Switching planning permissions – challenging pooled contributions

Christopher Cant

A developer under pressure in order to obtain a planning permission speedily may have to accept a planning obligation to make a pooled contribution which given time the developer would have challenged. Once the planning permission is granted and the planning agreement is entered into it is too late to challenge the contribution under that agreement. Any challenge that the contribution does not satisfy the requirements of regulation 122 Community Infrastructure Levy 2010 must be made during the planning application. It cannot be used as a defence to a claim to enforce payment.

The outcome in the recent Court of Appeal decision in Robert Hitchin Limited v Worcester City Council and Worcestershire County Council [2015] EWCA Civ 1060 shows that in certain circumstances it may be possible for a developer to continue the challenge by a less direct route. In that case the developer was under financial pressure and needed planning permission so that the site could be sold with an uplifted price. To obtain the planning permission a pooled transport contribution was accepted by the developer despite the developer considering it not to be justified.

The developer sold but was permitted by the terms of the sale agreement to make a second application which it did. In this second application no transport contribution was offered. The Council did not determine the application so the matter went to a planning inspector who decided that the transport contribution sought infringed reg. 122 and in consequence a second planning permission was granted in identical terms to the first planning permission save that the unilateral undertaking by the purchaser did not contain a transport contribution. It recited and covenanted that the purchaser intended to implement the second planning permission and to dispense with the implementation of the first planning permission and the discharge of the planning obligations under the first planning agreement.

By this time the residential development had been commenced by the purchaser under the first planning permission and the first tranche of the transport contribution had been paid by the developer. It was then argued that thereafter the purchaser was carrying on the development in accordance with the second planning permission and so no further instalments of the transport contribution under the first planning agreement fell due. As against this it was argued that having started the development under the first planning permission it was not possible to switch to the second planning permission and even if possible such a switch had not occurred. Both arguments were rejected at first instance and in the Court of Appeal. The following points come out of the judgments:-

(i) the obligation to pay the transport contribution was held by the planning inspector to infringe reg. 122 CIL Regulations 2010 but that did not cause the obligation to cease to be enforceable or provide a defence. If the development had been carried on under the first planning permission then the last two tranches of the transport contribution would have fallen due and had to be paid. A challenge to this obligation in judicial review proceedings on this ground was not allowed to proceed.

(ii) it was common ground that given a choice between two existing planning permission the developer can choose which to implement.

(iii) the commencement of a development under one which has not yet been completed does not prevent switching to the other if they are consistent.

(iv) in this case the two planning permissions were identical save for the transport contribution and so switching was possible.

(v) on the ground there could be no evidence of switching as the works being carried out were not attributable only to one of the planning permission.

(v) the focus , therefore, was on the terms of the second planning agreement and the covenant to implement the second planning permission and to cease implementing the first. Implementation was construed as meaning carrying on until completed rather than commencing the development. These terms led the Court to the conclusion that the planning permission under which the development was being carried on had been switched.

(vi) the standard clause in the first planning agreement reserving the right to develop in accordance with a different planning permission was a factor in the decision.

(vii) the argument that it was unlawful to carry on a development which had started under a different planning was rejected.

(viii) the terms of each of the two planning agreement and the sale agreement had a material influence on the outcome and care must be taken in their drafting.

(ix) apart from the implications for the section 106 planning obligations the CIL implications will need to be considered. Some regulations in the CIL regime cater for switching once a development has started but it is not comprehensive. There may be issues as to a CIL exemption can be claimed in respect of the development under the second planning permission when the development has already commenced.

A fuller article can be found at http://www.christophercant.co.uk/wp-content/uploads/2015/11/A-further-battle-over-a-pooled-contribution-final.pdf