

Case Name: *Braithwaite And Melton Meadows Properties Ltd, R (On the Application Of) v East Suffolk Council* [2022] EWCA Civ 1716 (21 December 2022)

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Commentary: This appeal to consider the effect of a "revised liability notice" for Community Infrastructure Levy ("CIL") upon an earlier liability notice relating to a housing and office development for which planning permission had been granted was dismissed on the grounds of delay.

Liability for CIL had been formally assumed by the developer at an earlier stage of the planning history of the site before modest changes to the scheme, which required an application under section 73, were made. It is agreed that the earlier liability notice (issued in 2020) did not comply with requirements in the CIL legislation, because it was not served "as soon as practicable after the day on which a planning permission first permits development", as was required by regulation 65(1) of the Community Infrastructure Levy Regulations 2010 ("the CIL Regulations"), and also because it was not served on the "relevant person" for the purposes of regulation 65(3)(a). However, the Council issued a revised liability notice pursuant to regulation 65(5) of the CIL Regulations in 2021 together with a demand notice and these notices are the subject of the proceedings.

The appeal was brought on the same grounds as the original claim itself, which were that the 2021 liability notice was not a revised liability notice under regulation 65(5) but a liability notice served two years and seven months after the relevant planning permission was granted, and that in any event the effect of regulation 65(8) was to render the 2020 liability notice ineffective when the 2021 liability notice was issued, so that the grounds for challenge arose only at that stage.

It was concluded that pursuant to Regulation 65 the 2020 liability notice was not a nullity. It was, from the time it was issued, an extant liability notice unless either quashed by the court, which has never happened, or superseded by a revised liability notice, which is what did happen when the 2021 liability notice was issued. It was capable of being challenged by a claim for judicial review, and also capable of being superseded by a revised liability notice under the legislative scheme.

Having concluded that the 2020 liability notice was valid when issued, the Court reasoned that the grounds for a claim for judicial review arose with the issuing of that notice, and not when the 2021 liability notice was issued. The 2020 liability notice has never been quashed by the court, nor has it at any stage been the subject of direct attack in a claim for judicial review, and any such challenge would now in any event be hopelessly late. Beyond the contested validity of that notice, the Court stated that it has not been given any reason to conclude that there is a plausible basis for challenging the 2021 liability notice itself.

While it is true that the 2021 liability notice does not describe itself as a revised liability notice, there is nothing in the CIL Regulations which requires a revised liability notice to do that. The court is entitled to regard the 2021 liability notice as a revised liability notice if that is the obvious purpose and effect of the notice in question. Since the 2021 liability notice is, on its face, a liability notice for the same chargeable development as the 2020 liability notice, it can and should be regarded as such. And since the 2021 liability notice was, in reality, a revised liability notice, it could be issued "at any time" in accordance with the express provision which states that. It does not breach the requirements for service in regulation 65.

Sir Keith Lindblom (Senior President of Tribunals), Lord Justice Singh and Lord Justice Males came to the conclusion that the application for permission to bring a claim for judicial review in this case was rightly refused by Mrs Justice Lang on the grounds of delay. The claim is in substance misdirected because it challenges the 2021 liability notice and not, as ought to have been done at a much earlier stage, the 2020 liability notice itself. Ultimately, what is fatal to the appellants' case is that the 2020 liability notice was never the subject of a timely and successful challenge before the court, and therefore subsisted until superseded by the 2021 liability notice, which was and is a lawful revised liability notice under regulation 65(5).

Case summary prepared by Amy Fender