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CIL – going through a phase?

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The recent High Court decision in Oval Estates (St Peter's) Ltd (R) v Bath & North East Somerset Council highlights why developers should establish the phasing of a project at the outset. If they do not, they may find themselves paying the full Community Infrastructure Levy (CIL) payment upfront.

The intention behind the introduction of CIL was to afford greater transparency to planning projects, allowing parties to understand the contributions they would be required to pay from the get-go. This is especially important with larger projects, where the cost of the CIL contribution could be potentially prohibitive for developers. As a result, CIL payments on larger projects are often staggered, only falling due on the commencement of each separate phase of development as and when it commences.

In the Oval case, the developer was granted outline permission for 81 homes at a site in Radstock. The outline application, granted in March 2016, was not phased in nature. However, the reserved matters application of April 2017 did include phasing plans. The developer's assumption of liability form also stated that the development would be phased. Following commencement of development in October 2018, the local authority then accepted the developer's Non-Material Amendment application to add the phasing plan in February 2019. In May 2019, the developer received a CIL liability notice for the full project, totalling £874,283.78. Incidentally, this notice should have been issued by the local authority prior to commencement of the chargeable development, not 7 months later. The developer challenged the liability notice.

The High Court rejected the developer's contention that the CIL contribution should be calculated on the basis of phased development:

(A) The developer contended that the permission should be read in conjunction with the s.106 agreement, which referred to phases. The s.106 agreement could not be read as part of the planning permission.

(B) The developer's second submission was that the NMA should be treated like a s.73 application to amend the planning permission, so that the NMA became the operational planning permission for the purposes of CIL. The Court held that although the NMA was capable of making this a phased permission, it was made too late.

(C) The developer's final argument was that the CIL liability should have arisen from the date of the notice, i.e. after the NMA. This was rejected because the requirement to pay the full CIL contribution had already been triggered by the commencement of development.