Impact of Community Infrastructure Levy on existing but unimplemented permissions

Many developers had hoped that the community infrastructure levy ("CIL") would be pushed into abeyance but this hoped for outcome shows no signs as yet of materialising. Rather there appears to be an accelerating implementation of the procedure leading to the approval and publishing of CIL charging schedules by charging authorities as deadlines begin to loom. Recently the Community Infrastructure Levy (Amendment) Regulations 2012/2975 ("2012 Regulations") have been swiftly enacted. These seek to tackle some of the problems with the new CIL regime which have come to light. Although the CIL regime is intended to be simple and certain in operation it has resulted in some complicated and potentially harsh outcomes.

There is a focus with the new regulations on one such aspect of CIL which is how the regime can impact sites with an existing but unimplemented planning permission. It has been discovered that the introduction of a charging schedule for the area in which such a site is located can produce unexpected CIL charges which could be for substantial sums. This can cause proposed developments to cease to be viable. There has been considerable publicity with regard to a high profile development in Victoria Street by Land Securities caught by the operation of the CIL regime which is now going ahead due to the changes in the 2012 regulations.

A planning permission granted before the introduction of the CIL charging schedule for the area ("pre-CIL permissions") will not give rise to a CIL liability payable when the development permitted commences even if this occurs after the introduction of such a charging schedule. Inevitably there will be a section 106 agreement but no CIL charge. Until the relevant charging authority has invoked the CIL regime by successfully establishing a charging schedule the grant of planning permission cannot lead to a future payment of CIL. However, problems come when after the establishment of a charging schedule for the area there are changes to the planning permission or it is replaced.

1. Section 73 applications – an application to remove or change conditions attaching to an earlier planning permission can be made pursuant to section 73 TCPA 1990 and if successful it will result in a new planning permission ("section 73 permission"). The application may involve a substantial change such as the addition of floors to the development or be relatively minor such as a change in the external appearance of the building. One increases the gross internal area of the development whilst the other has no impact at all.

The grant of a section 73 permission can give rise to two unexpected CIL consequences.

1.1 Pre-CIL permission - If between the grant of the pre-CIL permission and the grant of the section 73 permission a CIL charging schedule has been put in place for the area then the section 73 permission will trigger the operation of the CIL regime. In many cases if the

proposed development involves a vacant site this will mean that the charge to CIL is levied on the full development. In a very few cases there may be a deduction from the gross internal space of the development if it had already commenced before the section 73 application and one or more buildings or parts had been constructed and been in continuous use for six months or more. In all cases the site will already be subject to a section 106 agreement as a result of the earlier permission. No relief is given as against the CIL charge for the burden arising from that section 106 agreement. The burden of the section 106 agreement will have been anticipated by the developer but not the CIL charge.

1.2 Earlier CIL permission - Similarly there is currently an unwelcome CIL outcome if the earlier planning permission was granted after the introduction for the area of such a CIL charging schedule. The earlier permission gives rise to the possibility of a CIL charge. For instance, assume a planning permission is granted for a development on a vacant site and is commenced giving rise to a liability to pay the CIL charge. A section 73 application is made to change a condition attached to the earlier permission and a new section 73 permission is granted. The development is still substantially the same but with a modification. Until the recent regulations came into force there is nothing to mitigate in such circumstances the second charge arising on the occurrence of the successful section 73 application. The second CIL charge is not restricted in scope by the modification. It will be chargeable on the full amount of the gross internal area of the development save that if any building has been constructed in accordance with the earlier permission then its internal floor area will only be taken into account as a deduction if it has been in use for a continuous period of six months or more prior to the successful section 73 application.

In neither case under the original CIL regime is the second CIL charge related only to the consequences of the change brought about by the second 73 application. The financial consequences with a large development could be huge. With the proposed redevelopment In Victoria Street by Land Securities the prospective CIL bill due to the section 73 application was said to be millions of pounds. It can mean the difference between the proposed development going ahead and being shelved. Such a prospect has encouraged the Government to act and remove both these problems arising in relation to successful section 73 applications.

1.3 Solution - The new regulations bring into force two sets of provisions to relieve the CIL consequences of a successful section 73 application resulting in a new planning permission:-

1.3.1 earlier pre-CIL permission – on the grant of the section 73 permission the amount of CIL payable shall be the amount by which the CIL chargeable by reason of the section 73 permission exceeds what would have been the CIL charge if it had been chargeable on the occasion of the earlier grant of planning permission. The earlier deemed charge is calculated at the same CIL rate as applies on the second occasion (new regulation 128A inserted in 2010 CIL regulations added by reg. 9 2012 Regulations). No CIL is payable as a result of the section 73 permission if the CIL otherwise chargeable is the same or less than it would have

been if there had been a CIL charge on the occasion of the earlier permission. A change, for example, in a planning condition relating to the opening hours of a retail unit will not have CIL consequences. On the other hand if the change adds a floor (but not a mezzanine floor) thereby increasing the gross internal area of the development CIL will be charged by reference to that increase only and not the gross internal area of the whole development.

1.3.2 earlier CIL permission – in cases where the CIL regime applied to the earlier permission then there is an abatement so that on the second charging occasion only any increase in CIL is payable. The amount of CIL payable due to the earlier permission is deducted from the CIL payable on the section 73 permission (new regulation 74A inserted in 2010 regulations added by reg. 8 2012 Regulations). To obtain the benefit of this relief the person to pay the CIL arising from the section 73 permission must request it and provide proof of the payment of CIL on the first permission.

Additionally the definition of chargeable development is amended to ensure that it is the actual development carried out by the developer which is charged. This is contained in regulation 3(2) of the 2012 regulations (amending reg. 9 of the 2010 regulations) which is in terms which show how hard it will be to achieve the objective of simplicity with this levy. These amendments also highlight what seems to be a continuing problem with the drafting of the CIL regime. There is a failure to spell out clearly how the provisions are intended to operate and an excessive reliance on assumption. In this case it is not spelt out whether the CIL charge relating to the section 73 permission replaces the earlier charge or remains separate and there is a need to revise the CIL liability with regard to the earlier permission. The regulations talk of a "new or revised liability notice" in relation to the development under the section 73 permission which leaves the point open.

If the CIL charge relating to the earlier permission exceeds the CIL charge following the grant of the section 73 permission then it seems that it is expected that there will be a repayment of the difference as an overpayment because it is provided that in those circumstances no interest is payable by the collecting authority pursuant to reg. 75(3) 2010 regulations (new reg. 75(4) added by reg. 8(4) 2012 Regulations). This is consistent with there being one chargeable development. It seems that this is to be achieved by a revised liability notice in relation to the earlier permission resulting from the change in the chargeable development. If there has been a change in the person liable for the CIL the repayment should to the person who paid the CIL arising from the first permission but it is not clear how that is secured. It may be that this will need to be expressly covered by the terms by which any change in ownership or liability occurs.

1.4 Warning – the provisions in the 2012 Regulations are not retrospective. Any section 73 permissions granted before these regulations come into force will still bear the adverse CIL consequences discussed above. In those circumstances two courses of action will need to be considered.

1.4.1 Fresh section 73 application - is it possible to make a further section 73 application after the coming into force of the new regulations? If so then that could be the permission which is implemented. Alternatively

1.4.2 Implement earlier permission - can the original proposed development be carried out rather than the varied development? In this respect it is relevant to note that the new definition of chargeable development expressly covers the possibility in reg. 9(8) 2010 regulations that a development may start under an earlier permission, be halted, work then start on a different development under the section 73 permission, be halted and then the earlier development be restarted. This is to ensure that the "recommenced" development is the chargeable development.

Separately when the first permission is a pre-CIL permission it may be necessary to re-visit the section 106 agreement in order to ascertain whether the burden can be mitigated by varying the terms of the agreement.

2. Replacement permission – similar unwelcome CIL consequences arise with permissions granted pursuant to reg. 18(1)(b) or (c) Town and Country Planning (Development Management Procedure)(England) Order 2010. This procedure allows the replacement of permissions which are extant but have not been implemented provided that they were granted before 1st October 2010. It is not possible to use the power in section 73 to change a time limit when a planning permission is due to lapse (sub-section (5)) so this procedure is available for such purposes but only for older planning permissions (pre-1st October 2010).

If the replacement permission is granted after a charging schedule has been put in place it will result in a CIL charge even though no such CIL liability would have arisen in relation to the permission replaced. The new reg. 128B (added to the 2010 regulations by reg.9(2) of the 2012 Regulations) removes from the CIL regime the development carried out in accordance with such a replacement permission when there was no charging schedule in place at the date of the first permission.

As with the new provisions relating to section 73 permissions a warning has to be given that this relief applies only to replacement permissions granted after the new reg. 128B comes into force (reg. 10(5) 2012 Regulations). Any granted before then will remain subject to a CIL charge.

3. Summary

3.1 The CIL consequences of any amendments of planning permission pursuant to section 73 or replacement planning permissions relating to sites within an area subject to a CIL charging schedule which have been granted before the 2012 Regulations take effect need to be looked at again. Not many authorities have yet put in place CIL charging schedules so this will have limited the size of the problem/

3.2 If they have increased the burden on a developer or landowner then consideration needs to be given to taking steps to reduce the burden as suggested in section 1.4 above.

3.3 For the future the adverse CIL consequences of amendments to and the replacement of planning permissions have been relieved so that although the CIL bill may still be increased it will only be as a result of an increase in the gross internal area of the development.

3.4 When there is a change in ownership of a development site in respect of which CIL has been paid consideration will need to be given as to who is to receive any repayment of CIL in the event of a subsequent section 73 permission. Will the developer or new owner retain it or should it be paid to the vendor?

3.4 Unfortunately the CIL regime is not going to be as simple as claimed. The levy is an unwanted burden in difficult financial times but the need to consider carefully how the CIL regime operates is an additional unwelcome burden for developers and landowners. With more amendments to come it is an area which will continue to need to be monitored