More problems with pooled contributions

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The continuing problems faced by local authorities seeking pooled contributions by way of section 106 planning obligations is not limited to the application of the pooling restriction in reg. 123(3) of the Community Infrastructure Levy Regulations 2010 ("the 2010 Regulations"). Earlier in the year Rutland faced the prospect of losing £6.7 million in section 106 payments in relation to a large residential development because a subsequent section 73 permission had been issued without the continuance of the planning obligations. The developer contributed £4.8 million and so it was not necessary to discover whether the Council had a route open to it to remedy the failure.

At the end of last month the Court of Appeal gave its decision ([2015] EWCA Civ 1060) in the culmination of a battle between Robert Hitchins Limited ("the original developer") and two councils, Worcester City Council and Worcestershire County Council, over a pooled transport contribution. It illustrates how misplaced was the expectation that pooled contributions would quietly take a back seat with regard to infrastructure funding.

First planning agreement - The original developer was suffering financially due to the property crash and was concerned that it was close to a breach of the covenants given to its lenders. It needed to obtain planning permission for a residential development of the former Ronkswood Hospital. Worcestershire County Council as the highway authority was holding out for a transport contribution of just over £1,000,000. This was justified by the County Council on the basis that the proposed development would generate significant demands on the strategic transport network. Para. 32 NPPF requires that a development should only be prevented or refused on transport grounds "where the residual cumulative impacts are severe". The developer's position was that no pooled contribution was required but it needed to obtain the planning permission. Consequently, it started what was described in evidence to the Court as "commercial horsetrading" and the outcome was a planning agreement containing an obligation to pay to the County Council £4,530 for each dwelling which with 181 dwellings would amount to £819,000. The contribution was to be paid in three equal tranches – (i) the commencement date; (ii) on or before 50% occupancy of dwellings; and (iii) on or before 75% occupancy. It contained the standard provision stating that nothing in the agreement prohibited or limited any right to develop any part of the site in accordance with a different planning permission granted after the agreement. A provision highlighted by the judge at first instance.

Second planning application - the developer then sold the site to BDW Trading Limited ("BDW") but in such a way that it could continue to take steps to avoid payment in full of the transport contribution. Under the terms of the sale agreement BDW agreed to allow the developer to make a second planning application in identical terms to the first except for the obligation to pay the transport contribution. BDW further agreed that if the

second planning permission was granted that it would only develop in accordance with the second planning permission. The developer agreed to indemnify BDW in relation to the transport contribution.

This second planning application was a means of challenging the obligation to pay the transport contribution when the original developer did not have the time to appeal in relation to the first planning application. This second application was not determined in time so the developer made a section 78 non-determination appeal to the Secretary of State which resulted in an inquiry held by Mr. M Whitehead. Before that inquiry took place the reserved matters with regard to the first planning permission had been approved and the development commenced by BDW which in turn triggered the payment of the first instalment of the transport contribution. In accordance with the terms of the sale agreement this was paid by the original developer to the County Council.

Inspector's decision (Appeal ref: APP/D1835/A/13/2202841) – this was given on 10th January 2014 and upheld the contentions of the original developer. The Inspector found that the transport contribution did not satisfy the requirements of reg. 122 of the 2010 Regulations and in particular was not fairly and reasonably related in scale and kind to the development. In doing so the Inspector refused to become involved in the dispute over the transport contribution due under the first planning agreement. The County Council's evidence put forward to justify the transport contribution was not sufficient in his judgment and did not show that the proposed development would have a severe transport impact. There was evidence that the specific measures to be taken (including alterations to a junction) under the separate highway agreements with the developer would actually ease the transport situation and be a transport benefit. This decision was then unsuccessfully challenged by the County Council.

Second planning obligation – in relation to the second planning permission a unilateral undertaking was given by BDW on 25th June 2014 in the same terms as the first planning agreement save for the transport contribution. The undertaking both recited and covenanted that BDW intends to implement the second planning permission and to dispense with the implementation of the first planning permission and the discharge of the obligations under the first planning agreement. The obligations under the second planning agreement took effect on 18th September 2014 and by then around 60 dwellings had been constructed under the first planning permission.

Judicial review proceedings – in March 2014 the original developer commenced judicial review proceedings in the Birmingham Planning Court against the County Council. These proceedings challenged three decisions by the County Council – (i) the assertion that the first planning permission and planning agreement continued to govern the relationship between the developer and the County Council; (ii) the refusal to vary the first planning agreement by removing the transport contribution; and (iii) the refusal to set aside the first planning agreement on the grounds of duress or unconscionable conduct. Permission to proceed on the second and third grounds was set aside by Paterson J. thereby holding the obligation to pay the transport contribution under the first planning agreement to be valid and the first instalment to be irrecoverable. This emphasises that once a planning

agreement has been entered into and the related planning permission granted non-compliance with the requirements of reg. 122 is not a valid ground for refusing to make a pooled contribution pursuant to the planning agreement. Permission was given for the proceedings to be continued in relation to the first ground.

Decision of Hickinbottom J. [2014] EWHC 3809 – by the time the matter was heard by Hickinbottom J. the second planning agreement had been executed and subsequently taken effect. Around 80 houses had been completed, sold and occupied whilst a further 21 houses had been completed but not sold. Still less than half of the dwellings had been occupied so the second instalment of the transport contribution had not fallen due.

The two principal issues to be decided were

(i) Whether it was possible to switch from the first planning permission to the second; and if it was

(ii) Whether the switch had actually occurred.

If the answer was yes to both then the developer would avoid the second and third instalments of the transport contribution as their triggers would never occur.

Ability to switch - it was common ground that if there are two extant planning permissions in relation to a site the developer has a choice which to implement (para. 48). The County Council's argument was that on the facts of this case such a choice was no longer available to the developer because the development pursuant to the first planning permission had begun and been progressed so switching was no longer possible and would be unlawful. This was not accepted by the judge. Key to the decision was the identical nature of the two planning permissions. They were not inconsistent as in Pilkington v SSE [1973] 1 WLR 1527 and so implementing the first did not thereby make impossible implementation of the second (para. 50(iv)). Further the ability to switch between planning permissions was not lost when the implementation of one had commenced but not been completed (para. 50(iii)). It was held that having started the development in accordance with the first planning permission it was open to the developer to complete the development under the terms of the second planning permission.

Had the developer switched? – it was common ground that the issue was to be determined on the basis of an objective test and the intention of the parties is irrelevant (para. 53). The simple continuation of the works was not enough as the works could be attributed to either planning permission. Interestingly the focus for consideration of this point was the covenant in the second planning agreement to dispense with the implementation of the first planning permission. It came down to a battle over what was meant by implementation. Did it mean commencement so making the covenant meaningless. Alternatively, did it bear its ordinary meaning of carrying out until completion. In this context the judge noted that the first planning agreement had reserved the ability to apply for a planning permission for the same development but without the transport contribution. It was a matter of contractual construction and the judge found that the developer had covenanted "not to progress the development in terms of any material

operation under the authorisation of the First Planning Permission" (para. 68). In consequence once the second planning permission took effect on 18th September 2014 any material operation thereafter could only be carried out under the second planning permission. From that date the developer was held to have elected to continue and complete the development under the second planning permission (para. 69).

Declaration - a third issue was raised by the County Council that the claimant was not entitled to a declaration because it had sold the site and BDW was not a party. This argument was rejected. The original developer was liable to BDW in relation to the transport contribution payable under the first planning agreement. In consequence the original developer has a "real interest" in "a real question" on which there had been "proper argument".

Court of Appeal decision – the judge's construction of "implementation" was approved applying the judgment of Lord Neuberger in Arnold v Britton [2015] UKSC 36 on contractual construction to the unilateral undertaking with "appropriate adjustment"(para. 29). The decision on switching was also upheld. It did not matter that there was no physical demonstration on the ground of the switch (para. 37). Nor did it matter that the development had already been partly carried out "given the complete consistency between the two permissions" (para. 41). The argument that any operation carried out under the second planning permission was unlawful because it was completing a development already started under a different planning permission was rejected (para. 48).

Points of interest

(i) Challenges to planning obligations on the ground that reg. 122 of the 2010 Regulations has not been complied with normally need to be made during the planning application process. Attempts to withhold payment of a pooled contribution on such a ground will fail. This will not necessarily be the case if the contention is that the planning obligation infringes one of the limitations in reg. 123 such as the pooling restriction.

(ii) Instead of challenging a pooled contribution sought by an authority by way of appeal if there are time pressures then an alternative route in certain circumstances may be to make a second planning application as in this case.

(iii) If such a route is adopted then care will have to be taken to ensure that there is in place an appropriately worded second planning agreement assuming that the second application results in a decision that the particular pooled contribution is not required. The wording of the second planning agreement was crucial to the outcome in this case. In addition any sale agreement relating to the site must be in an appropriate form.

(iv) switching between planning permissions after the commencement of a development is possible provided that the permissions are not inconsistent. However, care will need to be taken regarding the impact on CIL liabilities if switching is being contemplated. Although some areas of the CIL regulations cater for switching between permissions such provision is not comprehensive. In particular if a CIL exemption has been

or is to be claimed then the consequences of switching will need to be thought through. Switching may be a means of securing a CIL advantage.

(v) the dispute between the original developer and the County Council in this matter involved a number of different proceedings and was started by the developers concern that the issue could not be speedily determined within the first planning application. If the dispute resolution procedure consulted on earlier in the year by the DCLG is introduced that could shorten such disputes.