Lessons for developers from CIL enforcement appeals

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There have now been thirty-five CIL appeal decisions to the Planning Inspectorate. These can be found on its website in redacted form. Appeals to this body relate to three areas of CIL –

(i) surcharges (reg. 117 Community Infrastructure Levy Regulations 2010 ("2010 Regulations"));

(ii) deemed commencement notice in demand notice (reg. 118); and

(iii) stop notices (reg. 119).

In contrast appeals relating to the chargeable amount of CIL and to certain exemptions under reg. 114 to116B are made to the VOA.

Many of these appeals indicate strongly that some developers and landowners have not got up to speed with the greater formality of the CIL regime and the absence of a role for mitigation and negotiation when dealing with failures to comply with statutory requirements. This is borne out by many cases met in practice. With CIL being introduced by areas over a period of years rather than nationally in one go this is perhaps not surprising. It has meant that for some developers there have been unexpected and significant CIL liabilities which cannot be avoided with the result that developments have ceased to be financially viable.

Even now some developers have yet to face a CIL liability. The paramount lesson from the appeals is that every developer (whether large or small) needs to understand CIL and in particular the statutory procedure to be followed and to appreciate the different mindset arising from the CIL regime as opposed to the previous planning regime which was reliant on the negotiation of section 106 planning obligations for funding. Picking up the phone to the planning department will not now overcome a failure by the developer to comply with the CIL procedure. Adverse financial consequences from such a failure affecting

the viability of the development will not be allowed as mitigation resulting in a reduction of the total CIL bill. On the contrary the failure may increase the CIL bill and the authority will have no discretion to waive modify or relax the statutory requirements or the consequences of failure to comply. It is important for developers to fully appreciate the absence of such discretion and the significance that this has for the manner in which they now run developments subject to CIL and administer the paperwork. It is hard to overstress the importance of this. Developers who have taken this on board and addressed what is going to be needed have secured the valuable benefit of peace of mind freed from expensive CIL surprises.

There are particular lessons and points that come out from the CIL enforcement appeal decisions so far:-

1. Commencement notices – before commencing a development the developer is under an absolute obligation to serve a Commencement Notice on the local authority (reg. 67). The notice must be submitted to the collecting authority no later than the day before the date the chargeable development is to commence. This is so whether the development is authorised by a grant of planning permission or by a general consent such as under the Permitted Development Rights regime. Starting the development without complying with this obligation will result in a surcharge which will be the lower of £2,500 or 20% of the CIL liability (reg. 83). If an exemption is being claimed it will be important to have served a Commencement Notice before the development is commenced. Failure to do so will lose the exemption. This is a point on which many self-builders trip up.

The appeal decisions highlight the following points with regard to such commencement notices:-

(i) informal communication of the start date for a development to the authority is not compliance and the obligation will remain outstanding. Starting a development after informal communication of the commencement date to the authority will not avoid the surcharge. For example, informing the authority by telephone will not be sufficient even if the person at the authority says no more is needed from the developer. A notice relating to building regulations such as a demolition notice will not suffice. The prescribed form

properly and fully completed must be submitted to the collecting authority in order to discharge this obligation.

(ii) the Commencement Notice must be submitted no later than the day before the date of commencement of the development. A notice submitted on the same day as the start date is not valid. It has been accepted in one appeal that it is the date of submission rather than the date of receipt which is important but the sensible course to adopt is to ensure receipt of the Commencement Notice on a day earlier than the commencement date.

(iii) a sensible precaution is to retain evidence of service of the Commencement Notice. Perhaps unsurprisingly in a number of cases the developer or owner has said that the completed commencement notice was posted and the local authority says that it was not received. Without evidence to show that it was posted the person appointed to hear the appeal against the surcharge has little choice but to decide there is insufficient evidence to prove the Commencement Notice was posted. Even assertions that a notice was handed delivered has not been accepted due to the absence of written corroboration. The onus is firmly on the developer/owner to show that the Commencement Notice was submitted and not on the authority to prove that it was not received. Production of a copy of the completed notice is not evidence that it was posted.

(iv) the surcharge imposed due to the failure to serve a timely Commencement Notice cannot be mitigated by the adverse financial consequences for the development or by the lack of developer's lack of understanding of the operation of CIL or by discussions with the planning officer. Further it is not the responsibility of the authority to inform the developer of the need for a Commencement Notice prior to the start date for the development. The onus is on the developer to understand the obligations imposed by the CIL regime.

(v) there is no sliding scale as regards the amount of the surcharge. It is the lower of the two amounts and the circumstances surrounding the particular development cannot be taken into account with a view to reducing the surcharge. An argument that the costs incurred by the authority as a result of the failure to serve a Commencement Notice is much less than the amount of the surcharge was rejected as wholly irrelevant.

(vi) warning was given in one of the appeals that starting a development as soon as the planning permission is granted without receiving the planning documents from the authority is a risky business. That warning reflects good sense. In that case by starting on the day that planning permission was granted the developer made it impossible to comply with his requirement.

2. CIL Liability Notice - A surcharge cannot be claimed if a CIL Liability Notice has not been served by the authority (reg. 117(b)). However, in some cases the CIL Liability Notice has been served on a previous owner of the development site but a later owner may be unaware of this. Such an owner may seek to rely on reg. 117(b) and also seek to argue that it was unaware of the CIL procedure. Neither argument will be successful because a local land charge is registered by the authority upon service of the CIL Liability Notice and any subsequent purchaser of the site is treated as having full knowledge of the CIL burden.

3. Demand Notice – there have been a number of appeals against demand notices on the ground that an incorrect commencement date has been given in the demand. Some appeals concerned retrospective planning permissions. In the demand notice the authority has attempted to give the date that the works actually commenced rather than the date of the section 73A permission. In another appeal the authority had failed to give a commencement date because it related to a section 73A permission. These appeals have succeeded and the demand notices quashed in accordance with reg. 118(4). The authority must then serve a fresh Demand Notice with a revised commencement date (reg. 118(5)). When successful the appointed person may also squash any surcharge (reg. 118(6)) but it is a discretionary power which often will not be exercised.

4. Errors in authority's documentation - in a number of the appeal decisions there have been errors in the completing of the CIL Liability Notice or Demand Notice served by the local authority. For example, in one CIL Liability Notice the name of the developer was incorrectly spelt, it did not contain the developer's correct address and the site address was not included. In the decision it was stated that the errors did not invalidate the notice or prejudice the developer. Similarly, when a demand notice stated that an appeal against a surcharge was to the VOA that did not result in the demand notice being invalid. Appeals based on such errors are not going to have much chance of success.

5. Retrospective planning permission – the need for a planning permission to authorise retrospectively development that has already been carried out is usually a sign that there is an involved and interesting planning history. Until there is a grant of planning permission it is not possible for the developer to serve a notice of commencement of development nor can the authority serve any CIL notices. Once the retrospective planning permission is granted then the development is treated as having commenced on the date of the planning permission (reg. 7(5)). The authority will usually serve a CIL Liability Notice and a Demand at the same time. In the circumstances there is no opportunity to serve a Commencement Notice and so the inevitable consequence of such a retrospective permission is a failure to comply with reg. 67. No appeal against a surcharge for that failure has succeeded. The carrying out of development prior to permission by the appellant is viewed as bringing this outcome on the appellant.

The retrospective planning permission will be independent of any earlier planning permissions in contrast with a section 73 planning permission.

6. Earlier planning permissions – complications can arise when there have been a series of planning permissions. For example, it may be the case that the earlier planning permission is before the authority introduced CIL to the area. This will not avoid CIL if the later planning permission is implemented and is not a section 73 planning permission. When there have been a number of planning permissions the authority has to take care in identifying the correct planning permission in the demand notice but that in turn will depend on the developer serving the appropriate Commencement Notice. An incorrect reference may invalidate the demand notice.

It may be that the subsequent planning permission is a section 73 planning permission. Due to amendments in the CIL Regulations introduced in 2012 if a section 73 planning permission does not change the CIL liability arising from an earlier post-CIL planning permission then the earlier planning permission will determine the chargeable development and so the first CIL Liability Notice will hold good. However, if the CIL liability is changed by the section 73 planning permission then a revised CIL Liability Notice will need to be served by the authority and if that planning permission is implemented then both the Commencement Notice and the Demand Notice will need to refer to the section 73 planning permission.

7. Self-build exemption – a number of appeals have raised issues concerning the self-build exemption. A person appointed by the Planning Inspectorate does not have jurisdiction to decide such issues but is limited to the three areas of enforcement outlined at the start. There is no ability to transfer such issues to another forum.

One of the requirements with this exemption which has caused problems with self-build is that the application for the exemption must have been made and a decision given by the authority before the development is commenced. This is in addition to the requirement that a Commencement Notice be submitted no later than the day before the commencement. Failure to comply with any of these requirements means that the exemption is lost and the authority has no discretion to overlook such failure. Often the works will not have complied with the first planning permission which may have been pre-CIL or subject to the self-build exemption. Such non-compliance will require a fresh planning application to be made. A subsequent planning permission will not qualify for the self-build exemption. For a self-builder any of these failures will be extremely painful financially. Attempts to recoup the position by means of an application for a section 73 planning permission have not been successful.

8. Commencement of development – it is important for a developer to be clear when a development commences. This will be a crucial issue, for example, as regards compliance with reg. 67 (section 1 above) or the self-build requirements (section 7 above). It may be one of the issues to decide in a CIL enforcement appeal. In one case the development site had been segregated from the remainder of a garden by hoardings. It was found that this was not the commencement of the development but as the photographs produced by the authority also showed lorries leaving the site which had been cleared and a hole dug in the middle this was sufficient to constitute the commencement of development. In contrast in one appeal it was accepted that starting to get the site ready did not constitute development but importantly the works did not include any demolition. In more than one appeal it has been argued that demolition is not development for these purposes but without success.

What constitutes the development for these purposes will be material. The appointed persons have uniformly looked at the description of the development in the

planning permission which may include works which have already been completed. The description in the planning permission is paramount.

In one case part of the mitigation put forward and rejected was that the developer was unaware that the start of demolition triggered the commencement of the development. It is too big a topic for this paper but the involvement in a development of someone with a proper understanding of CIL and its statutory procedures is important so that the appropriate timetable is carried out. Firm control requires a sound basis of knowledge.

9. Statements by officers – appellants have placed reliance on discussions with officers of the authority. Not everyone working for the authority will have a full understanding of the operation of the CIL regime. Inevitably comments will be made which are not wholly accurate. There is considerable information to be found on local authority websites. CIL documents such as the Liability Notice will set out relevant guidance. The onus is on the developer to be properly informed and no account will be taken of discussions which run counter to the correct operation of the CIL regime. No authority has the power to change those statutory provisions. The onus lies squarely on the developer/owner.

10. Acknowledgements from authorities – failure to receive an acknowledgement from the authority for a Commencement Notice or Assumption of Liability Notice has been viewed in many appeals as something which should have put the developer or owner on notice that there was a problem that needed to be addressed. It highlights the onus on the developer/owner.

A fuller discussion of CIL can be found in my Guide to Community Infrastructure Levy at either http://www.christophercant.co.uk/community-infrastructure-levy/ or http://www.9stonebuildings.com/barrister/christopher-cant/ .