

WAVERLEY BOROUGH COUNCIL
“DISCRETIONARY CIL HOUSEHOLDER REVIEW”

A D V I C E

Introduction

1. My advice is sought by Waverley Borough Council (“the Council”) on the scope of the power contained in Regulation 65(7) of the Community Infrastructure Regulations 2010 (“the Regulations”) to withdraw a liability notice duly served under the Regulations.

2. The context within which this advice is sought is that, at its meeting of 28 January 2025, the Full Council of Waverley Borough Council resolved that householders previously subject to CIL liability should be able to request a discretionary review “*in line with West Berkshire,*” with a review period extending from 1 June 2025 to 31 May 2026.

3. The position in West Berkshire, is that the Council commissioned a review into what it termed “*the CIL Customer Journey*”. That review was undertaken by the Planning Officers’ Society (POS) and identified a number of opportunities to improve the CIL process in that district. One of the proposals was the adoption of a “*CIL Enforcement Policy - Householder Applications*” (“the Policy”).

4. At its meeting of 23 May 2024, *the Executive* of West Berkshire Council resolved to adopt the Policy and also approved a “*Discretionary CIL Householder Review Scheme*”. The purpose of these actions, as set out in the report to the Executive, was said to be that:

“This policy enables greater flexibility in the Council’s approach to enforcing CIL liabilities where the strict process set out in the regulations has not been correctly followed due to a genuine mistake of the homeowner”

The Policy itself states that the Council will not normally pursue CIL liability for householder development in circumstances where the liability would arise because forms have not been submitted and/or the process has not been followed in strict accordance with the regulations due to error or oversight.

5. The introduction of the discretionary CIL review process was to ensure that householders who had previously paid CIL were not penalised due to a genuine mistake or other circumstance beyond their control, which resulted in a CIL payment being due. Requests for review under the Scheme may be made up until

31 May 2025. It was also resolved by West Berkshire's Executive that, where appropriate having regard to the Policy, the Council's Executive Director, Place might agree to cancel CIL Liability Notices and refund CIL payments made.

6. From the wording of the resolution 28 January 2025 as reported above, I assume that intention of Waverley's Full Council was that within its administrative area, the Council would apply the same Policy and Review process as in West Berkshire, but with the period for requests for review running from 1 June 2025 to 31 May 2026.
7. That of course begs the question: does the Council have the statutory power to introduce such an approach? That is a question which, from my research into the West Berkshire decision making process, that Council did not in fact ever properly engage with.
8. For the reasons I shall now set out, I have reached the conclusion that Regulation 65(7), when correctly interpreted, provides no general discretion entitling a Charging Authority to withdraw liability notices in order to relieve householders of the consequences of their mistakes or omissions in seeking to comply (or not) with the Regulations. Whilst the Regulations are complex both procedurally and substantively, the purpose of the legislation is to establish a development tax for which all chargeable developments are liable unless exempted by the Regulations and, in consequence, the personal circumstances of developers (be they householders or other developers) are not relevant to the issue of liability save to

the extent *expressly* provided for by the Regulations. Any attempt to use Regulation 65(7) effectively to introduce categories of “*non-liability*” would be inconsistent with the scheme and purpose of the legislation and would, in my view, be unlawful.

CIL

9. Introduced by the Planning Act 2008, the purpose of CIL as set out in section 205(2) is to:

“ensure that costs incurred in supporting the development of an area can be funded (wholly or partly) by owners or developers of land in a way that does not make development of the area economically unviable”

10. In setting the rates of CIL to be charged to be included in the CIL Charging Schedule, the Regulations provide¹ that the charging authority must strike an appropriate balance between
- (a) the desirability of funding from CIL (in whole or in part) the actual and expected estimate total cost of infrastructure required to support the development of its area, taking into account other actual and expected sources of funding; and
 - (b) the potential effects (taken as a whole) of the imposition of CIL on the economic viability of development across its area.

¹ Regulation 14(1)

11. The focus on the setting or charging rates is, therefore, on the potential effects on the economic viability of development across the entirety of the charging authorities' area. Whilst there will be instances where this focus will need to take account of the effects of the proposed charge on the viability of a specific development (e.g. a new settlement critical to the future planning of any area), in setting the rates, the charging authority is generally not concerned with the effects of the charge on particular developments nor on particular developers.

12. Whilst the Regulations allow for differential rates to be set where justified by viability considerations,² this flexibility can be used only to provide for different (or no) charges to apply in different *zones*, to different *uses* or by reference to the *number* of dwellings to be constructed. There is no power to use the charging schedule to exempt categories of developer. For example, whilst there *might* (subject to the evidence) be a viability justification for not seeking to levy CIL from single dwelling developments in a certain zone of the charging authority's area. However, there is no power which allows the charging authority to limit that exclusion to developments undertaken by "*householders*" rather than to a commercial developer undertaking a single house development. This is made clear by the inclusion within the Regulations of a specific exemption in respect of the development of extensions and annexes to dwellings³ and self-build homes.⁴ The

² See Regulation 13

³ Regulation 42A

⁴ Regulation 54A

focus in setting rates of CIL is on the viability of development in an area or zone; not on the resources or personal circumstances of any given developer.

13. In order to mitigate for the deliberate inflexibility in the liability to pay CIL, a number of limited exemptions and reliefs are expressly provided for. These are contained in Part 6 of the Regulations and are as follows:
- (i) Exemption for minor development⁵;
 - (ii) Exemption for residential annexes or extensions⁶;
 - (iii) Exemption for charities⁷;
 - (iv) Social housing relief⁸;
 - (v) Discretionary social housing relief⁹;
 - (vi) Exemption for self-build housing¹⁰; and
 - (vii) Discretionary relief for exceptional circumstances;¹¹
14. Save in respect of the exemption for minor development, there are strict procedural requirements which must be complied with in order to secure the exemption or relief. Non-compliance results in either a claim being refused or it lapsing. In

⁵ Regulation 42 – where the gross internal area of the new build on the completed development is less than 100 square metres and is not comprised one or more dwellings

⁶ Regulation 42A

⁷ Regulation 43 – where the owner of a material interest in the relevant land is a charitable institution and the chargeable development will be used for wholly or mainly for charitable purposes

⁸ Regulation 49

⁹ Regulation 49A

¹⁰ Regulation 54A

¹¹ Regulation 55 – only to be granted where the relief is made available in its area by the charging authority, a planning obligation was entered into in connection with the development with planning permission and the charging authority considers that to require payment of CIL on top of the planning obligations would have an unacceptable effect on the viability of the development.

particular, the exemptions require the person who wishes to benefit from them to make a claim for the exemption to the charging authority in the prescribed form and including the particulars specified in the form before the commencement of the development¹². In the event that the chargeable development to which the claim relates is commenced before the charging authority has notified the claimant of its decision on the claim, the claim lapses and there is no entitlement to the exemption.¹³

15. Whilst there are rights of appeal against the decision of the charging authority in respect of decisions on exemptions/reliefs in respect of charitable relief, residential annexes, self-build housing, the grounds are limited and, importantly, any appeal lapses in the event that the chargeable development commences before the decision on the appeal is notified.¹⁴
16. This strict regime is clearly intended to instill discipline into the process of applying for and relying on exemptions and relief. Unless and until notified of the decision on the claim for relief (or any appeal), the developer knows (or ought to know) that they cannot commence the chargeable development without incurring liability for CIL. That is a simple and straightforward approach. For developers it is not difficult to comprehend and for charging authorities it is straightforward to police. It ensures that the exemptions from liability for CIL are substantively and available

¹² See e.g. Regulation 42B(2) and (3)

¹³ See e.g. 42B(3)

¹⁴ See e.g. Regulation 116B(3)

only where the strict procedural requirements are met. That in turn ensures that the CIL system operates in a way which does not unfairly subsidise one developer over another and also maximises the CIL return from development in the charging authority's area.

17. Because it is relevant to the scope of the claimed wide discretion afforded by regulation 65(7), I should also refer to the fact that in relation to all the exemptions/relief, other than the minor development exemption, the Regulations provide for the withdrawal of the relief granted where a disqualifying event occurs before the end of the three year claw back period. For example, in relation to residential annexes, in the event that the main dwelling starts to be used for purposes other than as a single dwelling or the annex is let or sold away, CIL is payable as if the exemption had not been granted.¹⁵ I will turn to the implications of this later in this advice.

18. Liability for CIL is governed by Part 4 of the Regulations. CIL is payable on "*chargeable developments*" which means a development for planning permission.¹⁶ It is payable either by the person who has assumed liability to pay or, if no one has assumed liability, by either the owner or the developer of the land.¹⁷ Where a person has assumed liability to pay CIL, on commencement of

¹⁵ Regulation 42C

¹⁶ Regulation 9

¹⁷ Section 208 of the Planning Act 2008 and Regulations 31 and 33

the chargeable development that person becomes liable to pay CIL. Regulation 31(3) provides:

“A person who assumes liability in accordance with this regulation is liable on commencement of the chargeable development to pay an amount of CIL equal to the chargeable amount less the amount of any relief granted in respect of the chargeable development”.

19. Commencement of development is the date on which any material operations begin to be carried out on the land¹⁸.
20. This again provides for a simple approach. If the chargeable development is commenced, the person who has assumed liability (or, in default, either the owner or developer) is liable to pay CIL. Anyone commencing development in an area where CIL is in operation, other than minor development, knows or can be assumed to know that, if they commence their development, they will become liable to CIL unless they have first been granted an exemption.
21. Under the scheme of the Regulations the developer is effectively given three principal options:
 - (a) to commence the development and incur liability for CIL without exemption/relief;
 - (b) to wait for the grant of exemption/relief and then to commence development with either no or reduced CIL liability (depending on the applicable exemption/relief); or

¹⁸ Regulation 7

(c) not to implement the permitted development and thereby avoid any CIL liability arising.

22. In enabling the developer to decide on which option to pursue, the service of a valid Liability Notice by the charging authority is critical. Part 8 of the Regulations deals with the “*Administration*” of CIL. This provides for a series of notices to be served in sequence. Under Regulation 65(1), as soon as possible after the day on which planning permission first permits the relevant development, a charging authority must issue a Liability Notice. Regulation 65 provides as follows:

“(1) The collecting authority must issue a liability notice as soon as practicable after the day on which a planning permission first permits development.

(2) A liability notice must—

(a) be issued on a form published by the Secretary of State (or a form to substantially the same effect);

(b) include a description of the chargeable development;

(c) state the date on which it was issued;

(d) state the chargeable amount;

da) where the chargeable amount may be paid by way of instalments, include a copy of the charging authority’s current instalment policy (if any);

(e) state the amount of any exemption for residential annexes or extensions, charitable relief or relief for exceptional circumstances granted in respect of the chargeable development;

(f) where social housing relief or an exemption for self-build housing has been granted in respect of the chargeable development, state—

(i) the particulars of each person benefiting from the relief or exemption, and

(ii) for each of those persons, the amount of relief or exemption from which the person benefits; and

(g) contain the other information specified in the form.

(3) The collecting authority must serve the liability notice on—

(a) the relevant person;

(b) if a person has assumed liability to pay CIL in respect of the chargeable development, that person; and

(c) each person known to the authority as an owner of the relevant land.

(4) The collecting authority must issue a revised liability notice in respect of a chargeable development if—

(a) the chargeable amount or any of the particulars mentioned in paragraph 2(e) or (f) change (whether on appeal or otherwise); or

(b) the charging authority issue a new instalment policy which changes the instalment arrangements which relate to the chargeable development.

(5) A collecting authority may at any time issue a revised liability notice in respect of a chargeable development.

(6) A liability notice issued in accordance with paragraph (4) or (5) must be served in accordance with paragraph (3).

(7) A collecting authority may withdraw a liability notice issued by it by giving notice to that effect in writing to the persons on whom it was served.

(8) Where a collecting authority issues a liability notice any earlier liability notice issued by it in respect of the same chargeable development ceases to have effect.

(9) A liability notice issued in respect of a chargeable development ceases to have effect if liability to CIL would no longer arise in respect of that chargeable development.

(10) Subject to paragraph (11), a liability notice issued in respect of a chargeable development ceases to have effect once all outstanding amounts due in respect of that chargeable development have been paid to the collecting authority.

(11) A liability notice issued in respect of a chargeable development ceases to have effect at the end of the clawback period if—

(a) charitable or social housing relief, or an exemption for residential annexes or self-build housing, has been granted in respect of that chargeable development; and

(b)no disqualifying event occurs before the end of the clawback period (or, if a disqualifying event under regulation 54D(2)(b) has occurred and the collecting authority may take no further action in relation to that event).

(12) In this regulation “relevant person” means—

(a)in the case of a general consent, the person who has submitted a notice of chargeable development;

(b)in the case of phased planning permission granted subject to a condition requiring that further approval is obtained before commencing development, the person who has applied for that approval;

(c)in all other cases, the person who applied for phased planning permission.”

23. The Liability Notice has an important role in the administration of CIL and the charging authority’s ability to demand payment of CIL. The Liability Notice precedes the Demand Notice which, as with the Liability Notice, must be served under Regulation 69 on each person liable to pay an amount of CIL. It is the Liability Notice which records and informs a party of their *liability* to pay CIL. The subsequent Demand Notice is to record and inform the person liable to pay CIL when *payment* is due and that sum they must pay (including any surcharge or interest (see R (*London Borough of Lambeth v SSHCLG* [[2021] PTSR 1601 per Thornton J @ [67])). Neither the Liability Notice nor the Demand Notice determine when liability arises. The Liability Notice is forward looking; its function is to identify the liability to CIL that will arise; not liability which has already arisen (*Oval Estates (St Peter’s) Limited v Bath & North East Somerset Council* [2020] PTSR 861 per Swift J @ [33]).

24. The importance of the service of a valid Liability Notice was stressed by Lang J in *R (Trent) v Hertsmere Borough Council* [2021] PTSR 1573. In that case, the Claimant applied for judicial review of the Council's issue of a demand notice requiring a CIL payment of £16,389.75, following the issue of a liability notice issued to her on 5 August 2019. The CIL charge related to the development of a three-bedroom dwelling which had been granted planning permission on 10 February 2017 and for which the Claimant had submitted a self-build dwelling exemption application but no assumption of liability notice which a Council officer had incorrectly advised was discretionary. Although the Council created an electronic version of a CIL liability notice on 14 February 2017, this was effectively an incomplete draft and there was no evidence that it was ever sent to the Claimant. The Claimant denied ever having received it.
25. The Claimant commenced development without serving a commencement notice and, as she had not formally notified the Council of her assumption of liability for CIL, her application for the self-build housing exemption had been treated by it as invalid. Her claim for the exemption therefore lapsed. However, two years passed before the Council took any further action. Following a site visit in June 2019, a liability notice was issued on 5 August 2019 requiring payment of the CIL liability and additional surcharges for failing to submit an assumption of liability notice and a failure to serve a commencement notice. For the purposes of the Demand Notice, the Council declared the deemed commencement date to be the date of its site

visit (June 2019) despite being aware from other contact with the Appellant that it had in fact commenced in 2017.

26. The Claimant successfully appealed against the 2019 demand notice on the ground that the incorrect deemed commencement notice has been determined. The Inspector agreed. She also successfully appealed against the surcharges on the grounds that the claimed breach of the Regulations had not occurred as the collecting authority had not served a liability notice in respect of the chargeable development to which the surcharge related. The Inspector agreed with her that the service in 2019 of a Liability Notice some two and a half years after the planning permission was granted, could not reasonably be described as “*as soon as practicable*” after the grant of planning permission, that no notice was therefore served at the correct time and, in consequence, the Claimant could be prevented from serving a commencement notice as such a notice requires the Liability Notice to be identified.
27. Shortly after the Inspector’s decision allowing the Claimant’s appeal, the Council issued a Demand Notice which was the subject of the High Court claim. Her principal ground of claim was that, in the absence of the service of a Liability Notice, the Council had no power to serve a Demand Notice and the decision to do so breached her rights under Article 1 of Protocol 1 to the European Convention of Human Rights.

28. Lang J agreed and held that under the scheme of the Regulations, the Council had been required to issue and serve statutory notices within the prescribed sequence. The consequence of its failure to do so was that the Claimant was not under an obligation to pay the CIL under the 2020 Demand Notice unless and until a valid liability notice had been issued. The Judge held that it was not too late for the Claimant to challenge the validity of the 2019 Liability Notice, because she had sought first to use the statutory remedy of appeal available to her and she could reasonably have expected the Council to respect the reasoning of the Inspector in his appeal decisions, rather than to issue a fresh Demand Notice. The judge added that:

“61. In the sequential scheme of notices under the CIL Regulations, the liability notice is critically important for the following reasons:

i) It is the formal notification of a person’s liability to CIL.

ii) It identifies any other recipients of the notice, their addresses, and the category within which they fall.

iii) It sets out the amount of CIL payable, showing how the calculation has been made.

iv) It indicates whether the authority accepts that the person is eligible for any exemption or relief from CIL.

v) It notifies the owner of the land that “[t]his CIL liability has been registered as a local land charge against the land affected by the planning permission in the notice”.

vi) It explains the requirement to submit a commencement notice disclosing the date when development will commence. It warns the recipient that failure to submit a commencement notice may result in the loss of relief claimed.

(vii) It explains that the Council will send a demand notice after a commencement notice has been served, setting out the final amount

payable, the date when payment must be made, and the precise payment arrangements.

viii) It explains that liability to pay in full arises from the date development commences.

ix) It explains the consequences of non-payment, including liability to additional surcharges.

x) It offers recipients a right to apply for a review of the calculation by the authority.

xi) It sets out the rights of appeal to the Valuation Office Agency (an executive agency of Her Majesty's Revenue and Customs).

xii) It directs the recipient to the appropriate links and addresses for obtaining further information and copies of CIL forms.”

29. On the facts here, the Judge held that the failure to serve a liability notice had been prejudicial to the Claimant. The service of a Liability Notice would have alerted her to her potential liability and the fact that her exemption had not been granted. Had she been aware of this, she might well have been prompted to complete the assumption of liability notice and apply for the exemption afresh. She would also have been alerted to the need to serve a commencement notice and could have done so to avoid a surcharge. In these circumstances, her claim succeeded.
30. However, it should be noted, as stressed by the Court of Appeal in *R (Braithwaite) v East Suffolk Council* [2022] EWCA Civ 1716, that unless until quashed by the High Court, a Liability Notice is valid and of full effect and, even where a Council might have been at fault in the timing of its issue, it does not follow that the Court

will quash it. Whether the Court will intervene to do so will turn on the facts and the extent of any prejudice which would arise to the person liable to pay CIL.

31. In *Braithwaite* the Court had to consider the effect of a revised liability notice served in September 2021 in relation to a housing development for which planning permission had been granted under section 73 of the Town and Country Planning Act 1990 in circumstances where it was accepted by the charging authority that the original liability notice did not comply with Regulation 65(1) because it had not been served as soon as practicable after the day on which planning permission had first permitted the development.

32. The Court of Appeal rejected Mr Braithwaite's contention that the original notice was a nullity and could not provide a lawful basis for a revised Liability Notice. It held that a Liability Notice which is not served as soon as practicable is liable to be quashed, but it is not a nullity. The Court added:

“There is nothing in the CIL Regulations which enables a late notice to be challenged. The only public law mechanism for such a challenge is by way of judicial review. Whether a late liability notice should be quashed in any particular case is a discretionary decision in accordance with the ordinary principles applicable to judicial review.”

33. In *Braithwaite* three planning permissions had been granted for the same site, two under section 73 of the 1990 Act. Liability to pay CIL had been assumed by Mr Braithwaite in relation to the development permitted by the first of the three and a Liability Notice had been issued in respect of that development. No liability notice

was issued in respect of the development authorised by the first of the section 73 permissions because the amount of chargeable floorspace remained unaltered. No liability notice was issued in relation to the development authorised by the second 73 permission, because neither the charging authority nor Mr Braithwaite had appreciated that one was required. Development commenced in August 2019 without a commencement notice being served and with no indication of which of the three permissions was being implemented. It was in fact the development under the second of the 73 permissions which was being built out and, despite the fact that the charging authority was aware that development was progressing, it did not turn its mind to the CIL implications until June 2020 when it issued a Liability Notice (on 30 June 2020) accompanied by a demand notice for £871,840.39 to be paid in instalments. Mr Braithwaite had asked the Council to consider payment by instalments when the CIL issue was raised with him in June 2020.

34. Mr Braithwaite failed to make the first instalment payment and, in consequence the Council imposed a surcharge. At this stage, Mr Braithwaite first raised the issue of the validity of the June 2020 Liability Notice. He successfully appealed against the imposition of the surcharge; the Inspector finding that the June 2020 Liability Notice had been incorrectly served and that the 16-month delay in serving it meant that it had not been served as soon as practicable. On 17 September 2021, three days after the issue of the Inspector's decision, the Council issued a revised Liability Notice and a Demand Notice. The Council argued that the consequence of the service of the 2021 Liability Notice was that the 2020 Liability Notice ceased to have effect.

35. The Court of Appeal agreed, concluding that where a charging authority has issued a late Liability Notice and later a revised Liability notice, the initial late notice will still be susceptible to challenge by a timely claim for judicial review on the grounds that it breached regulation 65(1). The power to issue a revised Liability Notice does not undermine the requirement in regulation 65(1). That requirement retains its legal force as a component of the liability notice issuing process, and a failure to comply with it may render the Liability Notice unlawful and liable to be quashed if a challenge to it is brought without delay. But, as always, it is for the developer aggrieved by the late issuing of a notice to challenge it by a claim for judicial review in good time.

36. The Court also concluded that it would inappropriate and inimical to the certainty and precision inherent on the legislative scheme for CIL if a charging authority were able to issue and maintain two or more conflicting Liability Notices for the same chargeable development. Hence a revised Liability Notice supersedes a prior Liability Notice. It added that a revised liability notice:

“...is also a mechanism which can enable errors in the issuing of earlier liability notices, such as in this case an error in service on the “relevant person” to be corrected. But of course, although a revised liability notice may be issued “at any time”, this does not mean that such a notice will remedy a breach of regulation 65(1) which has occurred by the late issuing of the initial liability notice”.

37. The certainty and precision emphasised by the Court of Appeal bear on the proper interpretation of Regulation 65(7) as I will address later in this advice. However,

what is clear from the scheme of the legislation is that any exemption or relief must be claimed *before* commencement of the development and there is no provision under the Regulations which supports the argument that the CIL payable in respect of a chargeable development i.e. the CIL *liability*, can subsequently be reduced on discretionary grounds. It is a tax; if a chargeable development is commenced it is not an optional tax and it is a tax which has to be applied, consistent with the Charging Schedule, to all.

38. This is reinforced by Regulation 66 which provides that the chargeable amount payable in respect of a chargeable development is a local land charge and only ceases to be such, once all outstanding amounts of CIL have been paid to the collecting authority.
39. The only relevant elements of discretion within the legislative scheme come at the enforcement and recovery stages under Part 9 of the Regulations. The collecting authority has a discretion as to whether to impose a surcharge in respect of the various specified failures to comply with the Regulations,¹⁹ although the payment of late payment interest is obligatory.²⁰ The service of a CIL stop notice is also discretionary,²¹ as is the making an application for an injunction to restrain an actual or apprehended breach of a CIL stop notice.²²

¹⁹ See Regulations 80, 82,83, 84, 85,86,

²⁰ Regulation 87(1)

²¹ Regulation 90

²² Regulation 94

40. Recovery of CIL also involves the exercise of a discretion rather than being obligatory. The collecting authority *may* apply to the Magistrates' court for a liability order, although if it does so the role of the Magistrates' court is limited to determining whether the amount is due and whether it has been paid. The court has no power to consider any other factors such as hardship. Equally, in relation to an appeal against levying by distress,²³ whilst the debtor may appeal, it is only if the levy of distress is "*irregular*" that the court may order that the collecting authority desist from levying in the manner giving rise to the irregularity. There is no wider discretion enabling the court to intervene in other circumstances.

41. This may be contrasted with the position under Regulation 107 in relation to the enforcement of a local land charge imposed under the Regulations. Such enforcement requires the consent of the Court which, in deciding whether to grant consent:

"... must consider all the circumstances of the case, and in particular any evidence before it as to whether any person would be unlikely to be unduly prejudiced by enforcement of the charge"

42. Similarly in relation to commitment to prison, the Court is required to consider a broader range of factors in deciding to issue a warrant of committal:

*"On such an application the court must (in the debtor's presence) inquire as to the debtor's means and inquire whether the failure to pay the debt which led to the liability order being made against the debtor was due to the debtor's willful refusal or neglect"*²⁴

²³ Under Regulation 98 – the collecting authority may levy by distress

²⁴ Regulation 100(2)

Only if the Court is of the opinion that it was so due, may a warrant be issued.

43. What the enforcement and recovery provisions demonstrate is that, whilst as a matter of discretion, the collecting authority may refrain from taking enforcement action or seeking recovery of the CIL due, the liability for the CIL payable and interest on any unpaid sums remains unaffected, as does the local land charge in place. Further, if a collecting authority decides in the exercise of its discretion to take enforcement action or steps to recovery CIL due, it is only where the most draconian of the recovery methods is chosen (loss of property or prison) that the Court has a discretion to take into account the effect of the debtor of the remedy applied for.
44. This all serves to reinforce the certainty and precision of the CIL Regulations. Only appeals or a claim for judicial review can affect liability to pay CIL.

Regulation 65(7)

45. Within this wider context, I turn to the proper scope of Regulation 65(7). I do so bearing in mind that when seeking to ascertain the meaning of a statutory provision the first and often determinative step is to ascertain the ordinary and natural

meaning of the language used in the legislation, having regard to the relevant context.²⁵

46. There are two possible interpretations of the scope of Regulation 65(7). Firstly, that it enables a charging authority to withdraw a Liability Notice which should never have been issued /served whether at all, or in the form or the manner in which it was issued but that it confers no wider discretion. Secondly, that it provides the charging authority with a broad discretion to withdraw a liability notice where it considers it appropriate e.g. where the imposition of CIL liability would cause hardship or where, but for a mistake on the part of the person liable which resulted in a failure to comply with the Regulations, an exemption or relief would have been available.
47. In my view, the context set by the Regulations as a whole supports the narrow rather than broader construction of the scope of Regulation 65(7) power.
48. The Regulations institute a development tax under which the ability of any given individual to pay it or the effect of doing so on their individual circumstances, is (save for a limited number of narrowly prescribed circumstances) not relevant either to its imposition or the rate at which it is payable. As the Court of Appeal said in *Braithwaite* the statutory scheme is one of precision and certainty in respect of liability, as one would expect in the context of legislation imposing taxation.

²⁵ See *Project Blue Ltd v Commissioners for Her Majesty's Revenue and Customs* [2018] 1 WLR 3169

Given this context, had Parliament intended that charging authorities should have a general discretion to relieve developers of liability where, but for a failure to comply with the Regulations, they would not have been liable to pay CIL, then it would have made express provision for that.

49. The context set by the Regulations as a whole does not support the existence of a wide discretion to take into account hardship or proportionality in the context of liability for CIL. Those considerations may be relevant to the decision on whether to enforce CIL liability or to recover the CIL sums due, but they do not affect the liability to pay CIL.

52. This is reinforced by the context set by Regulation 65 itself. Under Regulation 65(1) there is an *obligation* on the charging authority to serve a liability notice. There is no discretion. Had Parliament intended that the imposition of liability should be affected by factors such as honest mistakes as to the applicability of the Regulations, it would have expressly provided for that in Regulation 65(1) or elsewhere in the Regulations. The obligation to serve a Liability Notice under Regulation 65(1) would be substantially diluted if under Regulation 65(7) the charging authority could, as a matter of wide discretion, then decide whether to keep the liability in place.

50. It is clear, in my view, that the Regulations are drafted in such a way as to provide certainty as to when exemptions/relief may be claimed and to make avoidance as

difficult as possible. Had the intention been otherwise, the Regulations would have made express provision for (i) the circumstances in which any wider discretion fell to be exercised, (ii) a process for establishing whether it should be exercised and, (iii) potentially, a right of appeal against a refusal. None of this is provided for by the Regulations.

51. In my view, when read in its full context, the purpose of Regulation 65(7) is to allow a charging authority to withdraw a liability notice which has been issued in error or where, unless withdrawn, it is likely to be quashed on a claim for judicial review. So, for example, in the *Trent* case, the Council had power to withdraw the Liability Notice which it has issued late and the Court ultimately quashed. The Regulation allows the Council to correct its own mis-steps. It is not a provision which allows the charging authority to waive non-compliance with the Regulations by the person liable to pay CIL.

52. The contrary argument, that Regulation 65(7) provides an undefined and apparently wide discretion to waive liability is not consistent with the scheme of the legislation when taken as a whole. I have read Mr Edwards' Advice of 27 February 2025, but that does not consider Regulation 65(7) in its full statutory context as I have done. Further, I do not accept his argument that:

“it would be surprising if Parliament, in enacting the CIL regs, did not make provision for a collecting authority to respond to cases of legitimate hardship or where to impose and pursue liability for CIL would be oppressive or disproportionate (such as where a homeowner becomes liable for CIL for a residential extension simply

be reason of a claim for an extension not having been made on a correct date”

53. There are two problems with this reasoning. Firstly, Regulation 65(7) is a power of the *charging authority* and not the collecting authority. The collecting authority *does* have a discretion as to whether to pursue CIL liability and *can* take account of factors such as hardship. Parliament has therefore made provision for such considerations to be taken into account at the *appropriate* stage. But CIL is a tax and, as such, the Regulations draw a distinction between *liability* and *enforcement* of that liability.
54. Secondly, the requirement that exemptions or reliefs are applied for before the commencement of the development is a consistent requirement of all of the available exemptions and reliefs (save the minor development exemption). Had Parliament intended that there should be flexibility in this key requirement for each of the reliefs and exemptions, given the precision of the Regulations, it would have provided for an exception within each of those Regulations defining the exemption and relief. The absence of such specific provision weighs more in favour of a narrow scope for the Regulation 65(7) power, than it does for the wider interpretation advanced by Mr Edwards.
55. There are also other consequences of the withdrawal of a liability notice which are unaddressed by Mr Edwards. For example, it would not be open to the Charging Authority to grant an exemption for a residential annex which has already been

commenced without an exemption being granted. To do so would be contrary to Regulation 42B. It would follow that where a Liability Notice is withdrawn in the context of an already commenced development, the right to claw back CIL in the event of a disqualifying event does not arise. By the simple device of claiming that a mistake had been made in not applying for an exemption before commencing the development, a householder could circumvent the claw back provisions and let or sell away an annex with no CIL liability arising.

56. Contrary to Mr Edwards; view, I see nothing disproportionate in a regime which is designed in such a way as to prevent such tax avoidance. Interpreting the Regulations as permitting hardship to be taken into account at the enforcement stage but not the liability stage, allows for an appropriate balance to be struck, whilst still preserving the ability to pursue a clawback in the event that a disqualifying event occurs. That is more consistent with the purpose of the Regulations than the alternative interpretation advanced by Mr Edwards.

West Berkshire

57. I have reviewed both the POS Report and the report to that Council's Executive which resolved to put in place the Discretionary CIL Householder Review Scheme 2024-2025. I note that the Review Scheme was not a recommendation of the POS Report but resulted from the Council's officers' report to the Executive. The POS Report, although it does not specifically address Regulation 65(7), appears to support my interpretation of the Regulations:

“7.11 There is little or not discretion afforded to the authority in waiving, negotiating or reducing CIL charges and little or no leeway for the applicant who does not comply with the letter of the Regulations”

“7.11 The general distinction in the regulations is that CIL MUST be paid and the same applies to late payment interest. Surcharges which can be applied for a variety of reasons.... MAY be applied. If the authority was minded not to impose surcharges for any reason, it should adopt a formal policy setting out which charges will not be pursued and in what circumstances”²⁶

This second recommendation resulted in West Berkshire putting in place its CIL Enforcement Policy – Householder Applications which provides guidance on when the Council is *likely* not to *pursue* liability.

58. The report to the Executive does not grapple with whether the Council had the power to put in place a review process with the potential to result in the withdrawal of liability notices in the absence of any fault on its behalf. The report states:

“Under the Community Infrastructure Regulations 2010 (as amended) there is no mechanism to return monies once the development has commenced. However, if the Council has received monies that it should not be holding then the equitable remedy is to return the monies”

However, under the Review process the person requesting the review is required to demonstrate:

“..the precise nature of the mistake made on the part of the applicant at the time of making an application for relief, exemption or offset or

²⁶ There are two paragraphs numbered 7.11 in the Report

the nature of the mistake made on the part of the Council in determining the CIL liability”

It is clear, therefore, that the Review would allow for the withdrawal of a Liability Notice and repayment of CIL in circumstances where no mistake has been made by the Council and, therefore, in circumstances where, under the Regulations the Council has been obliged to collect the CIL payments and it is therefore entitled to retain them. No explanation is provided in the report to the Executive as to which statutory power was being relied upon to allow for this course of action or any reasoning as to the basis on which it would be lawful. For the reasons that I have set out above, to the extent that under Scheme, West Berkshire might waive accrued liability, such a step would, in my view, be unlawful.

London Boroughs of Wandsworth and Richmond

59. Both Wandsworth and Richmond have Protocol's in place entitled "Withdrawal of CIL Liability Notice Protocol. Their substance is identical. The Protocols set out the criteria which each charging authority will apply in considering requests for the withdrawal of Liability Notices. The Protocols state that they operate at the absolute discretion of the authorities. Four criteria fall to be applied *cumulatively* to any such request:

"1. A formal request to withdraw the Liability Notice has been received from the liable person/party; and

2. Where the Council issued a Liability Notice for any relevant chargeable amount later than a period of 16 weeks or such period as the Council considers to be as soon as reasonably practicable,

retaining absolute discretion, from the date on which the relevant planning permission first permits development (as defined in regulation 9 of the CIL Regs); and

3. The chargeable development has commenced in accordance with the CIL Regs; and

4. The Council is satisfied at its absolute discretion that the issue of a Liability Notice has caused significant hardship to the liable person/party...

.....”

The Protocols then set out a range of factors which the Council will consider in determining whether there has been significant hardship.

60. The Protocols support my interpretation of the scope of the Regulation 65(7) discretion. Under both of them, the discretion can only be exercised where the charging authority has failed to issue a liability notice as soon as practicable after the grant of planning permission for the chargeable development. In such circumstances, the liability notice is liable to be quashed by the Courts (see *Braithwaite*) and, by considering the extent to which the person liable has suffered hardship, the Councils effectively put themselves in the position of being able to assess whether, if a claim for judicial review were made, the Court would be likely to quash the notice. Neither Protocol lends material support to the wider interpretation of regulation 65(7).

Woking Borough Council

61. In *Woking* the Council's Executive has approved a scheme of delegation in relation to the administration of the CIL enforcement regime. This includes delegation to the Deputy Chief Executive in consultation with the Portfolio Holder for Planning to withdraw Liability Notices "when justified". The report seeking the delegations stated:

"1.5 Regulation 65(7) of the Regulations is a specific provision that allows scope for the Council to withdraw a Liability Notice issued by it by giving notice to that effect in writing to the persons on whom it was served. The Regulations do not provide any further guidance on when it is appropriate to withdraw a Liability Notice. Delegated authority is sought for the Deputy Chief Executive to exercise this responsibility and to provide the necessary guidance on then this Regulation would apply. The guidance will ensure consistency in application and the proper use of the authority. It is important to highlight that this would apply in very limited situations when it can be justified by very special circumstances. An example would be when the Council had wrongly issued a Liability Notice or miscalculated the liability"

62. That approach is consistent with my interpretation of Regulation 65(7). It is there to allow the charging authority to remedy its errors or omissions; not to absolve those liable to pay CIL by reason of their failure to comply with the Regulations.

Conclusions

63. For the reasons I have set out in this advice, my view is that the Council has no power to withdraw Liability Notices save where it is necessary to do so in order to remedy defect in the notice or a defect in its service which means that it is liable to be quashed. Regulation 65(7) cannot be used effectively to waive liability incurred

by householder or developers by reason of their failure to comply with the requirements of the Regulations. Whilst the circumstances in which liability has arisen are capable of being material to the exercise of the discretionary enforcement powers under the Regulations, the Council in deciding whether to take enforcement action or action to recover the CIL liability as a debt, would also need to weigh many other factors in the balance, including the effect on the integrity of the CIL regime of allowing some, but not all, of those who have failed to comply with the Regulations, relief from the consequences of their mistakes.

SIMON BIRD KC
12 May 2025

Francis Taylor Building
Inner Temple
London
EC4Y 7BY

DX 402 4DE

WAVERLEY BOROUGH COUNCIL
REVIEW OF CIL LIABILITY

A D V I C E
