

Implications of Giordano decision

Christopher Cant

The Court of Appeal has allowed the appeal against the decision of Mrs. Justice Lang DBE ([2018] EWHC 3417 (Admin) in R (oao Giordano Limited) v Camden LBC [2019] EWCA Civ 1544. The decision has CIL implications for all development authorising the change of lawful use whether under a planning permission granted by a local planning authority or a general consent. Some of the consequences seem odd in the context of CIL.

1. Facts - The case concerned the conversion of an office block in Camden to flats. The first planning permission in 2011 authorised conversion of three floors to six flats and was granted before the authority had introduced CIL and so did not give rise to a CIL liability. After the building had been extended and gutted but before any of the floors had been partitioned a second planning permission was granted in 2017 after the introduction of CIL for three larger flats in place of the six smaller flats. It was accepted that at the time the second planning permission was granted the lawful use of the building was still as office use because the flats had not been completed.

The Council charged the development authorised by the second planning permission to CIL notwithstanding the owner's claim to be entitled to a deduction in respect of the whole of the gross internal area ("GIA") of the three floors under KR(ii) (now para. 1(6) Schedule 1 of the Community Infrastructure Levy Regulations 2010 previously reg. 40(7)). The building did not qualify as an "in-use building" so no claim for a deduction within KR(i) could be made.

KR(ii) permits a deduction to be made "for other relevant buildings" (that is buildings which are not "in-use buildings"). The deduction is the GIA of "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". In this case the second planning permission first permitted development on 21st June 2017.

2. Decision - the Council argued and Lang J accepted that to qualify for the deduction the lawful use of the relevant part of the building must be the same on 21st June 2017 as the intended use under the relevant development. "A potential use was not sufficient" (para. 28) so the change of lawful use of the relevant part of the building must have occurred by that day and be the same as the intended use.

The owner argued and the Court of Appeal accepted that it is sufficient for the intended use of the development authorised by the second planning permission to be a use which the owner has the ability to bring about on 21st June 2017 without a further planning permission having first to be granted (para. 31). It was not necessary that the lawful use of the building on 21st June 2017 be residential use. It sufficed that the office use could be converted to residential merely by completing the works started under the 2011 planning

permission without having to first seek a further planning permission. The owner consequently had the necessary ability enabling a KR(ii) deduction to be claimed.

For these purposes Lindblom LJ stated at paragraph 31 that “An extant and implementable planning permission will suffice.” In this case the works which commenced the development authorised by the first planning permission were apart from the extension only important because the first planning permission was granted in 2011 and so would but for the works have lapsed by 21st June 2017 and not be an extant permission which could be implemented. However, if instead the time limit on the first of two planning permissions has not expired it would seem that there is no need for any works to have started before the KR(ii) deduction can be claimed.

3. Two post CIL planning permissions rather than one - it would appear to follow from this that CIL on a change of use of an existing building can be avoided. By way of example, an owner of an office block wishes to convert it into flats after CIL has been introduced in the area. The office block does not qualify as an “in-use building”. Planning permission for conversion to six flats is granted subject to the works starting within three years. No works are commenced but within that three year period a second planning permission is granted to convert the building to three larger flats. The owner implements the second planning permission. No CIL liability is payable in respect of the first planning permission because the development authorised by it has not commenced and so no payment has been triggered. However, on the day before the date the second planning permission first permits development the first planning permission is still “extant and implementable”. This means that on that day although the lawful use of the building is still office use it is possible for the owner to change the lawful use to residential without the need for a further planning permission. All that is needed is for the development authorised by the first planning permission to be completed by the carrying out of the necessary works. Applying the Court of Appeal decision it means that a full deduction within KR(ii) is available and so no CIL liability is payable.

If the owner only applies once for planning permission and commences the development authorised by that planning permission then CIL is payable assuming no KR(ii) deduction is available due to the owner’s rights under the Permitted Development Rights (“PDR”) regime (as to which see below). Such an outcome is odd.

4. Permitted Development Rights - In the judgment of Lindblom LJ at paragraph 33 it is stated that what constitutes a use that the owner is able to carry out on the day before the date on which a development is first permitted includes “a use that lawfully be carried on in the retained parts of the building under an implementable planning permission granted before, or on the relevant day, or with the benefit of “permitted development” rights.” This paragraph contains the only reference to permitted development rights in the judgment notwithstanding that the Court of Appeal decision will enhance the importance of such rights in the context of KR(ii) deductions.

If it is correct then the most obvious consequence would seem to be that if it is possible to change the lawful use of an existing building to another lawful use under the PDR regime then a KR(ii) deduction should be available if a planning permission is then granted

authorising such a change of use. On the day immediately before the granted planning permission first permits development the owner will be able to change the use under the PDR regime. But in such circumstances will it mean that in all cases there is no need to obtain a further grant of planning permission? If no prior approval is required then the right to carry out the change clearly does not need further planning permission.

However, if prior approval is needed under the PDR can a claim for a KR(ii) deduction be made if the prior approval has not been granted? The prior approval does not by itself constitute a planning permission for the purposes of CIL within reg. 5. For example the grant of prior approval before the introduction of CIL in the area will not avoid CIL if the development authorised does not commence until a date after the introduction of CIL (reg. 128(2)(b)). Does the obtaining of such prior approval equate to the carrying out of works and, therefore, is not be regarded as preventing the ability to change a lawful use? Alternatively even if not itself a planning permission does it constitute part of the general consent which is a planning permission for the purposes of CIL (reg. 53)) and so needs to be granted before the owner can be considered to be able to change the use without a further planning permission.

5. Possible reform - would it just not be simpler for the CIL regime to provide that a development comprising only the change of use of an existing building with no new build is not a development for the purposes of CIL? This would avoid the need for overly complicated analysis and planning applications which serve no purpose other than to seek to avoid CIL. Such complications arise in part due to the failure of the CIL regime to fully tackle the consequences of treating developments authorised by the PDR regime as chargeable developments yet different to developments authorised by a granted planning permission.

6. Summary - as matters stand up at present it is arguable after the Court of Appeal decision that:

(1) Two planning permissions authorising a change in the lawful use of an existing building will avoid CIL if only the second is implemented at a time when the first could also be but has not been implemented.

(2) The same is the case if instead of two planning permissions there is both an ability to change the lawful use of an existing building under the PDR regime and then a granted planning permission. If a prior approval is required under the PDR regime before work can go head then probably that should first be obtained to avoid an argument that without it the owner is not able to change the lawful use without a further planning permission.

(3) it is not clear whether a right to change the lawful use of a building under the PDR regime means the owner is able for the purposes of the KR(ii) deduction to carry on such use of the building when the grant of a prior approval is still required. In consequence it is sensible if such a claim for a KR(ii) deduction is to be made to first obtain prior approval.

