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John Litton QC

CIL Cases

Some key changes to CIL Regs (1)

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- **Commencement notices** - new regulations reduce the penalties for non-compliance with commencement notices. Now, a developer will only be charged a surcharge equal to 20 per cent of the notional chargeable amount or £2,500, whichever is the lower amount – reg. 83(1A).
- **Infrastructure funding statements** – previously reg. 123(4) provided for charging authorities to set out a list of projects or types of infrastructure intended to be funded by CIL and to report annually on CIL received/spent. Now, reg. 123 lists replaced with a requirement for *all* local authorities to provide an annual infrastructure funding statement by 31 December each year detailing the projects authority intends to fund by CIL and details required under Sch.2 (how much CIL is collected/spent, what it is spent on, how much passed to parish councils etc) – see PPG for guidance.

Some key changes to CIL Regs (2)

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- **Pooling restrictions** – reg. 123 pooling restrictions originally introduced to encourage Local Authorities to adopt CIL and limited the number of contributions from s. 106 obligations to 5 per infrastructure project or type. Now, reg. 123 removed but also restriction on seeking 106 contributions to infrastructure on the infrastructure list.

R. (oao Giordano Ltd) v Camden LBC [2019] EWCA Civ 1544

- The interpretation and effect of reg. 40(7)(ii) of the 2010 CIL Regs. Whether reg 40(7) reduces the amount of CIL payable to nil where the property could be used for the same purpose (C3 residential) as that permitted by a later permission.
- Re-wind to 2015 – *R(oao Hourhope Ltd) v Shropshire Council* [2015] EWHC 518. "In-use" deduction for parts of buildings retained in re-development after completion available if the part has been *in lawful use* for a continuous period of at least 6 months in the last 3 years. Agreed that "in lawful use" means a use that is *lawful for planning purposes*. Court held that "in lawful use" means that not enough that a building has a use to which it may be put but has to be *actually used* for that purpose. As part of argument, Court considered the "retained parts" deduction but said [23]:-

R. (oao Giordano Ltd) v Camden LBC (2)

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- "Sub-paragraph (ii) deals with circumstances in which a building, or part of a building, already has a use which is lawful in planning terms prior to the grant of the permission that triggers CIL liability. Furthermore, that lawful use must continue to be available (i.e. it cannot have been abandoned) on the day prior to the grant of the operative planning permission. *However, it must be the case that the mere existence of such a lawful use is not sufficient to constitute that building an "in-use building", since otherwise it would fall within sub-paragraph (i). It must follow, in my view, that for purposes of this provision, actual use is required in order that the building can be said to be "in use" for the purposes of sub-paragraph (i)*. Since there is no indication that the phrase "in-use building" has any different meaning as between that provision and the other places in which it is used (in particular the demolition deduction), or that Parliament intended to change the meaning of that phrase when it made the amendments in 2014, it must follow that the same interpretation must apply, and must always have applied, in those other locations, and in particular to the demolition deduction."

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R. (oao Giordano Ltd) v Camden LBC (3)

- **Facts** - May 2011, the Applicant was granted permission for the re-development of a building for 6 flats. When 2011 permission granted, no CIL was required because the grant of permission pre-dated a CIL schedule. 2011 permission was extant at the relevant date (21 June 2017) but not fully implemented. On 22 June 2017, after the CIL schedule had been introduced, the lpa granted a further permission for a development of 3 (instead of 6) flats and issued a notice of liability for £547,419.09. Whilst the number of flats had changed the amount of floorspace was the same. The Applicant challenged the notice, which was upheld by the Court.

R. (oao Giordano Ltd) v Camden LBC (3)

- **Issue** - The sole issue was whether the effect of reg.40(7) properly construed, was to reduce to nil the amount of CIL payable, because on the relevant date, under the 2011 permission, the building could be lawfully used for the same purpose as that permitted by the 2017 permission – i.e. residential use within Class C3 of the Use Classes Order.

R. (oao Giordano Ltd) v Camden LBC (4)

- **Held** - The definition of K_R in reg. 40(7)(ii) i.e. the aggregate of “(ii) for other relevant buildings, retained parts where the intended use following completion of the chargeable development is a use that is able to be carried on lawfully and permanently without further planning permission in that part on the day before planning permission first permits the chargeable development…” means that the use permitted by the new permission under which CIL is payable is a use that can already be carried on lawfully in the retained parts of the building. The use permitted by the 2011 permission for 6 flats (Class C3) was the same use as the intended use under the 2017 permission. A “use that is able to be carried on lawfully and permanently without further planning permission” is one that on the relevant day, without further planning permission having to be obtained, together with any necessary physical works to the building, would be lawful and would not be a temporary use. “Able” signifies the ability to carry on a use lawfully and permanently and rests on the lawfulness of doing so. It does not depend on the building being actually occupied in that use on the relevant day.

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Manor Oak Homes Ltd v Secretary of State [2019] EWHC 1736

- **Issue** – the approach which an Inspector should adopt to the grant of permission where highway infrastructure, necessary to make the development acceptable, depends in part on contributions from other developments, as yet without permission or contributions secured by agreement.
- **Context** – Developer, highways authority and lpa all agreed a s. 106 agreement requiring funding of highways infrastructure would dispose of highways objections. However, Inspector did not accept agreement as sufficient to address highways objections because of as yet unsecured contributions.

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Manor Oak Homes Ltd v Secretary of State (2)

- **Argument** – Inspector had unlawfully required certainty that the other contributions form other schemes would come forward.
- **Held** – Inspector had not adopted an unduly high standard for judging what risk should be run that highway improvements would not be forthcoming. No policy, guidance or case law to guide Inspectors or lpas as to the level of certainty required of a mitigation measure before it is relevant/acceptable to dispose of an objection to which it is directed (pooled schemes no exception). The DoU contributions would not of themselves address all highway problems and certain works required contributions from other development sites. The question, therefore, was: what would happen if those other contributions did not come forward? Answer, the agreed solution would not occur and the Inspector was entitled, as a matter of judgment, to refuse the appeal. Certainty had been used in the sense that the achievement of the necessary highway infrastructure for the development to be acceptable, had to be "*beyond sensible doubt*".

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Thank you for listening

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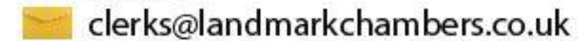

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