

CIL - New Research Lays Bare Planning Cost

E³ Consulting analyse 2020/21 PINS CIL Decisions

Appeals to the Planning Inspectorate about the Community Infrastructure Levy (CIL) are failing in seven out of ten cases, according to new research out today.

National property tax specialists E3 Consulting analysed every Planning Inspectorate (PINS) appeal since January 2020 and found that the vast majority were upheld in favour of the local planning authority.



E3 - with offices in London, Southampton and Bournemouth - found that 65 appeals were made against local authority decisions regarding CIL. There was less than a 30 per cent success rate.

It has highlighted appeal cases which demonstrated the necessity of acting early, taking appropriate advice and keeping evidence to show that procedures have been complied with.

Alun Oliver FRICS, managing director of E3 Consulting, said: “CIL is highly procedural and overcomplex. “A lack of understanding leads to time consuming and costly appeals. Often the appeals are made as an emotional response to the perceived unfairness of CIL, as it is seemingly a heavy price to pay for relatively small administrative mistakes. This response is common however not useful as retrospective action in CIL is fruitless and time consuming. Developers and homeowners must be proactive from the very start with CIL or may rue the day they chose to put off dealing with CIL!”

“CIL can be costly and can hugely increase the cost of a development. Without expert knowledge it is easy to get lost in the procedural nature of CIL and miss out on key deadlines and documents. Most importantly, all reliefs, exemptions, reviews or appeals must be concluded before work commences on site”

CIL was introduced through the Planning Act 2008 to replace Section 106 agreements in planning permissions England and Wales to fund vital infrastructure, such as roads, parks and GP surgeries. Coming into force in 2010, more than 70 local planning authorities have now adopted CIL.

However, unlike Section 106 agreements it is non-negotiable with applicants facing a set levy depending on the local authority’s own schedule - often differing for varying locations and planning use. The most common development type affected by CIL is residential, but many councils also apply it other forms of property, including halls of residence, hotels, retail and offices.

It is calculated per square metre of floorspace and applies to new developments exceeding 100 square metres or creating one or more new dwellings - meaning many homeowners building extensions should be exempt as well as with people building their own home. Any exemptions or reliefs need to be gained prior to work starting.

E3 conducted its own set of research based on CIL appeals by the Planning Inspectorate on GOV.uk webpage. Some 38 per cent of cases involved disputes over the start date of works. Overall, the majority of appeals - 39 out of 65 cases - were made on the basis that a did not occur yet few had grounds or evidence to support their appeal.

E3's advice includes:

- Be sure to keep material evidence during a development. Keep proof of postage as evidence for the submission of documents so as not to be caught out if it gets lost. Keep photographic evidence to use if there is dispute over the date works began. CIL is extremely procedural, especially regarding dates. The more evidence to support the developer's claim (including retaining copies of emails and read receipts) the more likely they will be to avoid surcharges further down the line.
- It is solely the Charging Authority's (the council's) responsibility to submit a Liability Notice as it acts as a trigger for further documents including the Commencement Notice for work starting. This means that they should be held responsible for sending documents in a timely manner. Previous cases have determined that the Charging Authority need to be held responsible for their actions.
- Retrospective planning permission is something to avoid as a Commencement Notice cannot be submitted retrospectively and thus is an automatic CIL liability.
- The developer must be clear on what constitutes material works - demolition counts for works beginning on the chargeable development. There is, however, a difference between preliminary organisation and material works. This could include works such as testing soil and clearing vegetation.

The majority of appeals since 2020 were made under CIL Regulation 117(1)(a) 'that the alleged breaches did not occur'. Alun said: "This is one of the more general regulations and suggests that the appellants do not fully understand the procedures. Some 39 out of 65 PINS appeals in our research were made under Reg 117(1)(a) yet few had material grounds or evidence to support this appeal. The regulation with the fewest appeals was Reg 117(1)(c) with just 10 cases, however this also follows the pattern of a clear lack of understanding of CIL by the appellants. Often there is a shock at CIL surcharge prices and despite being capped at £2,500 there is often an emotional response to the 'extreme' costs to these 'form filling' errors."

Appeal cases where the council's decision was upheld included APP/C1435/L/20/1200440 when a developer had chosen to start work despite failing to ensure that they had submitted a Commencement Notice (CN). Claimed that this was due to the agent being unable to submit a CN do so because of the Covid-19 lockdown failed to change matters. The Inspector concluded: "Notwithstanding there was a problem with his agent's availability, the appellant chose to press ahead with the development without ensuring that a CN had been submitted. I take the view that this was a risky strategy for the appellant to take. In these circumstances, I have no option but to dismiss the appeal as it is clear the alleged breach occurred."

Another appeal - APP/ V1260/L/20/1200417 - failed when the council was able to prove that Commencement Notices were not submitted prior to work starting. The Inspector stated: “With regards to the first Commencement Notice (CN), although it is dated 31 January 2020, the Council have [sic] provided evidence to demonstrate that it was actually created on 23 June 2020, the same date the appeal was submitted... The appellant states that he submitted the original CN by post but has not produced any proof of postage. I also note that the Council’s Building Control Team confirmed that demolition works began on 17 February 2020, but the appellant has not provided any evidence to refute this.”

Alun said: “This highlights the need for proof of postage and indicates that appellants need robust evidence for their contest of the commencement date. Mistakes will be spotted.”

E³ says that other cases in which appeals were won also demonstrated the importance of keeping reliable and detailed evidence. In the case of APP/F1610/L/20/1200395 council photographs did not clearly show that work had begun - only preliminary organisation of the site.

The Inspector ruled “While the photographs support preliminary organisation for starting to initiate the planning permission, what is shown does not amount to a material operation itself.”

E³ has hosted workshops and webinars for planning and property professionals about CIL and has advised clients across England and Wales about the levy for the past seven years. Alun said: “Our own set of research based on CIL appeals has given us a unique insight into the nature of CIL appeals. This benefits our work with CIL projects greatly as we have a keen sense of common mistakes and blind spots for developers and homeowners. There are important lessons to be learned. The saying a ‘A stitch in time saves nine’ has never been more appropriate. Acting at an early stage to get the right advice will typically cost a fraction of the surcharge and save money as well as time, energy and stress.”

E³ Consulting is an independent, award winning, multi-disciplinary property tax practice specialist established in 2003.

All of the PINS appeal decisions were researched on the gov.uk website. Cases referred to included: APP/L/19/1200314 and 315; APP/F1610/L/20/1200395; APP/C1435/L/20/1200440; and APP/ V1260/L/20/1200417.

ALUN OLIVER BSc(Hons) MCIM MBA FRICS is Managing Director of E³ Consulting and a CEDR accredited mediator. He has worked in property tax since 1994 and founded E³ Consulting in 2003 together with his wife and co-director, Nicky Oliver ACII. The firm advises a wide range of clients from FTSE100 through to regional developers and family offices on various property taxation matters, including; Capital Allowances, Community Infrastructure Levy (CIL), Land Remediation Tax Relief and Repairs & Maintenance throughout the UK.

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