



AGENDA ITEM: 5(b)

CABINET: 15 September 2015

Report of: Assistant Director Planning

Relevant Managing Director: Managing Director (Transformation)

Relevant Portfolio Holder: Councillor J Hodson

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SUBJECT: COMMUNITY INFRASTRUCTURE LEVY - PROTOCOL FOR LEVYING SURCHARGES

Wards affected: Borough wide

1.0 PURPOSE OF THE REPORT

1.1 To seek approval for a protocol establishing how the Council will apply surcharges and interest to developers/landowners that fail to follow the Community Infrastructure Levy (CIL) administrative requirements.

2.0 RECOMMENDATIONS

2.1 That the Protocol for handling failures to adhere to the requirements of the Community Infrastructure Levy (CIL) Regulations (as amended) at Appendix A be approved.

2.2 That delegated authority be granted to the Assistant Director Planning to apply the surcharges in accordance with the Protocol and CIL Regulations 2010 (as amended).

3.0 BACKGROUND

3.1 The Community Infrastructure Levy (CIL) was introduced nationally in April 2010 and allows local authorities in England and Wales to raise funds from developers who are undertaking new building projects in their area. The revenue collected

is then used to pay for a wide range of infrastructure that is needed to support new development.

- 3.2 A CIL Charging Schedule was adopted by Council on 23 July 2014 and took effect from 1 September 2014. All developments approved in the Borough, that trigger a CIL liability (the creation of over 100sqm of new build floorspace or the creation of a dwelling), will be charged a levy in accordance with the Council's adopted Charging Schedule. The levy is payable upon the commencement of each development, or a relevant phase, and the revenue collected used to fund infrastructure provision or improvements which are identified as required to support new development in the Borough.

4.0 ADMINISTRATION OF CIL

- 4.1 The CIL Regulations 2010 (as amended) govern exactly how CIL should be administered by each charging authority. All procedures must be dealt with in direct reference to the legislation, and the regulations stipulate set penalties that must be imposed where breaches of the administration process occur.
- 4.2 It is useful to approach the administration of CIL like a game of 'tennis' – with a series of notices served repeatedly between the applicant/developer and the Council. Upon the grant of planning approval, and before commencement of the development, the developer is required to serve a number of notices to the Council – to assume liability (to pay CIL), to apply for any relief/exemption and to serve a commencement notice (notifying the Council of the intended commencement date for the development). In return, the Council must acknowledge all notices received, issue a liability notice (setting out the charge due upon commencement) and, following commencement, issue a demand notice requesting payment. The Council must also acknowledge payment(s) and monitor clawback (for up to 7 years) on those sites which are granted relief.
- 4.3 The administration of CIL therefore depends on the correct notices being served at the correct times, and failure to follow this process creates significant additional administrative work for the charging authority (Council) and affects the speed and ease at which CIL revenue can be collected. Subsequently, the regulations state **mandatory penalties** that **must** be applied where the most significant administrative breaches occur. These penalties are designed to act as both a deterrent to anyone thinking they can avoid following the administrative requirements, and to heavily penalise anyone who does indeed try. Unfortunately the CIL Regulations do not distinguish between those who deliberately seek to circumvent the administrative process or avoid payment and those who have made a genuine error in their failure to comply. However, all reasonable measures are taken to make applicants/developers fully aware of the requirements of CIL to prevent inadvertent non-compliance.
- 4.4 The Regulations also grant the Council flexibility as to whether they choose to apply additional penalties through the means of **discretionary surcharges and interest** which **may** be applied.

- 4.5 It is considered that the mandatory penalties awarded through the regulations should provide sufficient scope to both caution against, and penalise, failure to adhere to the CIL administration process. However, the adoption of additional, discretionary surcharges will provide a further incentive for developers to pay promptly (to avoid the imposition of surcharges) and to deter most breaches from occurring in the first place. The surcharge will also help to meet the cost of additional administrative work associated with the enforcement of the Regulations when a breach has occurred. The fact that the application of the surcharge is at the Council's discretion provides the Council with the ability, in appropriate cases, to set aside the surcharge however, in order to ensure a consistent and unambiguous approach, it is my recommendation that the discretionary charges are applied without exception, where there has been a clear failure to comply with the legislative requirements of the CIL Regulations.
- 4.6 In cases of non-payment, or late payment, interest will be calculated and added to the CIL chargeable amount due. The CIL regulations also grant the Council enforcement powers to pursue cases of non-payment. Such enforcement action will be assessed on a case-by-case basis.
- 4.7 It is within reason that a development could have multiple CIL surcharges imposed on it for incurring successive breaches.

5.0 APPLICATION OF SURCHARGES

- 5.1 There are a number of administrative breaches that demand mandatory penalties to be imposed, and these can also incur additional, optional penalties. They are:
- Failure to submit an assumption of liability notice
 - Failure to submit a commencement notice
 - Failure to submit a notice of chargeable development
 - Failure to notify of a disqualifying event
 - Failure to comply with an information notice
 - Failure to make payment, or to make payment on time
- 5.2 For the purposes of clarity and to set out a consistent approach in the application of surcharges, the protocol proposed at Appendix A sets out for each type of breach, when and how the Council would apply the mandatory surcharge required by legislation and the discretionary surcharges that the Council will apply. The proposed discretionary surcharges range from £50 to £2500 (the level of charge is set by the Regulations), and are summarised below.

Failure to assume liability prior to commencement of a development

- 5.3 Liability must be assumed before a development commences, by submitting an assumption of liability form. This informs the Council who will be responsible for paying the CIL charge.
- 5.4 **Mandatory requirement:** Where this notice isn't received, the Council must identify those person(s) liability defaults to and, where there are multiple

landowners, how liability must be apportioned. This identification will incur significant additional administrative work and costs.

- 5.5 **Discretionary Surcharge:** The Council will therefore apply a surcharge of £50 on each of the persons liable to pay CIL in respect of that development, and/or £500 on each person liable to pay CIL where the Council have to apportion liability.

Failure to submit a commencement notice

- 5.6 A commencement notice must be submitted at least one day before the development commences to inform the Council of the commencement date. This date is used by the Council to issue the demand notice and set the payment instalments against.

- 5.7 **Mandatory requirement:** Failure to submit the commencement notice will place further administrative burdens on the Council, and officers must visit the site to deem a commencement date. Where a commencement notice is not received, and work begins, the Council must withdraw instalments and revoke any relief/exemption granted. Payment is due in full and immediately from the deemed commencement date, and a demand notice will be issued.

- 5.8 **Discretionary surcharge:** A 14 day payment window will be allowed for payment, with the threat that a surcharge will be imposed if payment is not received within this period. It is hoped that this will encourage prompt payment but provide an appropriate penalty if payment is not received. Should payment not be received within the 14 days, the Council will then apply a surcharge of 20% of the chargeable amount, or £2500, whichever is the lower amount, and re-issue the demand notice for payment.

Failure to submit a notice of chargeable development

- 5.9 **Mandatory requirements:** Some developments may be undertaken through permitted development rights, but still meet the triggers for CIL. In CIL chargeable cases, the developer is required to submit a Notice of Chargeable Development (NCD) to the Council so a CIL levy can be calculated and applied and a demand notice issued. The Council can also request further information to be provided. In the absence of a NCD, the Council must collect all relevant information, prepare a NCD and serve the notice on landowners, along with a liability notice. Various surcharges will be applied here, dependent on if and when a NCD is submitted.

- 5.10 **Discretionary surcharge:** Where an NCD has not been received, but is required, and development is deemed to have commenced, the Council will write to the landowner(s) and issue a request for the NCD to be submitted within 21 days.

- If the NCD is returned within 21 days, a demand notice will be issued. Where the due payment is made within 14 days of the demand notice being issued, surcharges will be waived.
- If the NCD is returned within 21 days, a demand notice will be issued. Where the due payment is not made within 14 days of the demand notice being

issued, then the Council will then apply a surcharge of 20% of the chargeable amount, or £2500, whichever is the lower amount, and re-issue the demand notice for payment.

- If the NCD is not submitted, a surcharge of up to £2500 will be applied immediately along with any other penalties, for example having to identify liable persons. A demand notice will then be issued. Further penalties will be applied in accordance with the procedures for non-payment as outlined in paragraphs 5.16 and 5.17 of this report.

Failure to notify of a disqualifying event

- 5.11 Applicants can claim for relief/exemption from CIL if their development relates to social housing, self-build housing (whole house), self-build housing (residential extension/annex) or the development belongs to a charity.
- 5.12 **Mandatory requirements:** Where exemption/relief is granted, clawback periods are put in place for 3 or 7 years, dependent on the relief type, to enable the Council to clawback the chargeable amount if a disqualifying event occurs. Relief recipients must notify the Council of such events within 14 days of the event occurring. The Council will then withdraw relief/exemption and confirm this in writing via a demand notice and full payment is then due within 14 days.
- 5.13 **Discretionary surcharge:** Failure to notify of a disqualifying event places the Council at risk of losing some CIL monies otherwise owed to them. Where the Council are not informed of a disqualifying event, a surcharge of 20% of the chargeable amount, or £2500, whichever is the lower amount, will be imposed for failure to notify of a disqualifying event.

Failure to comply with an information notice

- 5.14 **Mandatory provision:** The Council can issue an information notice to seek further information relating to liability apportionment or social housing relief claims. The regulations provide a 14 day period for the request to be complied with.
- 5.15 **Discretionary surcharge:** If a person fails to comply with the request within 14 days, the Council will impose a surcharge of 20% of the chargeable amount, or £1000, whichever is the lower amount.

Failure to pay CIL or failure to pay CIL on time

- 5.16 **Mandatory requirements:** Under the CIL regulations, where a payment, or an instalment, is not received by the date it is due the full, unpaid balance becomes payable immediately. The Council will subsequently issue a demand notice for full payment.

- 5.17 **Discretionary surcharge:** If payment is late, the Council will impose a surcharge of 5% of the chargeable amount, or £200, whichever is the greater amount. The surcharge will be applied at the end of 30 calendar days, the end of 6 months, and the end of 12 months, beginning on the date that payment is due. In accordance with Regulation 87(2), late payment interest will also be calculated, at an annual rate of 2.5 percentage points above the Bank of England base rate.

6.0 HOW THE COUNCIL MUST SPEND SURCHARGES

- 6.1 CIL revenue must be spent in accordance with the requirements of Part 7 of the CIL regulations and apportioned as follows: 5% retained by the Borough Council for administrative costs, 80% retained by the Borough Council to deliver strategic infrastructure and 15% passed to the Parish Councils for use on local infrastructure. The local portion will increase to 25% where Parish Councils have a neighbourhood plan adopted. In those areas that do not have a Parish Council, the Borough Council will retain the local portion and spend it in local areas in consultation with the local community.
- 6.2 Discretionary surcharges and/or interest must be collected as if they are part of the CIL charge, but there are differences in how they must be used. Regulation 88(2) requires that any interest collected should be apportioned in the same way as the CIL charge (5:15:80 split). However, Regulation 88(3) stipulates that surcharge payments are only assigned to administrative and strategic infrastructure funding. The Council will therefore apportion 5% of each surcharge payment received to administrative costs and 95% to strategic infrastructure.

7.0 SUSTAINABILITY IMPLICATIONS/COMMUNITY STRATEGY

- 7.1 There are no significant sustainability impacts associated with this report and, in particular, no significant impact on crime and disorder. The report has no significant links with the Sustainable Community Strategy.

8.0 FINANCIAL AND RESOURCE IMPLICATIONS

- 8.1 It is not anticipated that there will be any significant financial or resource implications arising from this report. The application of surcharges and interest provides opportunity for some increased CIL revenue for the Council, which will help to recover the cost of the extra administrative work resulting from the enforcement of the CIL Regulations.
- 8.2 The protocol has been reviewed against the Council's fees and charges policy and is consistent with its requirements. The financial penalties (surcharges and interest) set out through this report serve to penalise non-compliance with the administrative requirements of the CIL regulations and to recover service costs directly from the user, in accordance with statutory legislation.

9.0 RISK ASSESSMENT

- 9.1 The Council need to ensure that CIL revenue can be collected promptly. The regulations provide mandatory measures to deal with breaches in the CIL administration process, and further discretionary penalties applied by the Council can only serve to provide a further deterrent in regard to breaches whilst encouraging prompt payment. There is a risk that without such financial penalties CIL revenue will take longer to collect which will have a negative impact on available funds with which to deliver infrastructure.

Background Documents

There are no background documents (as defined in Section 100D(5) of the Local Government Act 1972) to this Report.

Equality Impact Assessment

There may be a direct impact on members of the public, employees, elected members and / or stakeholders. Therefore an Equality Impact Assessment is required. A formal equality impact assessment is attached as an Appendix to this report, the results of which have been taken into account in the Recommendations contained within this report

Appendices

Appendix A

Protocol for handling failures to adhere to the requirements of the Community Infrastructure Levy (CIL) Regulations 2010 (as amended).

Appendix B

Equality Impact Statement