



# The role of CIL liability notices and demand notices

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A number of High Court cases have explored the relationship between CIL liability and the giving of liability and demand notices. In two the principal issues have been when a CIL liability becomes due and the effect of revised liability and demand notices. The core argument has been that a demand notice is a pre-condition to a CIL liability falling due and if revised will cause the slate to be wiped clean and the process of the CIL liability falling due starts afresh. This raises the question of the precise role played by liability notices and demand notices in the operation of the CIL regime.

In section 1 to 8 below I set out the steps and regulations in the CIL regime relevant to those issues and then discuss the two High Court decisions.

**1. Liability notice** – regulation 65 of the Community Infrastructure Levy Regulations 2010 requires that the collecting authority must issue a liability notice as soon as practicable after the day that on which a planning permission first permits development. It requires certain information to be stated in the notice including the chargeable amount. In practice this notice should be issued and served shortly after the grant of the relevant planning permission. Normally this should be between the grant of the planning permission and the commencement of the development authorised by that permission. This is not always the case but that is a separate issue to be discussed in another article. It is worth mentioning because it does not always happen that a separate liability notice must be served for each planning permission even if a section 73 permission.

**2. Commencement notice** – before the development authorised by a planning permission is commenced a commencement notice must be served by the owner/developer. In the event that no such notice is given before the development commences then the collecting authority must under regulation 68 determine the date on which the development commenced (“the deemed commencement date”). Which of these dates is applicable is important information to be included in the demand notice.

**3. Assumption of liability** – in addition to the giving of a commencement notice before commencement an assumption of liability notice should be given whereby the person giving the notice accepts responsibility for the CIL liability. Such a notice may be given before the grant of planning permission but will not take effect until there has been a grant which thereby provides a subject for the notice. This point carries particular significance when the planning permission is retrospective in character with the consequence that the development authorised by it is treated as commencing on the date of the grant. This is important in the context of CIL exemptions and reliefs.

**4. Demand notice** – once the date specified in the commencement date has occurred or a deemed commencement date has been determined a demand notice must be served by the collecting authority pursuant to regulation 69. The information stated in this notice will include identification of the liability notice it relates to; the amount payable by the person served; the date when payment is due; whether the amount is payable by instalments and if it is the amount of each instalment and the date when each instalment payment is due.

**5. Revised notices** – there is a statutory power to revise a liability notice (regulation 65(5)) and a demand notice (regulation 69(3) and (5)). In each case it is provided that when a revised notice is served any earlier notice “ceases to have effect”. This wording has had a prominence in the argument over the issues discussed in this article.

**6. Payment of CIL** – regulation 31(3) of the 2010 Regulations provides that if a person has assumed liability in accordance with that regulation then that person is liable on commencement of the chargeable development to pay an amount equal to the chargeable amount less the amount of any relief granted in relation to the development. The CIL liability may be paid in accordance with the relevant authority’s instalments policy if there has been both the assumption of liability in accordance with regulation 31 and a valid commencement notice has been served (reg. 70). In such circumstances in the absence of an instalment policy the CIL liability will be payable in full on the expiry of the period of 60 days from the intended commencement date stated in the commencement notice

(regulation 70(7)). A failure to give a valid assumption of liability notice or a valid commencement notice will cause the CIL liability to be payable immediately upon commencement of the development (regulation 71).

**7. Late payment surcharge** – regulation 85 provides for three possible tranches of late payment surcharge to be imposed. The collecting authority has a discretion as to whether to impose such a surcharge. The first may be imposed if an amount of CIL is not paid in full after the end of a period of 30 days beginning with the day on which payment of the amount is due. In that case the surcharge is the greater of £200 or 5% of the full amount. The second late payment surcharge may be imposed if any part remains outstanding on the expiry of a six month period beginning with the same date. The third may be imposed if any part remains outstanding after the expiry of one year beginning with the same start date. In the case of the second and third surcharges the amount of the surcharge is determined by reference to the unpaid amount.

Clearly a crucial element in determining whether a late payment surcharge can be imposed involves fixing the start date for the three statutory periods in regulation 85 which depends on when the amount of CIL falls due.

**8. late payment interest** – in the event that an amount of CIL is not paid on the date it is due then late payment interest accrues in accordance with regulation 87 from the day after the day payment was due. As with late payment surcharges the date when payment is due is a crucial element in applying this provision which is mandatory.

**9. Lambeth LBC v Secretary of State for Housing Communities and Local Government** [2021] EWHC 1459 (Admin) – the cumulative effect of the structure and provisions outlined above was first raised in this case. The developer of a site had commenced without securing the necessary funding and so a CIL liability of £5,549,963.41 remained wholly unpaid. To reduce the amount an application for a section 96A consent was made reducing the proposed block of flats by a complete floor. Such a consent is not a planning permission for the purposes of CIL but if as in this case it causes a change in the gross internal area of the development then that in turn changes the amount of CIL and requires revised liability and demand notices to be issued as happened in this case. There were then a number of revised demand notice which imposed late payment surcharges.

The imposition of the late payment surcharges was challenged by way of a statutory appeal. The appointed person accepted the following argument and quashed the latest revised demand notice with the late payment surcharge. This outcome was challenged by the authority by way of judicial review.

The argument for the developer was that the revised demand notice caused the earlier demand notice to be irrelevant in law and fact and so in substance a nullity. This was argued to be the consequence of the wording in regulation 69(5) that any earlier demand notice “cease to have effect”. Thus there had to be a wait of thirty days from the issue and service of the demand notice before a late payment surcharge could be imposed because it was argued an effective demand notice is a pre-condition of the CIL liability falling due.

If correct this would have produced the oddity that having waited the thirty days from the issue of a revised demand notice there would then be a need for a further revised demand notice in order to impose a late payment surcharge which in turn would nullify the earlier demand notice and the thirty day waiting period would restart. Each succeeding demand notice would wipe the slate clean and thus a later payment surcharge could never be effectively imposed. All that would be required to achieve this outcome would be to bring about the issue of the first revised demand notice. As was pointed out by Mrs. Justice Thornton DBE this can be easily compelled by occurrences such as a transfer of liability or the need for a correction of an administrative error.

The appeal decision was quashed as it was based on an error of law. The crucial points from the judgment supporting that decision are:

- (i) the trigger for a CIL liability falling due is the commencement of the development (following *Swift J. in Oval Estates (St. Peter's) Limited v Bath & North East Somerset Council* [2020] EWHC 4357 (Admin)).
- (ii) the purpose of a liability notice is to record and inform a party of liability for CIL;
- (iii) the purpose of a demand notice is to record and inform when payment of CIL is due and how much including surcharges and interest;
- (iv) the role of a liability notice or a demand notice is not to determine when a liability arises or when a payment is due but only to record the liability and terms of payment;
- (v) a revised liability notice or demand notice may reflect and record a change to the quantum of the CIL liability or payment dates “but it does not itself change the genesis or origin of the liability” (para. 68);

- (vi) the consequence of a revision is that earlier notices cease to have effect but not that they never had effect;
- (vii) a revised liability notice or demand notice does not extinguish liability for a late payment surcharge which has already been incurred;
- (viii) liability for a late payment surcharge is not contingent on the service of either a liability notice or demand notice.

**10. R ( oao Heronslea (Bushey 4) Limited) v Secretary of State for Housing Communities and Local Government** [2022] EWHC 96 (Admin) – this case concerned a claim for social housing relief. The principal issue was whether a failure to serve a valid commencement notice before commencing the development caused the relief to be lost when the grant of the relief had been previously notified to the claimant. It was held that the relief had been lost but again that is an issue for a separate article. The second issue in that case was the one considered in the Lambeth case. The development had commenced on 19th June 2019 and as no valid commencement notice had been served this was found on a statutory appeal by the appointed person to be the date that the CIL became payable. The developer’s argument was that a demand notice had been issued on 11th February 2020 and so the statutory period specified in regulation 85 ran from that date.

Mrs Justice Lang DBE rejected this argument stating that it is clear that the demand notice must state the date on which CIL is due but that the demand notice does not set the date (para. 133). Instead the date is set by the operation of regulations 70 and 71 which date is then stated in the demand notice.

**11. Overall conclusion** - These decisions make clear that the notices to be issued by collecting authorities are not material to whether or not a CIL liability has fallen due for payment and when such payment should be made. Neither a liability notice nor a demand notice is a pre-condition to a CIL liability falling due or to the fixing of the date or dates of payment. Revised liability notices or demand notices will not cause the payments dates for a CIL liability to be reset or extinguish any existing liability to pay a late payment surcharge. When determining the date that an amount of CIL falls due for payment for the purpose of imposing a late payment surcharge or the application of the late payment interest regulation the authority does not have to take account of liability notices or demand notices but need only consider the application of regulations 31, 70 and 71. However, when it comes to enforcement such notices play a major role and that will be considered in a separate article.

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### Christopher Cant

Christopher Cant is a Barrister specialising in property law with over forty years’ legal experience. The Community Infrastructure Levy is a particular area in which Christopher has a pre-eminent specialism fitting in well with his work on behalf of developers and authorities. He enjoys the application of the legislative regime; planning to tackle CIL issues and the consideration of general planning policy including section 106 planning obligations. As well as advisory work, Christopher appeared in the Planning Court for the successful authority in the first judicial review case on the operation of the CIL regime and has acted on a number of statutory CIL appeals. Christopher is now being asked to consider professional negligence issues arising from CIL.

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