Should landlords and tenants pay the new CIL for change of use applications?

By: Alex Ground, Russell-Cooke

The Community Infrastructure Levy (CIL) is a new levy that local authorities can choose to charge on new development in their area; primarily it is meant to be a tax on additional floor space. The money can be used to support and maintain development by funding infrastructure that the council wants (an announcement will be made in October 2012 as to whether it can additionally be spent on affordable housing).

Tax for change of use planning applications However, many landlords and tenants are inadvertently finding themselves subject to a CIL charge for change of use applications where no new floor space is being applied for. With careful planning and awareness of the points below this can be avoided or at least factored into viability analysis.

Avoiding unnecessary tax The formula for CIL permits a deduction from the floor space of the development of all floor space that exists and has been in continuous lawful use for six out of 12 months before the relevant date on which the chargeable development is first permitted.

There are two aspects of this definition for what can be deducted that need to be given careful consideration if a CIL liability is to be avoided.

Firstly, the relevant date and secondly, what constitutes “continuous lawful use”.

The relevant date is different for both outline and full planning permissions. Change of use applications will nearly always be applications for full planning permission. If the full application is subject to a condition requiring further approval to be obtained before development can commence, the relevant date will be the date on which that final approval is given. If no final approval is required, the relevant date will be the date of grant of planning permission. Therefore, if for whatever reason, the tenant of the property is to vacate the property before grant of planning permission, landlords should be very careful that any gap in occupation is not so long as to prevent the deduction of existing floor space.

The second element of “continuous lawful use” is satisfied if at least part of a building has been in use for a continuous period of at least six months within the 12 months preceding the relevant date. The Valuation Office, who will deal with appeals on any CIL charges, states that whether a building is “in use” is a question of fact and degree. Therefore if part of a building is used for storage, whether it can be considered “in use” must be decided on the facts of the case

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having regard to the evidence submitted by the parties. Evidence of, for example, what was stored in the room, how often staff visited the room, who owned the items would need to be collated and submitted. Any photographic evidence in addition to leases/licences could be crucial. The collecting authority is allowed to deem the existing floor space to be zero if it does not have sufficient information to enable it to establish whether the existing floor space has been in continuous lawful use for the requisite period. Often an owner will want to claim relief for business rates if a building is empty; if this is done this could well be seen as determinative that none of the building was still in use.

Therefore when making applications for change of use:

- Don't just assume the application will be dealt with in eight weeks if there is likely to be a gap in occupation between last tenant and grant of planning permission - make the local planning authority aware of the situation and closely monitor to ensure it is granted within eight weeks and therefore there hasn't been more than six months since the last tenant.
- Before a tenant vacates all of a building and relief from Business Rates for an empty property is claimed, check the potential savings compared to a CIL liability if existing floor space cannot be deducted.
- Consider putting a tenant into part of the building for six months before date of grant of planning permission if building has been vacant.

About the author

Alex Ground is a planning solicitor at Russell-Cooke LLP. When not at work,Alex loves playing with her young children and carrying them round in her Dutch bike to keep fit.

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