

Case Name: *Giordano Ltd., R (On the Application Of) v London Borough of Camden Council* [2019] EWCA Civ 1544 (12 September 2019)

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Commentary: The Court of Appeal allowed a developer's appeal concerning the interpretation and effect of regulation 40(7)(ii) of the Community Infrastructure Levy Regulations 2010 as amended (the "CIL Regulations") under which no Community Infrastructure Levy ("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 on lawfully and permanently without further planning permission in that part on the day before planning permission first permits the chargeable development".

The appellant appealed against the order of the High Court to dismiss its claim for judicial review of the decision of Camden Council (the "Council") requiring payment of CIL in connection with a planning permission granted in 2017 for a change of use of offices and vacant floors of the relevant property to create three flats. This permission, granted following the introduction of both Mayoral and Camden Council CIL, followed an earlier pre-CIL permission granted in 2011 for the conversion of same floorspace into six flats. The development permitted by the 2011 permission was lawfully commenced but not completed at the time that the 2017 planning permission was granted, the developer preferring a three, rather than six, flat scheme and so submitting a further planning application.

The High Court upheld the Council's finding that CIL was payable and that the conditions in regulation 40(7)(ii) allowing for a statutory deduction from CIL were not satisfied. The High Court agreed with the Council's interpretation that the wording in Regulation 40(7)(ii), "able to be carried on lawfully and permanently without planning permission", meant that the relevant floorspace should be capable of the intended use under the chargeable development without any further physical adaptation. At the relevant date, the change of use to residential use had not occurred and, therefore, the present and proposed uses did not match; a potential use was considered insufficient.

However, this decision was overturned by the Court of Appeal which favoured the interpretation that the equivalence of use required on the specified day (namely, the day before planning permission first permits the chargeable development) is between "the intended use" (namely, the use to which the retained parts of the building may be put in accordance with the planning permission approving the chargeable development) and the "use that is able to be carried on lawfully and permanently without planning permission", by which is meant a use which can be carried on lawfully without the need for any further planning permission having to be obtained. In this case, the residential use permitted by the 2011 permission was the same as the intended use under the 2017 permission and so was a use which could be lawfully carried on in the retained parts of the building.

Lindblom LJ (giving the leading judgment) found that the ability to carry on the use in question rests on the lawfulness of being able to do so rather than the building actually

being occupied in that use on the relevant day, or upon its having already been physically adapted for the use. He held that “it entails the possibility of the use being lawfully and permanently carried on” but that “the right to carry it on need not have been exercised yet”. As such, “an extant and implementable planning permission will suffice” and “there is no stipulation, or necessary implication, that the use must already have been put into effect; or that it is, on that day, the ‘extant lawful use’”.

In reaching these conclusions, Lindblom LJ contrasted the concept of the “retained parts” of “in-use buildings” in Regulation 40(7)(i) with the “retained parts” of “other relevant buildings” in Regulation 40(7)(ii). While the CIL Regulations include a definition of “in-use buildings” (which must contain a part which has been “in lawful use” for the period specified), there is no such definition of “other relevant buildings”, the implication being that these are relevant buildings that are not “in-use buildings” and hence need not have been “in lawful use”. He noted that the lack of a parallel requirement for “other relevant buildings” to have been “in lawful use” is telling and draws from this that the requirement in Regulation 40(7)(ii) “is not that the intended use of the retained parts of the building must match their extant lawful use as it happens to be on the relevant day, but a use that has, by then been authorised or would in any event be lawful.” Lindblom LJ also endorsed both the Explanatory Note to the CIL Regulations and the relevant PPG Guidance as being consistent with this interpretation.

This case focused on just one provision of the CIL Regulations but, in doing so, provided useful clarification on the interpretation to be given to one of the key statutory deductions from CIL as well as indicating the likely approach of the Court to other provisions.

Case summary prepared by Victoria McKeegan