

Phased planning permissions and the self-build exemption

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A turbulent topic in the context of Community Infrastructure levy (“CIL”) continues to be eligibility for the exemption for self build housing. It features regularly in e-mails from those who have received a large CIL liability notice out of the blue. A recent statutory appeal decision highlights both the advantage of a phased permission and the problems that can rise from relying on one in the context of this exemption. It is a decision of Mr. A U Ghafoor BSC (Hons) MA MRTPI made on 27th May 2020 with ref no. APP/L/19/1200314 and 315.

It concerned a phased permission for the residential development of an open development site comprising five building plots obtained by Hanover Developments Limited. The permission authorised five houses to be constructed one on each plot. The development was to be carried out by six phases marked on an attached plan. The first phase is described as “road/infrastructure” and then each of the following five phases comprised a single plot and house.

From the point of view of CIL each of the six phases would be a separate chargeable development independently subject to the application of the CIL regime. The intention was that the first phase would be zero-rated as the works to create the road and landscaping would create no gross internal area on that part of the site. Then the intention of Mr. David Rock, Hanover’s managing director, was that each plot would be sold and the purchaser would claim the exemption for self build housing in respect of the individual house.

The developer carried out the first phase by laying out the internal road. On the eastern boundary of the site there had been a stone wall with a height of 1.2 metres running the length of the boundary. The wall was removed, the internal road laid out, the entrance to site the created and a new wall of the same height as the old built along the remainder of that boundary and running into the site. Condition 13) of the phased permission required that the “development shall not be brought into use until vehicular visibility splays of 2.4m x 43m as indicated on the approved plan 17-023-01 Rev E in which there should be no obstruction to visibility exceeding 1.0m in height above the adjacent carriageway channel line have been completed. Such sightlines shall thereafter be retained for the lifetime of the development.”

In order to comply with that planning condition the intention was to lower the replacement wall by removing one course of stone so that the height requirement was met for the two visibility splays.

Following the laying of the internal roadway and the replacement of the two stretches of wall to be retained the Council served CIL liability notices and demand

notices on the developer in relation to phases 1, 4 and 6 stating that the development comprised in each of those three phases had commenced on 23rd May 2019. This deemed commencement date was based on the removal of the boundary wall which ran along the eastern external boundaries of phases 4 and 6 and so the Council argued had commenced those developments as well as the first phase development.

If correct an important CIL consequence would be that the exemption for self build housing could not be claimed in respect of each of the houses to be built on phases 4 and 6 because prior to the commencement no valid commencement notice would have been served (this was prior the 2019 (No.) Regulations); no assumption of liability notice served by the self builder; and no valid claim made by the self builder.

The developer accordingly issued an appeal under regulation 118 of the Community Infrastructure Levy Regulations 2010 which permits an appeal to the Planning Inspectorate on the ground that the authority had incorrectly determined the commencement date. The appeals related to phases 4 and 6 as it was common ground that phase 1 had commenced but gave rise to no CIL liability.

Mr. Ghafoor accepted that the permission is a phased permission (paragraphs 7 and 8) because the description of the development in that permission is precise and refers to five houses to be delivered in six phases. Further condition 2) requires the development should be carried out in accordance with a list of drawings including a phasing plan.

The argument on behalf of the developer was that the works on the wall as well as the laying out of the internal road and entrance were solely attributable to phase 1 and so there had been no occurrence of a commencement date for either phase 4 or phase 6.

Mr. Ghafoor found at paragraph 12 of his decision that

“The frontage wall has been substantially rebuilt with a new access, but it is integral to the construction of the access with adequate sightlines. Whilst the Phasing Plan appears to show the geographical extent of phase 1 extending only to the access and internal road coloured grey, drawing no..... shows the extent of the visibility splays as required by condition 13). Both plans need to be considered in combination as drawing no. shows in detail the access with visibility splays and the frontage to the development site. I consider that the frontage wall splaying into the site and continuing to provide a visibility splay is part and parcel and necessary in delivering an internal road and infrastructure. The operations involved in rebuilding the wall practically fall within the scope of work pursuant to the implementation of phase 1.”

In consequence the demand notices for phases 4 and 6 were quashed because they had been issued with an incorrectly determined commencement date. This left

open the possibility of claims for the exemption for self build housing to be made in relation to phases 4 and 6.

Take away points from this decision are:

- (i) Phased permissions can have an important role to play in relation to residential development sites with more than one building plot and the application for the exemption for self build housing.
- (ii) Care has to be taken to ensure that a permission constitutes a phased permission when one is intended. To be certain it needs to be clearly stated in the permission.
- (iii) Care also has to be taken in ensuring that each phase is clearly defined and that they do not overlap.
- (iv) Describing a phase as “road/infrastructure” can throw up issues as this appeal illustrates.
- (v) The appeal decision serves to emphasise the important role of drawings accurately showing the phases and location of works.
- (vi) For these purposes, a road should include the visibility splay. In paragraph 11 Mr. Ghafoor stated that in his “assessment, the frontage wall splaying into the site and continuing to provide a visibility splay facilitates the provision of an access into the residential development as shown on drawing no. and required by condition 13) imposed on the 2018 permission.”
- (vii) There is no assumption that any works relating to a road or infrastructure must be carried out in one go unless required by a planning condition. In this case the provision of the visibility splay was undertaken in two stages.
- (viii) The approach adopted by Mr. Ghafoor as to the interpretation of the planning permission in this appeal is in line with the dicta of Lewison LJ in *Lambeth LBC v SSHCLG* [2018] EWCA Civ 844 who stated at paragraph 25 that “the ultimate question is still the same, namely: “... what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense.”

This has been reaffirmed more recently by Andrews J DBE in Swindon
BC v SSHCLG [2019] EWCA Civ 1677 (para. 30).

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