Case Name: *Stonewater (2) Ltd v Wealden District Council* [2021] EWHC 2750 (Admin) (15 October 2021)

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Commentary:
This was an unsuccessful challenge to the refusal by Wealden District Council (the "Council") to grant social housing relief under the Community Infrastructure Levy Regulations 2010 (the "CIL Regulations") in relation to a residential development scheme of 169 houses. The effect of the Council's decision left the claimant, a housing association, liable for a levy in excess of £3 million which was said to render the development scheme unviable.

In its early stages of the claim, it appeared to raise the following issues:

a) whether the provision of social housing relief is mandatory or discretionary under the CIL Regulations, and whether a section 106 agreement is a pre-requisite to the grant of social housing relief under conditions 2 and 3 in regulation 49(1); and
b) whether the section 106 agreement between the Council and claimant controls the amount of affordable housing that can come forward pursuant to the planning permission for the development scheme, capping the amount at 35% of the dwellings in the development.

By the time of the hearing of the claim, the meaning of the relevant CIL Regulations was, in all material respects, common ground: there is no express requirement in either of conditions 2 or 3 of regulation 49(1), nor elsewhere in the CIL Regulations, that the use of the qualifying dwellings as affordable housing must be secured by way of a planning obligation or other legal mechanism. The absence of an express requirement is a clear indication that it is not a necessary pre-requisite. Where a planning obligation is a necessary pre-requisite to the satisfaction of a condition in regulation 49, this is expressly stated as in regulation 49(7A) and (7B) which concerns conditions 5 and 6 for example.

Therefore the parties agreed that the interpretation of the section 106 agreement was the key remaining issue. The claimant argued that the section 106 agreement did not preclude the provision of affordable housing over and above the 35% referenced in the planning permission and the agreement: its focus was simply on securing 35% affordable housing as a minimum and did not regulate the remaining 65% of the dwellings. The claimant argued that the section 106 agreement was therefore an immaterial consideration.

The Court disagreed. It concluded that the terms of the agreement did control the amount of affordable housing that could come forward by providing that precisely 35% of the units in any phase of the development must be affordable. Accordingly, a scheme which provided less or more affordable housing would not comply with the section 106 agreement and so a scheme of 100% affordable housing could not lawfully commence unless the section 106 agreement were varied or to a fresh section 106 agreement were entered into. The claimant's application for relief on the basis of 100% provision of affordable housing was thus made in circumstances where there was in existence a section 106 obligation requiring affordable housing provision at a lower level. In those circumstances, the Council could not be satisfied that all of the dwellings would be qualifying dwellings so as to justify the full relief claimed.

Case summary prepared by Safiyah Islam