

Case Name: *Oval Estates (St Peter's) Ltd, R (On the Application Of) v Bath & North East Somerset Council* [2020] EWHC 457 (Admin) (28 February 2020)

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Commentary: The High Court has dismissed the claim by Oval Estates (St Peter's) Ltd who sought to challenge by judicial review the CIL liability notices issued by Bath and North East Somerset Council. The notices stated that Oval is liable to pay £874,283.78 by way of CIL in respect of a development at Parcel 6781 Cobblers Way, West Field, Radstock.

The Claimant (Oval) had contended that the liability and demand notices issued by the Council on 28 May 2019 were incorrect because the amount specified as being payable should have been calculated on the basis that the development phased so that each phase was a separate chargeable development, and that the only CIL payable at the start was in respect of the first phase of the development.

The Court held that the Council's liability notices were correct, because the Claimant had assumed liability to pay CIL and had commenced development before any phasing plan was approved so the whole CIL liability had become due.

The planning permission was granted in outline in March 2016, with the final reserved matters approval on 6 April 2017. The Claimant served a commencement notice on 5 October 2018, made an application for a s96A non material amendment (including adding a phasing plan to the list of approved drawings) on 12 October 2018 and commenced development on 15 October 2018. The Council approved the s96A non material amendment on 8 February 2019. The Council should have issued the CIL liability notice 'as soon as practicable' after the date on which the permission first permitted the chargeable development (CIL reg 8), 6 April 2017 in this case, but issued it on 28 May 2019.

The Claimant made three submissions.

The first was that the planning permission was to be read together with the section 106 agreement which referred to phases, and that this was supported by the Council's reserved matters decision which referred to a 'proposed phasing plan' and by the Council's approval of the Claimant's section 96A application with a new phasing plan to be added to the approved drawing list. The Court dismissed this submission and held that the planning permission did not state that the section 106 agreement was to be understood as part of the planning permission and that there was no operative part in the agreement requiring the development to be undertaken in phases. The word 'phase' was defined but was in relation to the construction of affordable housing and there was not yet an affordable housing scheme agreed. The Court held that the reserved matters decision did not confirm an approved phasing plan as it was only a 'proposed' plan, and that the phasing plan attached to the s96A permission was approved after development was commenced and did not assist as it showed different phases to the reserved matters plan.

The Claimant's second submission was that Regulation 9 of the CIL Regulations should treat

section 96A permissions in the same way as for section 73 permissions, so that the relevant planning permission for CIL calculations should be the s96A which includes the phasing plan. The Court held that the regulations did not make provision for identifying the 'chargeable development' in relation to s96A in the same way as for s73 permissions, so the relevant CIL liability became payable on commencement of the whole development.

The third submission was that the date of the CIL liability notice should be the date on which the Claimant's liability to pay CIL arose. The date of the notice (May 2019) was after the date that authorisation for a non-material change to planning permission had been given (February 2019). The Court held that, as set out in the regulations, the commencement of development triggers the liability for payment of CIL and the Claimant had already assumed liability and commenced development in October 2018, so was liable for paying CIL in respect of the whole development.

The Court also held that the CIL review and appeal route under CIL reg 113 and 114 should have been pursued before a judicial review claim was made (but in the circumstances here, the Council served the liability notice so late that the opportunity to make a judicial review application was not denied).

Case summary prepared by Lida Nguyen & Lucy Morton