Exceptional CIL-Related Ex Gratia Payment Policy

1. Purpose and status

1.1 This policy establishes the circumstances in which Epsom and Ewell Borough Council (the Council) may consider making an exceptional ex gratia payment to a householder developer who has paid Community Infrastructure Levy. This policy runs until 31st March 2027 only.

1.2 Any payment made under this policy:

a. is made from the Council's General Fund;
b. is wholly separate from the statutory Community Infrastructure Levy regime;
c. does not constitute a refund, repayment, remission or waiver of CIL;
d. does not alter or invalidate any liability notice, demand notice, surcharge or other decision made under the CIL Regulations;
e. does not amount to an admission that CIL was incorrectly assessed or collected; and
f. does not establish an entitlement or binding precedent in relation to any other case.

1.3 The Council has a duty to administer and collect CIL in accordance with the applicable legislation. The fact that an applicant would have preferred a different outcome, or that the statutory rules have produced a severe financial consequence, does not of itself justify an ex gratia payment.

1.4 Payments under this policy are exceptional. There is no right to receive a payment, and each application will be determined on its individual facts and evidence.

1.5 There is no right of appeal.

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2. Scope

2.1 The policy applies only to individuals undertaking development primarily for their own residential occupation.

2.2 It may apply where:

a. the development originally qualified, or would clearly have qualified, for a statutory householder or self-build exemption;
b. that exemption was validly granted, or would have been granted had the relevant procedure been correctly completed;
c. CIL subsequently became lawfully payable because of an administrative or procedural

error, an unintended event, or the need for retrospective planning permission; and
d. the CIL has been paid in full to the Council and the CIL liability discharged

2.3 The policy does not apply to requests to waive unpaid CIL. The Council may consider collection, and enforcement matters separately under the CIL Regulations and its applicable recovery procedures.

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3. Gateway eligibility criteria

An application will proceed to substantive assessment only where **all** the following criteria are met.

3.1 Eligible applicant

The applicant must:

a. be the person who incurred and paid the relevant CIL liability, or their duly authorised personal representative;
b. have undertaken the development as a genuine householder or self-builder;
c. for self-build dwellings have intended the completed dwelling to be their principal residence for a period of at least 3 years following completion; and
d. not have undertaken the development primarily for sale, letting, investment or other commercial gain.

3.2 Original eligibility for exemption

The Council must be satisfied that, immediately before the relevant error or event:

a. the original development met the substantive requirements for an applicable CIL exemption;
b. the applicant had either secured the exemption or would have qualified for it had the correct procedure been followed; and
c. no other fact existed that would independently have prevented or withdrawn the exemption.

3.3 Lawful CIL payment

The relevant CIL must:

a. have been lawfully assessed under the CIL Regulations;
b. have been paid in full to the Council; and
c. not already have been repaid, credited, written off or compensated through another procedure.

3.4 Direct causal connection

There must be a clear and direct causal connection between:

a. the administrative or procedural error or unintended event;
b. the loss or unavailability of the exemption;
c. the requirement for a new or retrospective planning permission, where relevant; and
d. the resulting CIL payment.

An application will not qualify where CIL would have arisen in any event for reasons unrelated to the matter relied upon by the applicant.

3.5 Exceptional circumstances

The circumstances must be genuinely exceptional and materially different from the ordinary consequences of failing to comply with planning or CIL requirements.

Exceptional circumstances may include:

a. a significant and evidenced administrative error by the Council or another public body;
b. demonstrably incorrect or materially misleading written advice from the Council on which the applicant reasonably relied;
c. an unforeseen structural collapse or emergency requiring immediate action;
d. demolition or other works undertaken by a contractor outside the applicant's express instructions and without the applicant's prior knowledge;
e. an unexpected safety issue supported by contemporaneous professional evidence;
f. serious illness, bereavement or another acute personal emergency directly affecting the applicant's ability to manage the relevant procedure; or
g. another event outside the applicant's reasonable control that could not reasonably have been anticipated or avoided.

The existence of one of these circumstances does not automatically justify a payment.

3.6 Conduct of the applicant

The applicant must demonstrate that they:

a. acted honestly and in good faith;
b. took reasonable steps to understand and comply with the planning permission and CIL requirements;
c. appointed appropriately competent professional advisers and contractors where reasonably necessary;
d. did not instruct, authorise or knowingly permit development materially contrary to the approved plans;
e. contacted the Council promptly after becoming aware of the error or event;

f. stopped or modified works when reasonably instructed to do so;
g. cooperated fully in regularising the development; and
h. provided a complete and accurate account supported by available evidence.

3.7 Nature of the completed development

The development subsequently authorised or completed must be materially comparable with the originally exempt development.

In assessing this, the Council will consider:

a. the number and use of the dwellings;
b. gross internal floorspace;
c. scale, height, footprint and volume;
d. approved and completed design;
e. whether additional development value was created;
f. whether the change gave the applicant a planning or financial advantage; and
g. whether the completed development continued to serve substantially the same residential purpose.

Minor or unavoidable differences will not necessarily prevent an award. A material enlargement, additional dwelling or substantially different form of development will normally do so.

3.8 Significant hardship or injustice

The applicant must demonstrate that retaining the full financial consequence of the CIL payment would cause significant hardship or a manifestly disproportionate outcome.

The Council may consider:

a. the amount of CIL paid;
b. the applicant's household income, capital, savings and accessible assets;
c. unavoidable household expenditure and liabilities;
d. borrowing undertaken to pay the CIL;
e. the effect on the applicant's ability to retain or occupy their principal home;
f. any exceptional health, care or accessibility costs;
g. the effect on dependent household members;
h. whether the applicant obtained any corresponding increase in property value; and
i. any other reliable evidence of serious financial or personal impact.

The size of the CIL charge alone will not establish significant hardship.

3.9 Alternative remedies

The applicant must have taken reasonable steps to recover the loss from any person who may be responsible, including:

a. a builder or contractor;
b. an architect, planning agent or other professional adviser;
c. an insurer or warranty provider; or
d. another public or private body.

The applicant must disclose:

a. any complaint, claim, insurance notification or legal proceeding;
b. any settlement, compensation, insurance payment or other recovery received or expected; and
c. the reasons why any available recovery route has not been pursued.

The Council may defer its decision pending the outcome of another claim or require an undertaking dealing with any later recovery.

3.10 Proportionality and public interest

The proposed payment must be proportionate and represent a proper use of public funds, taking account of:

a. the nature and seriousness of the exceptional circumstances;
b. the relative responsibility of the applicant, their contractor, professional advisers and the Council;
c. the degree of hardship established;
d. any financial or planning benefit obtained by the applicant;
e. the availability of alternative remedies;
f. consistency with decisions in materially comparable cases;
g. the impact on the Council's General Fund; and
h. fairness to council taxpayers.

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4. Exclusions

An ex gratia payment will not normally be made in any of the following circumstances.

4.1 Deliberate or reckless conduct

Where the applicant, their agent or a person acting with their authority:

a. deliberately departed from approved plans;
b. commenced or continued works knowing that the necessary permission, exemption or approval was not in place;
c. knowingly demolished or altered works required to be retained;
d. ignored an express warning or instruction from the Council;
e. acted recklessly as to whether the development remained lawful or exempt; or
f. attempted to use retrospective permission as an alternative to obtaining permission before undertaking the works.

For policy purposes, the actions of a contractor will not automatically be treated as outside the applicant's control. The Council will consider the applicant's instructions, supervision, contractual arrangements and response after becoming aware of the contractor's actions.

4.2 Commercial development or gain

Where:

a. the development was undertaken primarily for sale, letting or investment;
b. the applicant is acting as a commercial developer, company or development vehicle;
c. more than one dwelling was created, unless the additional dwelling was expressly included within the originally exempt development;
d. the relevant change materially increased the development's sale value, floorspace or development potential; or
e. the applicant disposed of the property or ceased to occupy it contrary to the conditions associated with the original exemption.

4.3 Failure to take reasonable care

Where the loss of the exemption resulted from:

a. failure to read clear information supplied by the Council;
b. failure to respond to correspondence or statutory notices;
c. failure to submit a required form without a credible exceptional explanation;
d. poor management or supervision of contractors;
e. proceeding without appropriate structural or professional advice where such advice was reasonably necessary;
f. failure to clarify an obvious discrepancy in the approved plans; or
g. avoidable delay in notifying the Council.

A minor or understandable procedural error will not necessarily be excluded, but the Council will consider whether a reasonable householder in the same circumstances could have avoided the outcome.

4.4 Unsupported assertions

Where the application depends on an alleged collapse, emergency, contractor error, professional error, health event or other exceptional occurrence but is not supported by appropriate evidence.

Depending on the circumstances, evidence may include:

a. dated photographs or video;
b. building-control or site inspection records;
c. a structural engineer's report;
d. contractor records and witness accounts;
e. contemporaneous correspondence;
f. insurance documentation;
g. medical evidence limited to what is necessary to establish the relevant circumstances; or
h. invoices, contracts, method statements and site diaries.

4.5 No significant hardship

Where the applicant cannot demonstrate significant hardship or serious injustice, including where:

a. the payment can reasonably be met without threatening the applicant's home or essential living needs;
b. the applicant has sufficient accessible resources;
c. the financial impact is principally a reduction in expected profit or investment return; or
d. the applicant has received a corresponding financial advantage from the revised development.

4.6 Available alternative recovery

Where:

a. another person has accepted responsibility for the loss;
b. an insurance or contractual remedy is reasonably available but has not been pursued;
c. compensation has already been received; or
d. an award would result in double recovery.

The Council may make an exception where the alternative remedy is demonstrably ineffective, disproportionate or unavailable despite reasonable efforts.

4.7 Incorrect statutory challenge

Where the application is in substance:

a. an attempt to appeal or reopen a lawful CIL decision outside the statutory appeal process;
b. a disagreement with the CIL Regulations themselves;
c. an application to waive unpaid CIL; or
d. a request to disregard a lawful liability or demand notice.

4.8 Fraud, misrepresentation or non-disclosure

Where the applicant:

a. has supplied information that is false or materially misleading;
b. has omitted a material fact;
c. has falsified or altered supporting evidence; or
d. has failed to disclose compensation, insurance proceeds or another relevant recovery.

Suspected fraud may be referred for investigation.

4.9 Previous determination

Where the same application has already been determined under this policy, unless:

a. significant new evidence has become available that could not reasonably have been produced earlier; or
b. a material procedural error affected the original decision.

4.10 Late applications

An application made more than **12 months** after the applicant became aware of the relevant policy or basis for making a claim will normally be excluded unless there are exceptional reasons for the delay.

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5. Determining the amount

5.1 Meeting the eligibility criteria does not create an entitlement to the whole amount of CIL paid.

5.2 The Council may determine that:

a. no payment should be made;
b. a partial payment should be made; or
c. in the most exceptional circumstances, a payment equivalent to the CIL paid should be made.

5.3 In determining the amount, the Council will consider:

a. the applicant's contribution to the events;
b. the extent to which contractor or professional conduct caused the loss;
c. any Council error or misleading advice;
d. the degree of hardship;
e. any increase in the scale or value of the development;
f. sums recovered or recoverable from another party;
g. the applicant's actions to mitigate their loss; and
h. proportionality and fairness to council taxpayers.

5.4 Any award must not exceed the amount of CIL actually paid, less:

a. compensation or insurance proceeds received;
b. sums recovered from contractors or professional advisers;
c. any identifiable financial advantage arising from the changed development; and
d. any other amount necessary to prevent double recovery.

5.5 The Council may reduce an award to reflect contributory responsibility.

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6. Suggested decision categories

For consistent decision-making, the following categories may be used:

Category A: no payment

The applicant's deliberate, reckless or materially negligent conduct caused the liability, or hardship has not been established.

Category B: limited payment

Exceptional circumstances are established, but the applicant or their contractor materially contributed to the outcome, or the evidence of hardship is limited.

Category C: substantial payment

The event was predominantly outside the applicant's reasonable control, the applicant acted promptly and responsibly, the completed development remained materially comparable, and significant hardship is established.

Category D: payment equivalent to the CIL paid

Reserved for the most exceptional cases where:

- the applicant would otherwise have retained the exemption;
- the loss was caused wholly or overwhelmingly an unavoidable event;
- the applicant bears little or no responsibility;
- there was no material development or financial advantage;
- alternative recovery is unavailable; and
- retaining the full financial effect would cause severe hardship or manifest injustice.

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7. Evidence and burden of proof

7.1 The applicant is responsible for supplying sufficient evidence to support the application.

7.2 The Council will determine the application on the **balance of probabilities**.

7.3 The Council may obtain information from its planning, building control, CIL, finance, complaints and enforcement records.

7.4 The Council may seek independent professional advice where necessary.

7.5 Failure to supply reasonably requested information may result in the application being determined on the information available or being declined.
