Case Name: *Gardiner v Hertsmere Borough Council & Anor* [2022] EWCA Civ 1162 (16 August 2022)

Full case: Click Here

Commentary:
This case concerned the interpretation of the self-build exemption from CIL under regulations 54A and 54B of the Community Infrastructure Levy Regulations 2010 in the context of a retrospective grant of planning permission under section 73A of the Town and Country Planning Act 1990. The Court of Appeal dismissed the appeal and held that the self-build exemption is never available for retrospective permissions.

The Respondent Council originally granted planning permission for part demolition and extension of the Appellant's bungalow, for which no CIL was payable. During the course of demolition, the Appellant realised that additional works would be required. After the Appellant commenced these additional works, Council officers visited the site and concluded that these went beyond what was contemplated by the original permission. The Appellant then applied for retrospective planning permission, following which they submitted the relevant CIL Forms, including an application for relief under the self-build exemption. The Council refused to grant the exemption.

In the High Court, the judge found that the criteria for making a self-build exemption claim (under reg 54(B)(2)) barred the availability of the exemption/relief in relation to retrospective planning permissions granted under s73A. She gave three main reasons:

1. The forward-looking wording of 54(B)(2)(a)(i) – the claimant must "intend[ ] to build, or commission the building of, a new dwelling";
2. The wording of 54B(2)(a)(ii), which requires the claim to be made by someone who "has assumed" liability to pay CIL, which (under reg 9(3)) must be after the chargeable development exists i.e. when permission is granted. Under reg 7(5), in the case of a s73A claim, development is treated to have commenced on the date of grant of permission – meaning there is no gap between grant and commencement in which liability may be validly assumed; and
3. The wording of reg 54B(3), which states that a claim for the exemption will lapse where the chargeable development to which it relates is commenced before the collecting authority has notified the applicant of its decision (again, rendering it impossible for s73A development to be eligible for the exemption).

The arguments brought on behalf of the Appellant were that liability could in fact be assumed prior to grant of planning permission. They also argued that adopting the High Court's interpretation would fail to meet the statutory purpose of the exemption (i.e. to incentivise self-building) and that it would bar relief for s73A development to not only under the self-build exemption, but also those seeking charitable relief and social housing relief.

The judges in the Court of Appeal rejected these arguments and upheld the High Court decision (placing weight on points 2 and 3 in particular). They too called for a natural and ordinary interpretation of the legislation, and emphasised that taxation (as CIL is deemed to be) ought to be strictly construed. The wording of the reg 54B criteria was sufficiently clear and absolute in its application, such that the exemption could not be available to retrospective planning permissions.

Case summary prepared by Jed Holloway