

## Worthing Borough Council Community Infrastructure Levy Coronavirus (COVID-19) guidance

The government has put in place a number of financial measures to help businesses during the COVID-19 outbreak. However, it is recognised that smaller developers may need more help. This guidance explains the steps that CIL collecting authorities (including Worthing Borough Council) may wish to consider to ease the financial burden on developers, including recent changes to the CIL Regulations, to help small and medium sized developers in particular. This guidance came into effect when the Community Infrastructure Levy (Coronavirus) (Amendment) (England) Regulations 2020 came into force (22nd July 2020) and will remain in place until 31 July 2021, because the measures only apply to CIL payments that are payable on or after the date the instrument comes into force (22nd July 2020) until 31 July 2021. This is government guidance that applies to the CIL charge in place in Worthing. Further guidance is available here;

<https://www.gov.uk/guidance/coronavirus-covid-19-community-infrastructure-levy-guidance>

More information on CIL in Worthing is available on the Council's website;

<https://www.adur-worthing.gov.uk/planning-policy/worthing/worthing-developer-contributions/worthing-cil/>

### What are the existing flexibilities available to local authorities?

The Community Infrastructure Levy Regulations 2010 (as amended) provide some flexibility for local authorities to defer the payment of CIL:

#### 1. Instalment policy:

- CIL charging authorities have the power under regulation 69B to allow those liable to CIL to pay the charge in one or more instalments and can set the date(s) on which each payment is due
- CIL charging authorities can also bring into effect a new instalment policy at any time - however, any new instalment policy will only apply to chargeable developments commencing after the new instalment policy comes into effect
- CIL is therefore payable in accordance with the instalment policy that was in place at the time of commencement of the chargeable development
- Worthing Borough Council has an existing instalment policy for CIL in place, which can be found here;

<https://www.adur-worthing.gov.uk/media/Media.147408.smxx.pdf>

#### 2. Enforcement:

- CIL collecting authorities have discretion around how they deal with the late payment of CIL. This could provide some scope to ease the financial pressures on developers
- In normal circumstances, a CIL collecting authority might consider it expedient to stop development until the outstanding amount has been paid. The regulations set out the procedure for issuing a CIL stop notice, contravention of which is an offence. However, decisions regarding whether and when to take such enforcement actions are at the discretion of the collecting authority

- A CIL collecting authority has the ability under regulation 85 to impose surcharges on a person that has not paid CIL. However, the imposition of these surcharges is at the discretion of the authority. CIL collecting authorities can therefore choose not to impose the surcharge for late payment and are encouraged to consider using this discretion where appropriate
- However, the regulations provide that late payment interest accrues automatically; starting from the day after the day payment was due (see regulation 87). The payment is calculated at an annual rate of 2.5% above the Bank of England base rate

Amendments to the Community Infrastructure Levy Regulations 2010 introduced by the Community Infrastructure Levy (Coronavirus) (Amendment) (England) Regulations 2020

The Community Infrastructure Levy (Coronavirus) (Amendment) (England) Regulations 2020 give CIL collecting authorities (including Worthing Borough Council) discretion, for a limited period, to defer CIL payments for small and medium sized developers without having to impose additional costs on them. The regulations came into force on 22 July 2020 and are explained below.

**The CIL payment deferral process:**

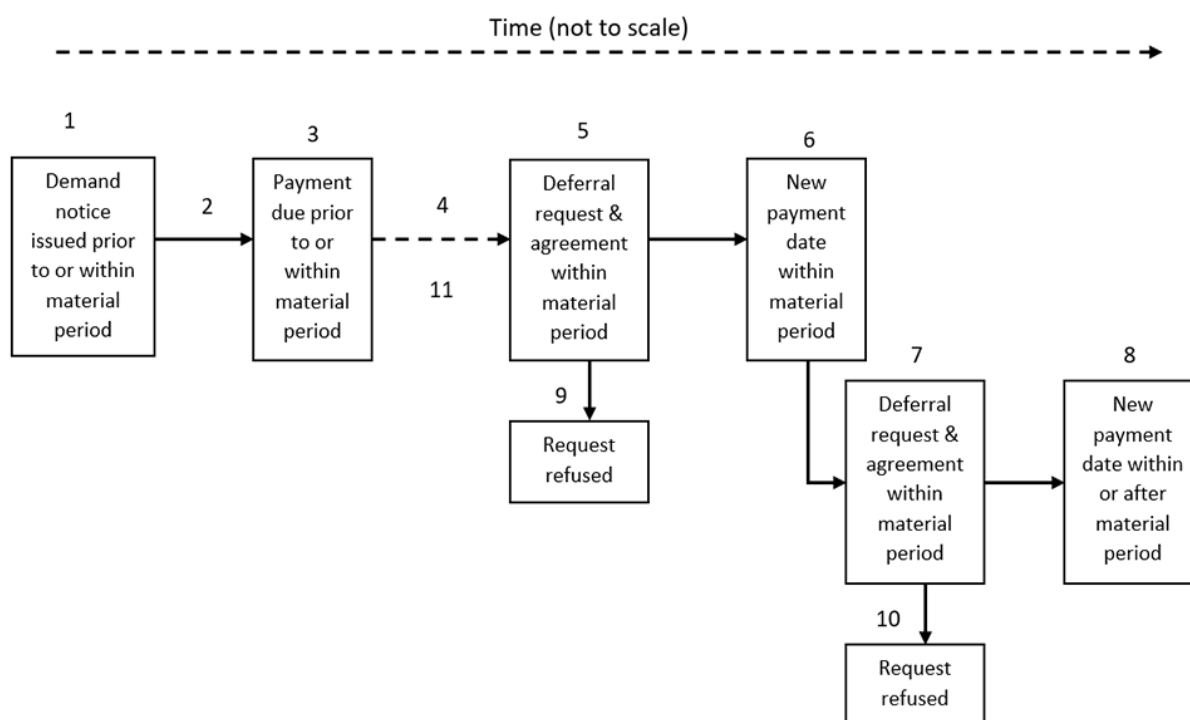
- The new Regulation 72A will apply to small and medium sized developers (SMEs) with an annual turnover not exceeding £45m and allow them to make a request to defer a CIL payment if:
  - they have received a demand notice for a CIL payment;
  - that CIL payment is set to be made during the ‘material period’<sup>1</sup> (after the regulations came into force and before 31 July 2021); and
  - they are experiencing financial difficulties for reasons connected to the effects of coronavirus
- CIL collecting authorities have the discretion, under the CIL Coronavirus Regulations, to defer CIL payments (regulation 72A), to disapply late payment interest and surcharge payments; and to credit interest already charged to developers (regulation 72B)
- The CIL Coronavirus Regulations do not prescribe a particular format for a deferral request, except it should be in writing and received no more than 14 days before, or as soon as practicable after the date on which the CIL payment is due
- Applicants are encouraged to engage with the collecting authority at the earliest opportunity to discuss what relevant information they should provide, but as a minimum they should supply a copy of the relevant demand notice, and where there is likely to be any doubt, evidence that they have an turnover not exceeding £45 million and that they are experiencing financial difficulties as a result of the coronavirus
- The collecting authority should consider the evidence provided by the applicant and ensure that it satisfies the criteria laid out in Regulation 72A. The collecting authority may also wish to take further evidence into account if they consider that is relevant

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<sup>1</sup> This may include payments that became due before the start of the ‘material period’ and are still outstanding

and reasonable. See the 'definitions' section below for more information on the evidence required in support of the annual turnover

Figure 1. Illustration of the deferral process (see key below for a detailed explanation of the stages)



Actions relevant to CIL payment deferral process:

1. The demand notice is issued under regulation 69 of the CIL Regulations stating the intended commencement date, the amount payable and the day on which payment is due. Where the amount is payable by instalments, the demand notice should state the amount of each instalment and the day on which payment of each instalment is due
2. The payment period is normally 60 days beginning with the intended commencement of the development - unless it is subject to an instalment policy (regulation 70)
3. The regulations could apply to any SME CIL payment that is required to be paid during the material period including those payments that fell due before lockdown (21 March 2020) and remain outstanding in the material period. The other criteria mentioned in regulation 72A (relating to the 'material period') must also be met
4. Where the original payment date occurred before the regulations come into force, a deferral request must be made as soon as practicable after the regulations are in force. Late payment interest will have accrued<sup>2</sup>. Where the initial payment date is after the regulations come into force, a deferral request should be made no earlier than 14 days before the payment due date occurs, or as soon as practicable after the payment is due
5. The developer should make a deferral request to the collecting authority, in writing, no more than 14 days before, or as soon as practicable after the date the CIL

<sup>2</sup> See step 11 for an explanation of the process for requesting a credit for the late payment interest

payment is due. The collecting authority can request whatever information from the developer they reasonably need to consider the deferral request. The developer must provide that information, in so far as it is in their possession or control, within 14 days beginning with the day on which the request was made. The collecting authority can refuse to grant a request if the information is not provided within the specified time (regulation 72C). The collecting authority must consider a deferral request as soon as practicable after it is received, and grant or refuse to grant the request in writing as soon as practicable, and in any event before the end of the period of 40 days beginning with the day the collecting authority receives the request. The collecting authority cannot charge late payment interest or a surcharge while they are considering the request, or in the case of a refusal to grant a payment deferral, for 7 days after<sup>3</sup>

6. The collecting authority may grant a deferral request if it considers it is appropriate to do so and for no more than 6 months **beginning with the day the authority receives the request in writing**; and in that case the authority must serve a revised demand notice under regulation 69(3) which states the amount of CIL payable and the day on which the payment is due, taking account of the deferral that is agreed. The Demand Notice should also include any surcharges imposed in respect of, or interest applied to, the amount.
7. If the new payment date is within the 'material period' the developer could submit a further deferral request if the criteria mentioned in new regulation 72A(1) are fulfilled again. The procedure and timing is again as set out in Step 5 above. It follows that the latest time for submission of a deferral request would be as soon as practicable after 31 July 2021 – which should be days or a few weeks after that cut-off date (not months)
8. The same follows as in Step 6 above. The collecting authority should determine that the applicant still meets the eligibility criteria and can grant a further payment deferral of up to 6 months – even if this means the deferred payment date is after 31 July 2021
9. Where a payment deferral has been refused, the collecting authority should notify the applicant as soon as practicable, and no later than 40 days after receipt of the request. If the collecting authority refuses to grant a deferral, the developer has 7 days, beginning with the day on which the deferral request is refused, to make their CIL payment (regulation 72B(2)). This should include any late payment interest and surcharge that accrued prior to the deferral request being made<sup>4</sup>. Charging authorities are encouraged to take a positive approach, but there is no right of appeal if the decision is taken to refuse the request. The legislation does not mandate that an authority must give reasons for refusing a deferral request, but the government expects that as a matter of good administrative practice, reasons should be provided wherever possible and reasonable to do so
10. The collecting authority can refuse to grant any further deferral if they consider it appropriate to do so. In that case the developer must make their CIL payment within 7 days of the deferral request being refused
11. If a deferral request is **granted** for a CIL payment that had accrued late payment interest within the period beginning with 21st March 2020 and ending with the day

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<sup>3</sup> See step 9 below

<sup>4</sup> See step 4 above

before the collecting authority receives that deferral request, the developer can request that the late payment interest is credited against the CIL amount due under the revised demand notice which is required under regulation 72B(3) (“an interest request”). **An “interest request” cannot be made if the deferral request is refused.** In this case, the collecting authority can issue a new demand notice under regulation 69 which includes the late payment interest (and where appropriate the late payment surcharge) (see regulation 72A(8)(b))

#### **Enforcement:**

- The CIL Regulations 2020 allow local authorities to temporarily disapply late payment interest:
  - The collecting authority cannot charge late payment interest while it is determining a deferral request, and also during the agreed deferral period, late payment interest would not apply
  - However, there will be many cases where late payment interest accrued in the period between the start of lockdown (21 March 2020) and the CIL Coronavirus Regulations coming into force (22nd July 2020)
  - The collecting authority must charge this interest in accordance with regulation 87, but the applicant may request that the collecting authority credits that interest payment against the CIL amount due under the revised demand notice which is required under regulation 72A(5). This is called “an interest request”
  - Late payment interest that accrued before 21 March 2020 cannot be credited against the CIL amount due
  - If the collecting authority does not consider the interest request to be appropriate and refuses it, the applicant will be liable to pay the outstanding interest amount in accordance with the existing CIL Regulations 2010 (as amended)
- The CIL Regulations 2020 allow local authorities to temporarily disapply surcharge payments:
  - Regulation 85 provides that the collecting authority may impose a surcharge where a person is liable to pay CIL and this amount is not received in full after the end of the period of 30 days beginning with the day on which the payment is due.
  - The provision is therefore already discretionary and is unchanged by the CIL Coronavirus Regulations.
  - The one change introduced by the CIL Coronavirus Regulations is that a surcharge cannot be imposed while the collecting authority is determining a deferral request (Regulation 72B(1))

## Definitions

**CIL collecting authority** means 'Worthing Borough Council'.

The '**material period**' is the period between the date when the regulation comes into force (22nd July 2020) and midnight on 31st July 2021 (as defined in regulation 72A(1)). A CIL payment deferral request can be made in respect of a CIL payment that became due prior to the 'material period', and which has not been previously paid so that it remains due during the material period.

A '**deferral request**' is a request to defer a CIL payment. It can be made by a developer with an annual turnover not exceeding £45 million which is experiencing financial hardship because of the effect of coronavirus and is having difficulty paying a CIL charge. The CIL charge may be by instalment or otherwise and must be due between the period the regulations come into force and 31st July 2021 (which is defined as the 'material period').

An '**interest request**' is a request from a developer that the late payment interest is credited against the CIL amount due under a revised demand notice. This occurs when the deferral request is granted for a CIL payment that had accrued late payment interest within the period beginning with 21st March 2020 and ending the day before the collecting authority receives the deferral request.

Examples of evidence in support of the '**annual turnover**' can include:

- A declaration from a responsible person or organisation, such as a chartered accountant or auditor. This can set out what the turnover is and whether the business meets the criteria of sole enterprise or is part of a linked business or has partners
- Information provided to Companies House including the company's confirmation statement (annual return)

What is '**turnover**' for the purpose of checking the eligibility for applying for a CIL payment deferral?

- If it is a sole enterprise, it is the turnover of the applicant only, as shown in the latest set of accounts.
- For applicants acting as part of a group, that have partners or linked enterprises, the turnover assessment should take the latest turnover of the applicant, as shown in their accounts, together with the turnover of any linked enterprises, any partners of any linked enterprises, any enterprises linked to any of the applicant's partners and any enterprise linked to the applicant's linked companies.

A '**sole business**' (for the purposes of the Regulations) is one that holds no more than 25% of the capital or voting rights (whichever is higher) in one or more other businesses; and/or other businesses hold no more than 25% of the capital or voting rights (whichever is higher) in them; or it is not linked to another business according to the criteria for "linked enterprises". In addition, certain investors may individually have a stake of up to 50% in the business and it may still be considered a sole business: public investment corporations, venture capital companies and business angels (provided the investment is less than €1.25 million), universities and non-profit-making research centres, institutional investors, (including regional development funds), or autonomous local authorities (with an annual budget of less than €10 million and fewer than 5,000 inhabitants).

**'Linked businesses/enterprises'** form a group by controlling the majority of voting rights of an enterprise, either directly or indirectly; or being able to exercise dominant influence over an enterprise. Enterprises are linked when one holds a majority of the shareholders' or members' voting rights in another; or can appoint or remove a majority of the other's administrative, management or supervisory body; or there is a contract between them enabling one to exercise a dominant influence over the other; or one can exercise sole control over a majority of shareholders' or members' voting rights in another. A typical example is a wholly owned subsidiary. An enterprise is indirectly linked to a business if it is directly linked to an enterprise that is linked directly to the business.

**A "partner" business** is an enterprise that has certain financial partnership with another, without one exercising effective direct or indirect control over the other. They are not sole enterprises or linked enterprises. This is the case where both hold 25% or more of the capital or voting rights in each other; and are not linked to other enterprises. Among other things, their voting rights in each other do not exceed 50%.