Retrospective planning permissions and Community Infrastructure Levy

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Problems - grants of retrospective planning permissions under section 73A TCPA 1990 are giving rise to CIL liabilities which have not been anticipated and are coming as a considerable shock. In particular there are two sets of circumstances in which they are arising. These are

(i) Pre-CIL permission – the developer obtains a grant of planning permission when there is no Charging Schedule in force and so regulation 128(1) of the Community Infrastructure Levy Regulations 2010 excludes a CIL charge. Work starts but it does not accord with the terms of the planning permission. The local authority may threaten to issue an enforcement notice. An application is made for a fresh planning permission. A second planning permission is granted authorising the prior work retrospectively. However, this is after a Charging Schedule has been brought into force in the area. The local authority then issues a CIL Liability notice and a demand notice because the date of commencement of the development authorised by the retrospective permission is the date of grant (reg. 7(5)(a)).

A number of CIL appeals to an appointed person appointed by the Valuation Office Agency have been made in such circumstances but without any significant success. The reason behind this is that the second planning permission will be an independent planning permission which is chargeable to CIL. In the circumstances in which it is granted it is unlikely that any account will be taken of the earlier pre-CIL permission.

Relief under regulation 128A is not available because a permission granted in exercise of section 73A TCPA 1990 does not trigger its operation. To do so requires a permission granted under section 73. Section 73 cannot operate retrospectively but only prospectively (Lawson Builders v Secretary of State for Communities and Local Government [2015] EWCA Civ 122).

It is unlikely that the deduction relating to demolished buildings (reg.40(7)) will be available because any demolition will probably have occurred before the grant of the retrospective permission which is the date when it first permits development. No deduction is available in respect of a building demolished before that date.

Strenuous efforts have been made to claim a deduction in relation to the building in existence on the site at the date of the retrospective permission. To be justified this building must qualify as an “in-use” building which means that it must have been in lawful use for a

continuous period of six months in the three year period preceding the date that the grant first permitted development. Such claims for a deduction usually fall down for one or both of two reasons. First the building will not usually have been in actual use for a continuous period of six months. Until the building has been completed it will not have been in actual use. Second even if it has been in actual use it is unlikely that it will have been lawful use. Reliance cannot be placed on the earlier permission to establish lawfulness because the failure to comply with its terms is why the retrospective permission is needed.

It has been argued in some cases that notwithstanding the grant of the retrospective permission the circumstances were such that there was no need for a second grant because the differences between what was authorised by the first permission granted and the actual development were minor. This has been rejected on the basis that even if correct there has actually been a second permission granted after the introduction of CIL in the area and so that permission has to be charged to CIL. The trigger for a CIL charge is the commencement of a development authorised by a grant after the introduction of CIL. That grant cannot be disregarded.

(ii) Self-build exemption - the shock caused by unanticipated CIL charges has been greatest with those who believe they are protected by the self-build exemption. Failure to comply with the statutory pre-conditions is one reason for the benefit of this exemption being lost often before the local authority has decided it applies. Many self-builders have not appreciated the importance of complying with all the pre-conditions. A different set of circumstances is when a planning permission is granted and the claim for the self-build exemption is accepted. Then the works carried out do not comply with the planning permission leading to a second planning which provides retrospective authorisation.

The problem facing the second permission is that the self-build exemption cannot be claimed. The development authorised by the retrospective permission will have commenced before the claim can be made and decided. No commencement notice can be given because the date of grant is the date the development commences (reg. 7(5)). It is in consequence impossible to gain the benefit of the self-build exemption for such a retrospective permission.

Lessons – once a retrospective permission has been granted there is little scope for attempting to reduce or avoid the CIL charge relating to it notwithstanding the first permission was either granted before the introduction of CIL or subject to the self-build exemption. The lessons to be learnt focus on the period prior to the grant of the retrospective permission.

(a) Understand the CIL regime – this is the paramount lesson which was also put forward last month in the earlier article on the CIL enforcement appeal decisions. An

understanding of the manner in which the CIL operates is now an important necessity for developers when sites are in areas with a Charging Schedule. Avoiding problems is far better than having to deal with them once they have occurred.

(b) Comply with the terms of the first permission – in some cases the problem has arisen because the developer has decided to change the plans. Before doing so the CIL consequences need to be thought through. In many case the failure is not deliberate. The price of such failure can be high and so it is worth taking care to comply with the terms of the permission.

(c) Consider whether there is really a need for a section 73A permission – not all failures will require a second full permission. In a recent CIL appeal the developer sought to avoid the CIL charge by arguing that the terms of the permission relied on by the local authority had not been complied with which was the reason for an outstanding section 73A application. This was rejected by Hilda Higenbottam on the basis that the alterations were "non-material amendments to the approved scheme" and so what was on the site was permitted by the earlier permission and constituted the chargeable development for the purposes of CIL.

Rather than rush into a section 73A application time should be spent determining whether the differences do require such an application. Alternatively, if the earlier permission is a pre-CIL permission is it possible to formulate the planning application so as to result in the grant of a section 73 permission?

One other alternative to be considered is whether it would be possible to take action so as to achieve compliance with the terms of the earlier permission. If this is possible then there should be no need for any further planning application.

Summarised developers need to understand the CIL regime; comply with the terms of the planning permission granted; and if a problem arises stop and think before acting.