# Jumping the Gun - E³ Consulting comment on Oval Estates Decision [2020] EWHC 457 (Admin)

evaluate 3
evolve
enhance




On 28 February 2020 the High Court published the decision on *Regina on the application of Oval Estates (St Peter's) Limited v Bath & North East Somerset Council (herein after "BNES")*. The parties had been in dispute for over two years over the interpretation of the complex and rather convoluted Community Infrastructure Levy (CIL) Regulations.

The developer, Oval Estates ("Oval"), sought a judicial review to clarify the matter, with £874,283.78 of CIL at stake on their housing development at Cobblers Way, West Field, Radstock - to build 81 new homes.

This decision provides a timely reminder of the importance of following, precisely, the correct procedures in any CIL matter and highlights the consequences of getting it wrong!

## Summary

Oval wanted to treat the project as a 'phased development' and thus pay the CIL liability in stages, corresponding to the relevant phases; giving them a significant cash flow benefit. However, they failed to observe the correct CIL processes and then commenced works before resolving the matter – this latter point highlighting the number one issue we see with CIL – developers (including businesses and individual home owners) jumping the gun! A very costly mistake in almost all circumstances, and held here too by Mr. Justice Swift who determined BNES had correctly issued the CIL Liability and Demand Notices.

## Timeline

The development timeline and respective actions of the two parties were the primary cause of their dispute:

- 01 September 2014 - Oval applied for a grant of outline planning permission for the development in Radstock, near Bath. The application made no reference to phasing of the development.
- 17 February 2015 - BNES approved their Charging Schedule and thus adopted CIL with effect from 06 April 2015; with Residential CIL being largely set at £100/m² but a lower rate of £50/m² for 'Strategic Sites & Urban Extensions'.
- 02 March 2016 – BNES granted permission (14/04003/OUT) with Reserved Matters. Oval maintained there was reference to the phasing within the s.106 agreement also dated 02 March.
- 06 April 2017 - Oval gained Reserved Matters Approval for the development at which point the 'approved plans' included Drawing HS3044E - dated Feb 2017 and referenced as *"Proposed Phasing Plan"* suggesting three different phases of the St Peter's Site.
- 25 April 2017 - Oval issued their Assumption of Liability (then Form 1, but Form 2 since Sept 2019) thereby committing them to pay the CIL on the chargeable development under Reg.31.
- 05 October 2018 - Oval submitted their Form 6 – Notice of Commencement to the Council advising that they intended to start the project on 15th October 2018.

- 12 October 2018 - Oval submitted a non-material change application to vary the 2016 permission – in which they sought to undertake the project in phases and pursuant of drawing HS3004G (largely similar to the earlier version in the Reserved Matters approval in April 2017 above).
- 15 October 2018 – Oval commenced work on site.
- 08 February 2019 – BNES granted the section 96A application – incorporating the three phases.
- 28 May 2019 - BNES issued their CIL Liability and Demand Notices to Oval for £874,283.78.

## Phased Planning

The CIL Regulations explicitly define *'Phased Planning Permission'* under Reg.2(1) of the 2010 Regulations as *"a planning permission which expressly provides for development to be carried out in phases"*. This clause in conjunction with Reg.9(4) allows each phase of a phased planning permission to be treated as separate chargeable development. Thus the CIL liability is calculated separately for each respective phase and so each portion only becomes payable upon commencement of that specific phase – affording such projects considerable cash flow benefits to spread their CIL costs.

## Commencement

A key part of the process for dealing with CIL is submitting a Commencement Notice (Reg.67), which states when the development will commence on site. This is important as, under s.208(3) Planning Act 2008 and CIL Reg.31, the previously assumed liability to pay CIL arises upon commencement of the chargeable development. Most Local Planning Authorities (LPAs) have some scope of extended payment terms through them having instigated, the optional instalment policy, depending upon the quantum and specific LPA terms. Furthermore, commencement of the works fixes the CIL liability as at that time, at the amount determined by the LPA. In other words, no further review or appeal can be made against the CIL liability determined, nor can any applications for exemptions or other applicable reliefs be made after the commencement of works on site.

For CIL purposes, development is treated under Regs.7(2) as beginning on the earliest date on which '*material operation*' is carried out. "*Material operation*" has the same meaning as in s.56(4) of the Town and Country Planning Act 1990, and includes *"any building works, demolition, digging of trenches for foundations or change in the use of land"*. Where a Commencement Notice is not submitted before work commences, the local authority may impose a surcharge equal to 20% of the total CIL liability or £2,500, whichever is the lower amount.

In this case, BNES disputed both the receipt of Form 6 (Commencement Notice) and the date that the work commenced. Ultimately, the Court determined the Commencement Date to be at the latest, on 15 October 2018.

In any case, at the time of project commencement, it was the permission granted under 14/04003 following the Reserved Matters Approval in April 2017 that had been started. This permission did not include phasing. Mr. Justice Swift also dismissed Oval's contention that the s.106 comment introduced phasing, as ineffectual and merely describing an element of the project dealing with Social Housing and not an explicit phase of works under Reg.2. Thus, the full CIL Liability pursued by BNES was indeed correct.

Oval failed to formally incorporate the intended project phasing into their planning permission until their October 2018 non material amendment application – which was only granted permission, after commencement, in February 2019. By their decision to commence works in advance of this grant, they sealed their own fate.

## Conclusion

Although this decision is not surprising based on the legislation and the facts, it does demonstrate that the complex CIL Regulations are still not well understood by developers and presumably their architects/planning advisers.

This project was early on in the CIL process for BNES, with the initial application and outline decision spanning their adoption of CIL. Equally, it is not clear from the case transcript to what extent Oval sought formal CIL advice or were perhaps undertaking the project in the manner 'they had always done' - without appreciating the impact of these, then, new Regulations

Whilst the CIL Regulations are very prescriptive, there are circumstances in which LPAs can apply discretion in their actions, rather than being mandated by the legislation. However, in our experience, LPAs generally follow the Regulations 'to the letter' with limited deviation from the procedural aspects, other than by rare exception.

There was also some criticism of BNES for the tardy issue of their CIL Demand Notice in May 2019 when they had the necessary details, following the exchange of emails with Oval, since August 2017. Ultimately this delay was not seen as critical to Oval's loss of the statutory CIL 'Review' under Reg.113 or 'Appeal' under Reg.114 – both of which were denied by their own actions - of commencing works on site. Oval could have sought these 'Review' or 'Appeal' options in advance of their beginning on site, as the Regulations do not prohibit such challenges, only that they cannot be brought *after* the statutory timescales of 28 days or 60 days respectively from the issue date of the Liability Notice.

Mr. Justice Swift has however set out that future cases should exhaust any rights or challenges within the CIL Regulations and wider statute before embarking upon a judicial review, stating that *"in the overwhelming majority of cases any attempt to pursue applications for judicial review without first following those routes ought to fail"*.

E³ Consulting's team has advised upon a wide range of CIL projects across England & Wales. We are very familiar with the CIL Regulations and necessary processes to ensure clients comply with the legislative requirements, correctly assess their CIL Liabilities and take advantage of any reliefs or exemptions in mitigating their liabilities that may be available. We have successfully saved our clients millions of pounds from CIL, often where the client's initial perception was that little or nothing could be done.

We work closely with developers and home owners as well as their respective architects, planners and project managers to ensure the correct CIL Liability is calculated and paid. We engage with the LPAs to ensure the liability is agreed at the correct amount (including any eligible exemptions or reliefs) and in a timely manner, so enabling site works to commence at the earliest opportunity, without triggering full CIL payment or unnecessary penalties.

E³ Consulting operate from offices in Southampton and London and work with clients that own, operate or invest in property across the UK and overseas. If you would like to discuss any aspects of this decision or its implications for you and/or your projects further, then please contact Alun Oliver for a no fee, no obligation initial discussion to see how we could help evaluate, evolve and enhance the available property tax savings from any property expenditure.

Contact us on enquiries@e3consulting.co.uk or by telephone on **0345 230 6450**.

@e3consulting - #CIL #property #tax