# Problems with service of CIL documents

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Compliance or rather the failure to comply has been a major problem with the CIL regime. In contrast to the planning regime it is inflexible and rigid with no power to waive or modify the statutory requirements. Contrary to the publicity ahead of the introduction of CIL it is not simple and the complexity unfortunately is increasing.

Local authorities have tried hard by placing information on their websites and providing helpful information in their notices. Frustratingly this has not achieved the intended objective of educating landowners and developers on the operation of the CIL regime. One reason is that even now too many advisers on planning applications still have little or no knowledge of CIL. They seek to carry over from planning the belief that if they hit an obstacle it can be sorted by picking up the phone or e-mailing the relevant officer in the authority. The failure to appreciate that CIL requires an entirely different mindset is a serious block to proper compliance. When the development is a self-build there is the added problem that self-builders and those acting for them have a tendency to believe that it is enough to be a self-build and that the potential advantages which could flow from this will do so automatically.

One area which has been the subject of a large number of appeals and challenges is the issue of service of the CIL documents. In itself this is not a good sign as it is an indicator that statutory requirements are not being satisfied and challenges are being made with regard to service as a fall back argument to try to avoid the consequences of non-compliance. Unless and until a better understanding of CIL is achieved these will continue. This is not desirable as notwithstanding the apparent economy and efficient of statutory appeals as compared to judicial review proceedings such appeals tie up resources on both sides and carry the very real risk that the appointed person's decision will be followed by judicial review proceedings as has happened.

The next batch of proposed amendments when introduced will sever the link between service of a commencement notice and the benefit of CIL exemptions and so may reduce the number of appeals regarding service. However, unless and until a better understanding of CIL is achieved these issues on service will continue and so the following points must be borne in mind.

1. Regulation 126 of the Community Infrastructure Levy Regulations 2010 ("2010 Regulations") – this regulation lays out the authorised methods of service. These are:-

(a) hand delivery to person;

(b) leaving document at "the usual or last known place of abode" of a person or at address provided by the person;

(c) post to either place in (b) above;

(d) prepaid registered letter or recorded delivery service to either place in (b) above;

(e) electronic communications to an address given for service of electronic communications by the recipient provided that in accordance with reg. 126(2) it is (i) capable of being accessed by the person mentioned in that provision; (ii) legible in all material respects; and (iii) in a form sufficiently permanent to be used for subsequent reference. If any such communication is received outside the "recipient's business hours" it is take as received on the next working day. Initially e-mails had not been held to be an acceptable means of service by local authorities but it is now recognised in the appeal decisions that they are provided that the recipient's e-mail address has been supplied, for example, in the Additional Information form.

(f) in the case of an incorporated company or body delivering to the secretary or clerk at the registered or principal office or posting to the secretary or clerk. There is no mention of electronic communication which may preclude the use of such a method of service with a company.

(g) in the case of service by the local authority reg. 126 is without prejudice to section 233 of the Local Government Act 1972 which provides for service of notices by an authority in addition to any other statutory provisions and is similar in effect to reg. 126.

Further in reg. 126(7) it is provided that service on one of two or more joint owners will suffice to serve all of the joint owners.

2. General points – a number of points have been clearly established by the appeal decisions. These are:-

(i) the onus lies on the server to prove that the CIL document has been served;

(ii) the decision whether or not the CIL document has been served is made on the basis of the facts supplied to the appointed person which may include new evidence provided after the statutory review;

(iii) in reaching that decision the appointed person applies the normal civil standard of proof - the balance of probabilities;

(iv) it is a high risk strategy to commence a development without first receiving from the authority an acknowledgement of receipt of the commencement notice or verifying that it has been received. There is nothing to stop the owner/developer adopting such a course but if in fact the authority has not received the commencement notice then the owner/developer bears the consequences.

3. Liability notice – the authority needs to issue the CIL liability notice as soon as practical after the date when the development is first permitted by the planning permission (reg. 65(1)). This is important as it informs the owner/developer of the amount of the CIL liability claimed by the authority and provides information needed to complete the commencement notice.

From the appeal decisions it appears that for obvious reasons of economy ordinary post is used. This leaves the authority with the problem that although it is possible to prove that the liability notice has been issued it cannot be proved that it has been posted. Ordinary posting will not supply proof of posting. In such circumstances the appointed person will inevitably find on the balance of probability that the liability notice has not been served.

Attempts to rely on the registration of local land charges to prove knowledge of the liability notice have so far failed. As yet the point has not arisen in respect of an owner who has purchased the land after the registration of the local land charge.

4. Commencement notices – failure to give a commencement notice in time has been a major source of problems. The consequences can be dire particularly the loss of a CIL exemption. Hence the strenuous efforts made to overcome the failure. Many mitigating factors for the cause of the failure have been given in the CIL appeals but without exception none have been accepted as a justification. Failure to serve a commencement notice by the day immediately before the date on which the development commences cannot be mitigated or waived.

Attempts to rely on other methods of communicating the commencement of the development have so far failed. The giving of notice to the building control department did succeed on the statutory appeal but this appeal decision has been successfully challenged by the authority by way of judicial review. Mr. Ockelton sitting as a judge of the High Court decided in R (oao Shropshire Council) v SSCLG [2019] EWHC 16 that a commencement notice has to comply with regulation 67 of the 2010 Regulations because it is defined in reg. 2 as a notice submitted under reg. 67. On behalf of the owner it was argued that there had been substantial compliance by the owner which sufficed in accordance with authorities such as R v Soneji [2006] 1 AC 340 and R v Secretary of State for the Home Department ex parte Jeyeanthan [2000] 1 WLR 354. The learned judge considered that such an approach to the issue in this case was wrong. At para. 29 relying on the Court of Appeal decision in R (Winchester College) v Hampshire County Council [2008] EWCA Civ 431 he stated:

"Jeyeanthan helps to answer the question what is to happen if a person undertaking a particular act has failed to comply with all the requirements prescribed for that act. But that can be a relevant question only if the actor has actually engaged in the regulated conduct. If the path of compliance has not, so to speak, been trodden at all, there is likely to be little scope or need for analysis of error or omissions in attempted or partial compliance."

This reasoning is further explained in para. 37 where it is stated that: "In my judgment, a provision of the Regulations, which received scant attention in the submissions before me, places the present case in the same frame as Winchester. It is the provision to which I have already referred in reg 2: "commencement notice" means a notice submitted under regulation 67'. Given the provisions of reg 67, a separate definition of what amounts to a commencement notice would not have been necessary unless to say something in addition to those provisions, and if Ms Sheikh is right in her submissions it would not have been necessary. The definition chosen is not 'a notice informing the charging authority of the date of commencement of the development': it is "a notice submitted under regulation 67". On

the ordinary meaning of the words it is extremely difficult to draw a conclusion other than that a notice that does not comply with the requirements of reg 67 (as to both content and timing) is not a commencement notice at all for the purposes of the Regulations."

Both the statutory interpretation and the Winchester point precluded the nuanced approach to non-compliance from applying and so the appointed person's decision was quashed. It may be that this decision will the subject of an appeal. In a more recent statutory appeal decision an attempt to reply on a demolition notice as having effect as a commencement notice was rejected.

It has been held that it is not possible for an owner/developer to jump the gun by giving a commencement notice before the planning permission has been granted. It is this which means that a commencement notice cannot be served when a retrospective planning permission is given pursuant to section 73A. The development authorised by a retrospective planning permission is deemed to have commenced at the date the permission is granted (reg. 7(5)) making it impossible for a commencement notice to be given. The proposed amendment preventing the loss of CIL exemptions due to failure to serve a commencement notice may have a considerable impact in the context of the self-build exemption.

It is not just the failure to give a commencement notice which causes problems. There have been cases in which the date given in the commencement notice is earlier than the date of the commencement notice or the same day. If the date given is correct then clearly the notice does not comply with reg. 67 and is not a commencement notice. But if the date is a mistake and the notice has been given before the development actually commenced can the notice stand as a commencement notice. In a recent appeal decision it has been held that it can. It will be interesting to see if this is challenged. Against the decision it is arguable that the notice does not comply with reg. 67 and so is not effective. However, as an attempt to comply with reg. 67 the nuanced approach discussed above may apply. If the decision is correct it opens up the need for the authority to check in order to ascertain whether there has been a genuine mistake. This may be difficult as the making of the mistake may not be discovered for some time.

5. Demand notice – the points made above with regard to liability notices will apply to the service of demand notices by local authorities. There is the separate point as to the consequence of an authority omitting parts of the demand notice required by reg. 69. This arose in Hillingdon LBC v SSHCLG and McCarthy & Stone Lifestyles Limited [2018] EWHC 845 (Admin) in respect of a demand notice which failed to detail the surcharges imposed in that case and to refer to the statutory right of appeal. Mr. Rodger QC sitting as a deputy judge of the High Court accepted that the line of administrative authorities including the two mentioned above adopted the nuanced approach did apply and approved as the test for determining the issue of validity "whether it was a purpose of the legislation that an act done in breach of the provisions should be invalid" (para. 57). Applying this test the learned judge considered that each of the matters omitted were of fundamental importance and the inclusion of the items amongst the statutory requirements left no room for ambiguity on that score. In consequence the notice served was not a valid compliant demand notice.

All of the points discussed in this article serve to emphasise the great importance of compliance in the CIL regime.