

LEGAL CASEBOOK

The latest court cases summarised

Legal viewpoint: **Simon Ricketts** -----



HOW INFRASTRUCTURE LEVY CAN BITE ON RELATIVELY MODEST DEVELOPMENTS

The Court of Appeal has considered some of the nuts and bolts of the Community Infrastructure Levy (CIL) regime for the first time. The facts illustrate the potential jeopardy faced by developers from provisions that are complex and, at their core, still open to varying interpretations.

Planning permission had been granted for change of use of three floors of a commercial building in north London to six two-bedroom flats and a four-storey rear extension. The permission pre-dated any CIL charging schedule for the area. This permission was implemented by carrying out the rear extension and external works and stripping out the three floors. Planning permission was then granted, after the mayor of London's and the borough's charging schedules had been introduced, for change of use of the three floors to create three three-bedroom flats. A CIL liability notice was issued stating that the amount payable would be £547,419.

The developers sought to argue that regulation 40(7)(ii) of the CIL Regulations 2010 applied, under which no CIL is payable for "retained parts" of relevant buildings "where the intended use following completion of the chargeable development is a use that is able to be carried out lawfully and permanently without further planning permission in that part on the day before planning permission first permits the chargeable development".

The council rejected this argument on the basis that, although planning permission was not required to use the three floors for residential purposes, the provision did not apply unless the floorspace was capable of the intended use "without the need for further physical adaptation". On judicial review in the High Court, Mrs Justice Lang agreed with it that a "potential use was not sufficient". She found that the floors were a mere shell and so were incapable of being used for residential purposes.

But the Court of Appeal took a different approach. Lord Justice Lindblom noted that the regulation "is perhaps less clearly drafted than it might have been" but decided that "its true meaning is not obscure". He found that "an extant and implementable planning permission will suffice" for CIL purposes. Indeed, deemed permission to carry on the use pursuant to the General Permitted Development Order would also suffice, he opined.

Although the dispute pre-dated the latest amendments to the CIL Regulations, regulation 40(7) remains unamended and so the ruling remains good law. It is also an excellent example of the CIL liabilities potentially arising from even relatively modest development proposals.

Case: R (Giordano Ltd) v London Borough of Camden;

Date: 12 September 2019;

Ref: [2019] EWCA Civ 1544

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