Phased planning permissions and CIL Liability Notices

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The recent decision of Swift J. in Oval Estates (St. Peters') Limited v Bath & North East Somerset Council [2020] EWHC 457 (Admin) contained an important consideration of the role of applications for judicial review in the Community Infrastructure Levy ("CIL") regime. That was considered in an earlier article. In addition to that topic the learned judge also considered in the context of CIL what constitutes a phased planning permission; the effect of a non-material change under section 96A of the Town and Country Act 1990 ("the 1990 Act"); and the effect of a CIL Liability Notice. All these are important CIL issues. They arose in the context of a CIL liability of £874,283.78 claimed by the Council.

1. History – Outline planning permission was granted on 2nd March 2016 ("the 2016 Permission"). It was provided in the permission that the development/works could only be implemented in accordance with the plans set out in the plans list. No phasing plan was included in that list. The permission referred to an accompanying section 106 agreement. The reserved matters were approved on 6th April 2017 and a phasing plan was added to the plans list. A commencement notice was served on 5th October 2018 with the 15th October 2018 specified as the commencement date. Subsequent to the development starting a non-material change to the 2016 Permission was authorised under section 96A of the 1990 Act on 8th February 2019. The change added a new phasing plan with phases 1 and 2 changing and phase 3 remaining materially the same. The Council did not serve the CIL Liability Notice until 28th May 2019.

2. Principal issue – the Council claimed the CIL liability on the basis that the 2016 Permission was not a phased planning permission. In consequence the full amount of the CIL liability was triggered by the commencement of the development. In contrast the developer contended that the 2016 Permission was either from the date of grant or subsequently became a phased planning permission and so only the CIL liability for the first phase was payable as a result of the commencement and not the full CIL liability.

3. Phased planning permission - this is defined by regulation 2(1) of the Community Infrastructure Regulations 2010 ("the 2010 Regulations") as "a planning permission which expressly provides for development to be carried out in phases". A grant of such a permission means "each phase of the development is a separate chargeable development" (reg. 9(4)) and so the payment of the CIL liability is spread across the phases. The difficulty for the developer was that the 2016 permission did not expressly state that the development was to be carried out in phases and the plans list did not include a phasing plan. Three arguments were put forward to justify the developer's contention. These placed reliance on:

(i) the section 106 agreement and the approval of a phasing plan amongst the reserved matters;

(ii) the inclusion of new phasing plan by the non-material change consent under section 96A;

(iii) the material date for determining whether the permission is phased being the date of service of Liability Notice which is after the non-material change consent.

4. Section 106 agreement – it was argued that the agreement should be read with the 2016 Permission to ascertain whether it constituted a phased permission. In the section 106 agreement there was a definition of "Phase" but no operative part required the development to be carried out in phases. Further that definition referred to an Affordable Housing Scheme but no such scheme existed then so it had nothing to bite on. In consequence there was nothing in the section 106 agreement which caused the development to be carried out in phases.

Separately and more far reaching the judge noted that the 2016 Permission stated that it was accompanied by a section 106 agreement but did not state that the agreement "was to be understood as part of the planning permission"(para. 26). Even, therefore, if the section 106 agreement had included an obligation to carry out the development in phases (which it did not) this may not have been sufficient. A condition attached to a planning permission probably will suffice to make the contents of the agreement part of the planning permission but a reference to it will not be enough. The safest course is to ensure that the planning permission expressly spells out the phasing of the development in unconditional terms rather than leaving it to the section 106 agreement.

The phasing plan in the plans list approved as part of the reserved matters did not help on this point because it was described as a "proposed" plan and so was not unconditional. Would a definite phasing plan at that stage have changed the position? Could the 2016 Permission have been converted from a normal planning permission to a phased planning permission. This point did not need to be addressed by the judge. Arguably it would if the permission had required the development to be carried out in accordance with the approved plans. Such an approach is encouraged by the permission not first permitting development until the approval of the reserved matters. The answer depends on whether the chargeable development is fixed at the date of the grant of the planning permission or there is the possibility of it subsequently changing. This is the point considered in the context of the non-material change consent (discussed in section 5 below).

Following the service of the Assumption of Liability Form by the developer there was then an exchange of e-mails in which it was being contended on behalf of the developer that the development would be undertaken in phases. Neither party relied on these e-mails during the hearing but following it the developer filed further evidence to which the Council responded. The judge took no account of it as leave to file further evidence had been limited to the reason for the developer having to commence the development which related exclusively to the alternative remedy issue in the context of making a judicial review application. The absence of leave for the further evidence stopped the argument on this point. It is hard to see how the argument would have developed even if the subsequent evidence had been admitted. There is no provision for communications to or by the authority

having an effect in the CIL regime other than formal notices specifically provided for in the CIL regime. There would seem to be little scope for an argument based on estoppel.

5. Non-material change consent – the argument on behalf of the developer was that the non-material consent under section 96A of the 1990 Act should for the purposes of CIL be treated the same as a section 73 planning permission. The CIL regime prior to the amendments in the CIL (Amendment) (No. 2) Regulations applied in this case and so the provisions in regulation 9 would have applied if there had been a section 73 permission. The difference between the two is that there are special provisions in the CIL regime applying to section 73 permissions but none relating to a consent to a non-material change. The section 73 permission is an independent planning permission which causes the structure of CIL to be operated in full subject to the special provisions. The applicant has a choice whether to carry out the development authorised by the original parent permission unvaried or the development authorised by the section 73 permission. The consent to a non-material change is not an independent permission and there is no right to elect as regards the development. Once the consent is given only the development subject to the change can be carried out and the original version cannot be.

It was not a difficult task for Swift J. to form the view that the non-material change should not be treated in the same manner as a section 73 permission was then by regulation 9 because there is no special rule in the CIL regime applying such treatment to a section 96A consent. The CIL liability arose when the development commenced under regulation 31(3) and no part of regulation 9 suggested that the CIL liability "either ceased to exist or was modified by the Council's decision on 8th February 2019 to allow the non-material change" (para. 31).

The application for the non-material consent referred to the covering letter for the terms of the application. The letter required a phasing condition to be added that the development may be carried out on a phased basis and in accordance with the phasing plan. This wording is ambiguous. Then it went to say that the development shall be carried out in accordance with the provisions of the approved phasing and/or any subsequent amendment to it approved in writing. The consent stated that it applied the amendment set out in the application. The intention would appear to have been to make this mandatory.

Swift J. held that once the CIL liability had been triggered then it is too late thereafter to spread that liability. The trigger is the commencement of development and at that time it relates to the whole of the development authorised by the unchanged permission. What if instead the non-material change increases or decreases the amount of the CIL liability? Some authorities would not consent to such changes but others have. Should that be regarded differently to this phasing point or should the approach be common to both and if so would that suggest that the decision in this case wrong.

Regulation 65(4) compels the giving of a revised CIL Liability Notice in certain specified circumstances including if the chargeable amount changes. This is not expressly restricted to circumstances before the commencement of development. Further regulation 65(5) empowers a collecting authority "at any time" to issue a revised liability notice. Is it wrong in

principle for a revised CIL Liability Notice to be issued if there is a change under section 96A after commencement of the development which affects the amount of the liability? If such change if taken into account means that CIL has been overpaid then that is dealt with by regulation 75. If the effect would be to increase the CIL liability then the revised CIL Liability Notice and revised Demand Notice will deal with the recovery of the increase. Any apparent complication an increase may appear to cause regarding the payment timetable and late payment surcharges should on reflection not arise.

It is possible that regulation 65 covers changes to the amount of the CIL Liability arising from a consent to a non-material change but not changes to the chargeable development. This does not seem convincing as they are closely linked. If some changes are to be taken into account then it is hard to understand why there should be a distinction between these different types of change. With some developments this could have a significant effect and it may need to be addressed again. What the decision does make clear is that the decision whether a development is going to be phased needs to be made not just before the commencement of the development but before the planning application.

6. Role of CIL Liability Notice – it was argued on behalf of the developer that the material date for determining whether a development is phased or not for CIL purposes is the date that the CIL Liability Notice is served pursuant to regulation 65. In this case it was after the consent to the non-material change. This was rejected by Swift J. who stated that the Liability Notice does not trigger the obligation to pay CIL. The function of the liability notice "is to identify the liability of CIL that will arise". Regulation 31(3) provides that if an assumption of liability notice has been given then the giver is liable on the commencement of the development. Regulation 71 provides for CIL to be paid in full on the commencement date if no assumption of liability notice has been given. These regulations do not allow scope for the developer's argument. This aspect of the decision will be important to bear in mind in respect of revised CIL Liability Notices and also the determination of late payment surcharges.

7. Conclusions -

(i) the safest course when the development is to be phased for the purposes of CIL is for it to be expressly stated in the planning permission;

(ii) reserving a discretion to phase or not phase will be insufficient;

(iii) relying on the section 106 planning agreement to impose the obligation carries a risk and in any event the agreement should make clear that there is such an obligation;

(iv) phasing is an important point and should be considered before the planning application is made;

(v) if the intention to phase arises subsequent to grant then action must be taken before the commencement of the development. When a section 73 application is made for this purpose all the CIL consequences must be considered particularly after the amendments to the calculation of the chargeable amount introduced in 2019.

(vi) the CIL consequences of a consent to a non-material change have been put in serious doubt. If such a consent would reduce the CIL liability were it to be taken into account then consideration should be given to applying for a section 73 permission to avoid the doubt. If were it to be taken into account the change would increase the CIL liability then the planning authority should give consideration as to whether the application for a non-material consent is appropriate or whether the applicant should be required to make a section 73 application.

(vii) Swift J. was clear that it is not the CIL Liability Notice which triggers the payment of the CIL liability but that such liability is automatically triggered by the commencement of the development.