulation 54A(10), the collecting authority must grant the exemption and notify the claimant in writing of the exemption granted (or the amount of relief granted, as the case may be).
- (5) A claim for an exemption for self-build housing is valid if it complies with the requirements of paragraph (2).

anticipating the introduction of the self-build exemption.

**Handle with care**

Mistakes that are commonly made in connection with a self-build exemption claim include the following:

- The commencement notice not being submitted before development commences, which results in the self-builder no longer

constitute ‘commencement’ under Reg 7 of the CIL Regs because they were carried out under the permitted development rights regime and not authorised by the planning permission (see Sch 2, Part 11, Class B (demolition of buildings) of the Town and Country Planning (General Permitted Development) (England) Order 2015 and the definition of ‘excluded development’).

*Unfortunately, there is rarely a way to remedy a procedural breach under Reg 54B of the CIL Regs, unless development has not yet commenced on site.*

being eligible for the exemption (under Reg 54B(6) of the CIL Regs) despite it having been granted. This is often due to a breakdown in communication about who is responsible for giving this notice. Is it the self-builder, building contractor, architect or town planner? It is worth noting that the failure to submit this notice, where a consultant is engaged to deal with all CIL-related matters, could result in a professional indemnity claim being made for negligence.

- A failure to apply for and obtain the self-build exemption anew when a s73 application is made to vary the original permission. If the s73 application is granted and this consent is built out (not the original permission), the self-builder will not be able to rely on the self-build exemption that was granted in connection with the original permission unless the amount of CIL that would be payable under Reg 40 of the CIL Regs has not changed (Reg 9(6) of the CIL Regs). For example, there has been no change in floorspace.
- Development commencing prior to the self-build exemption having been granted, which results in the claim lapsing (under Reg 54B(3) of the CIL Regs). Local authorities rarely accept the argument that works of demolition do not

- Development commencing under one permission and then continuing under a revised scheme through a s73 permission. In this scenario it would not be possible to obtain a self-build exemption in connection with the s73 consent because, even if the claim for the self-build exemption is made before the s73 permission is granted, development under the s73 permission will have already started (pursuant to the original permission), which would result in the claim lapsing (under Reg 54B(3) of the CIL Regs). Regulation 7(2) of the CIL Regs makes it clear that (emphasis added):

... development is to be treated as commencing on the earliest date on which any ‘material operation’ begins to be carried out on *the relevant land*.

That is to say, commencement is not to be judged relative to each planning permission. The only exception to this is a s73A (retrospective) permission, as in this instance:

... development is to be treated as commencing on the day planning permission for that development is granted or modified (as the case may be)...

(under Reg 7(5) of the CIL Regs).

- The claim form not including all of the particulars specified on the form and the local authority refusing the claim on account of it being invalid. There have been instances where the self-build exemption was refused due to the claim form not including the planning application reference for the proposed development. This was despite the form including the planning portal reference and a description of development which could be used by the local authority to identify the proposal and then assess the claim.
- The assumption of liability notice (which is submitted with the self-build exemption claim) not listing the current address for the party assuming liability and requests for more information not being answered in time, resulting, ultimately, in a refusal of the self-build exemption claim.

While each of these mistakes seems innocent and trivial, the CIL consequences are not. Unfortunately, there is rarely a way to remedy a procedural breach under Reg 54B of the CIL Regs, unless development has not yet commenced on site. A recent appeal decision, the Elmbridge case (see reference box on p28), demonstrates how difficult it is to try to argue that works carried out on site do not constitute ‘commencement’, to avoid any claim for the exemption lapsing (under Reg 54B(3) of the CIL Regs) or being refused (under Reg 54B(1)(b) of the CIL Regs). In this appeal, the self-builder argued that there had been no ‘commencement’ under any of the three permissions for a new dwelling house because:

- the permissions contained a pre-commencement condition that had not been discharged and this meant that none of the permissions could be said to have been lawfully implemented; and/or
- the development was not consistent with the plans that had been approved under any of the three permissions and was therefore the unlawful construction of a separate development that would require retrospective planning

permission under s73A of the Act. A self-build exemption could then be made in connection with the s73A application. (Arguably, there is also no ability to apply for the self-build exemption in connection with a s73A permission because the commencement notice needs to be given after the self-build exemption has been granted but before the commencement of works, which is practically impossible because the date of grant for a s73A permission is also the deemed date of commencement).

The inspector did not accept either of these arguments on the facts of the particular case, finding that:

- the pre-commencement condition was not expressly prohibitive and did not go to the heart of the planning permissions so as to render the development unlawful (applying the view of Sullivan J in the Court of Appeal decision of *Greyfort Properties Ltd v Secretary of State for Communities and Local Government* [2011]);
- the works on site were permitted under the third and most recent permission, despite there having been some non-material deviations from the plans approved for that scheme;
- works started on site with the demolition of the original dwelling house approximately three months after the grant of the second permission and six months before the grant of the third permission;

- because the development on site at the date of inspection was non-materially different from the development authorised under the third permission, it was unlikely that works ever commenced under the first or second permission and, instead, were started unlawfully, but in general accordance with the third permission; and

- the ability to claim the self-build exemption was forever lost to the self-builder as works had commenced, meaning that the self-builder was ineligible for the exemption (under Regs 54B(3) and (6) of the CIL Regs);
- development under the third permission was ineligible for the

*The amount of CIL will depend on the floorspace of the new home and the levy rates for the local area, although it could quite easily exceed £50,000.*

- the third permission had to be construed as a s73A permission, despite it having been granted by the local authority as a s73 permission, because it was granted after works had started on site and it needed to approve both retrospective (works carried out unlawfully) and prospective works, if works did not commence under the second permission.

The consequences of the inspector's findings were that:

- the first and second permissions had not been implemented, but the third permission had;
- the third permission was to be construed as a s73A permission, resulting in the date of its grant being the deemed commencement date under Reg 7(5) of the CIL Regs;

300 sq m demolition credit under Reg 40(11) of the CIL Regs because there was no 'in-use building' on 'the relevant land' at the time of commencement (despite there being an 'in-use building' at the time the original permission was granted) on account of the commencement date being the date of grant under a s73A (retrospective) consent; and

- a new CIL liability notice needed to be generated in accordance with Reg 40 of the CIL Regs and the CIL was to be paid in full.

While an unexpected CIL liability of tens of thousands of pounds will have serious consequences for most developers, it is exceptionally damaging to a self-builder, as they are unlikely to have the financial

## THE COMMERCIAL LITIGATION JOURNAL

The bi-monthly journal designed to meet the needs of commercial litigators

For a FREE sample copy: call us on 020 7396 9313 or visit [www.legalease.co.uk](http://www.legalease.co.uk)



## Reference

The Elmbridge case, appeal decision APP/K3605/L/16/1200069, 21 April 2017 (www.legalease.co.uk/elmbridge)

means to resource this additional sum on top of the construction costs they have already incurred in connection with their new home. The amount of CIL will depend on the floorspace of the new home and the levy rates for the local area, although it could quite easily exceed £50,000 (which would apply for a floorspace of

### Reform needed

Changes are needed, as a matter of priority, to ensure people are not discouraged from building their own home and will continue to make a much-needed contribution to supply of new homes in England.

The 64-page report of the CIL Review Team (*A new approach to*

*Changes are needed, as a matter of priority, to ensure people are not discouraged from building their own home and will continue to make a much-needed contribution to supply of new homes in England.*

350 sq m and a levy rate of £200 per sq m). A debt of this magnitude has the potential to ruin a person, and may, in the worst of circumstances, even lead to them having to sell their home, unfinished, in order to pay their CIL bill.

It is perverse, given the political and policy intent behind the exemption and the need to diversify the housing market, that the (often minor) act of commencing works can be enough to:

- invalidate a claim that has not yet been determined; or
- render an existing grant worthless if a commencement notice has not been given in advance of the start date.

The rigidity of the CIL regime is clearly frustrating its original intention to:

- create a fair and transparent mechanism for developers to contribute to infrastructure; and
- exempt self-builders from having to pay CIL on the development of their own home.

*developer contributions* (February 2017, submitted in October 2016)) made several recommendations for overhauling the CIL regime, which chiefly focused on the needs of the big developers. One notable exemption from this report is the need for reform to the self-build exemption provisions to ensure self-builders are better protected and the exemption is not lost without good reason.

The inherent unfairness of the current relief system can be overcome by one or more of the following amendments to the CIL Regs:

- Provide a collecting authority with a discretion to:
  - waive any non-compliance with the breach of procedure in Reg 54B of the CIL Regs; and/or
  - not charge CIL in circumstances where it is clear that the development is of the kind that should qualify for the exemption under Reg 54A of the CIL Regs.
- Provide a self-builder with the right to challenge, via statutory

appeal, any refusal of the self-build exemption by the collecting authority, where the refusal relates to a breach of Reg 54B of the CIL Regs. At present the only right of appeal for a self-builder is under Reg 116B of the CIL Regs and it is limited to an appeal about the amount of the self-build exemption that is granted. If no level of exemption is granted, there are no grounds for appeal.

- Delete the disqualifying provisions in Reg 54B of the CIL Regs so that the failure to give the commencement notice before starting works on site or the failure to obtain the exemption before starting work does not exempt a person from benefiting from the CIL relief. There is no compelling reason that a timing error should override the ability to claim and retain the exemption, particularly when the need for advance notice of works is redundant on account of there being no need for a collecting authority to generate a demand notice where CIL is not payable.
- Amend Reg 55 (discretionary relief for exceptional circumstances) of the CIL Regs to allow relief to be granted to a self-builder despite there being no s106 planning agreement and where the development is of the kind that would qualify as self-build development under Reg 54A of the CIL Regs and the requirement to pay CIL would result in an unacceptable financial burden on the self-builder.

These proposed amendments should not be tied up and delayed while we await the government's decision on the CIL Review, expected as part of the Autumn Statement. They are straightforward amendments, which should be enacted without delay if the government is serious about taking proactive steps to stimulate growth in the self-build sector. ■

*Greyfort Properties Ltd v Secretary of State for Communities and Local Government & anor*  
[2011] EWCA Civ 908