CIL – Update – Reviews & Appeals
Quis custodiet ipsos custodes… "Who will guard the guards themselves?"

Decimus Junius Juvenalis, also known as Juvenal, was a Roman poet living between 55AD and 127AD and published a series of 16 satiric poems known as 'The Satires' cataloguing the power, debauchery and corruption he saw throughout Rome as well as the folly and brutality of humans! You think that's 'heavy' – try property tax and in particular the 2010 Community Infrastructure Levy (CIL) Regulations (as amended… frequently)!

However, in the VI of these Satires, Juvenal coined the phrase *"quis custodiet ipsos custodes…"* translated to "Who will guard the guards themselves?" – which is rather fitting when it comes to CIL. The majority of Local Planning Authorities (LPAs) across England & Wales use CIL as the mechanism to extract funds from property developers and homeowners to support their investment in local 'infrastructure' across the respective LPA's locality – be it doctor's surgeries, school buildings, playing fields or bus stops – facilities necessitated by wider development. These 'developer contributions' have been increasingly levied in LPAs following their adoption of the CIL regime since the 2010 Regulations were 'activated' on 06 April 2010.

Who will guard the guards?

The LPAs which have adopted CIL possess considerable powers within these complex Regulations, and some take the enforcement of CIL with great care and responsibility. Sadly, some are belligerent, pedantic, and far too eager to wield their power, largely at the expense of unwary homeowners and developers. Thankfully there are 'guards' to oversee the LPAs – in fact - in regard to CIL there are two sets of guards – depending upon the issues to be considered!

The Planning Inspectorate (PINS) has a role to oversee CIL disputes on Regulations 117, 118 and 119 addressing appeals against surcharges, deemed commencement or CIL stop notices respectively. Whilst the Valuation Office Agency (VOA) has the responsibility to decide upon appeals under Regs. 114, 115, 116, 116A and 116B. These deal with general appeals - against Reg.113 reviews - where LPAs 'mark their own homework', as well as apportionment, charity relief and self build exemption on annexes or housing.

Great care must be taken in seeking any such oversight as there are restrictive timescales of between 28 and 60 days which must be complied with to even allow any challenge to be heard. Furthermore, the right to appeal will lapse if the project is commenced, before an agreed decision is made by the 'appointed person' at either PINS/VOA.

VOA - Guardians of CIL

Hot off the press, this September 2021 VOA decision on appeal ref: 1774805 brought by E^3 Consulting on behalf of client, Ms T, a Surrey based farmer owner, against her local planning authority and the relevant Charging Authority (CA) responsible for collecting CIL. The case involved the change of use of an ancillary outbuilding to a new independent dwelling. Ms T had sought planning approval for this intended change of use and a retrospective permission regarding some repair works undertaken in 2016 following storm damage. Further to 'advice' from the CA was sought as two separate permissions: The first granted in January 2021 for the retrospective repair works in 2016, the second for an intended change of use, importantly not yet enacted, and granted on 13 May 2021. To her alarm, the CA issued a CIL liability notice in the sum of £22,089.88 on 28 May 2021.

After appointing E^3 Consulting to review the matter in June, we identified a number of issues and lodged a review with the CA under CIL Reg.113. Unfortunately, without taking up various offers of dialogue to clarify the project situation and circumstances, the CA decided to reinforce their initial assessment, confirming in July that the CIL remained in place on this change of use project, involving no additional floor area. The matter progressed to appeal with VOA under Reg.114 and set out three key aspects where we felt that the CA had misunderstood the project and had erred in issuing a CIL Liability Notice.

After lengthy exchanges of project data, witness statements, legal precedents and trawling mobile phones of friends & family for photographic evidence of completion on the appellant's side and no doubt similar time and effort from the CA in remonstrating on their stance, we are delighted that 'our guardian' decided in favour of our client. The VOA appointed person found conclusively that two of our three points were held as correct, with the third being open to interpretation either way, but not detracting from the outcome of their decision reducing the CIL liability to £0 (nil), saving the client £22,089.88.

Ms T said *"I am thrilled with the outcome achieved by Alun, and E^3 Consulting. He said from my very first conversation that this CIL liability was incorrect, and the grounds were accepted by the VOA in their decision. Whilst I have found it extremely stressful having this unexpected demand for twenty-two thousand pounds, and dealing with the council and their dogged insistence they were correct - I do feel this decision is an important precedent for other homeowners and farmers, seeking to diversify their income streams to stay viable in these turbulent times. Not having heard of CIL before, I can only add that it is a truly complex area of property tax and the processes are slow and inflexible. I felt expertly guided by Alun's comprehensive knowledge and would urge anyone considering a project in an area that has adopted CIL to take early specialist advice. I only wish I had instructed E^3 earlier as we might have short-circuited some of the loops and anxiety in resolving this matter!"*

PINS Protectors

In respect of the PINS protection, this example *(not advised by E³ Consulting)* references a CIL appeal decision – against Cheshire East Council (CEC) under APP/R0660/L/19/1200319, decided on 24 April 2020. Whilst appeal decisions are published to help broaden the marketplace understanding of CIL, they are heavily redacted, which at times undermines the very purpose of publication. Bizarrely, this is despite the fact that all the relevant details are previously published, or entirely ascertainable, under the planning rules. Here, the developer made an appeal under Reg.118 challenging the basis of CEC's deemed commencement date, as determined on Liability and Demand Notices dated 10 March 2020. The project involved a number of sequential permissions, the last of which was granted on 29 March 2019 – just a few weeks after CEC adopted CIL from 01 March 2019.

CEC had deemed the commencement of this final permission as 29 March 2019, coinciding with the date of grant, irrespective of the works on site having clearly commenced under an earlier permission on 11 June 2018. The developer had mistakenly submitted a new full planning permission rather than using minor amendment applications under ss.73A or 96A Town & Country Planning Act 1990. Planning Inspector, Ken McEntee, accepted the appellants' appeal instructing that the Demand Notice be withdrawn and reissued.

It's not clear what the CIL impact was in this case as the Inspector's last point in his decision stated *"although I am allowing the appeal, I have no powers to quash the CIL charge"*. This would suggest that the decision was perhaps a 'pyrrhic victory' to coin another latin phrase – with the developer most likely still liable for CIL on the new and retrospective permission and arguably also liable to surcharges and interest on the CIL applied, resulting in over £40,000 of added costs to the project!

This case highlights the complexity of CIL and the importance of correctly meeting the requirements during the planning process; it also underlines the need to follow the correct means of varying projects, in accordance with the appropriate CIL Regulations. Had this developer's architect or planning consultant made the application using the minor amendment facilitated by s73 TCPA1990 they could have avoided the CIL altogether!

Conclusions

It demonstrates that while the 'guards' – PINS and VOA – have powers to oversee and reverse LPA decisions, in many cases their hands are tied (within their defined scope). The ultimate lesson is to gain good quality advice from an experienced and specialist CIL adviser at an early stage to minimise the risks and avoid problems altogether. Importantly planning law and CIL Regulations overlap but are intrinsically different in many areas, necessitating different inputs, expertise and actions! *"Too often we have people quoting what the planning law permits as justification for a hope for challenging to a CIL matter… only to disappoint as the CIL Regulations specifically address their situation… mostly in a contrary and costly manner!"* adds E³ Consulting Managing Director, Alun Oliver.

E^3 Consulting has over seven years of experience dealing with all manner of CIL matters from self build and charity exemptions, social housing relief and numerous reviews, validations and/or challenges to the CIL calculations. E^3 maintains its own comprehensive library of case law and appeal decisions. Please get in touch to find out more.

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