briefing

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Are you planning a section 73 application? Act with care!

A landmark judgment on CIL payment indexation is anticipated in the coming months, as courts decide on a judicial review of a recent Valuation Office Agency decision in the London Borough of Wandsworth.

CIL payments in the hundreds of millions could be at stake. Scheme promoters planning to apply for section 73 amendments to an existing planning consent should act with the utmost care.

- A fundamental issue has arisen relating to how CIL indexation calculations are applied on section 73 applications, where a planning authority has changed its CIL charging policy since the original application.

- Current regulations require a calculation that involves subtracting the hypothetical CIL liability of the original permission from the CIL liability of the section 73 proposal. But which CIL rate should be used and on which part of the scheme? That is the key question.

- Indigo is planning advisor to Peabody on its exemplar scheme on St John's Hill, Clapham.

- A recent section 73 amendment on the scheme has highlighted this CIL issue. LB Wandworth responded with a demand for an eye-watering increased CIL payment. This was appealed successfully by Peabody with the Valuation Office Agency, but is now subject to judicial review.

- The London Borough of Wandsworth approach, which would set a precedent if the judicial review finds in its favour, is to charge CIL at its new, higher rate across the whole of the development and not just that part of the development that represents the increase of floorspace secured through the section 73 permission.

- The case hinges on interpretation of vague language used in current CIL regulations and whether the phrase 'permits development' can be taken to mean the same as the granting of planning permission.

Commentary

Indexation can have a significant impact on the cost of CIL on all applications, with the current cost some 30% higher than the published rates in charging schedules adopted in 2012.

The application of CIL on s73 applications is particularly complicated in cases where the authority has adopted its charging schedule since the original permission was granted. Applicants need to be alive to the potential for authorities to apply the London Borough of Wandsworth interpretation, should it prevail at judicial review.

" 40% of local planning authorities have adopted CIL charging schedules in place, the large majority of which are based in London and the South East."

Pre-application agreement on the approach to CIL can help to ensure there are no nasty surprises further down the line. The demolition of buildings since the original permission can also have an effect on CIL liability.

Lack of flexibility within the CIL regulations means that it is not possible to negotiate a reasonable position – as would have happened with a s106 agreement. That makes it doubly important that all risks are assessed prior to a section 73 application being made.

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More about CIL

CIL was introduced with the stated aim of bringing more certainty and transparency, although CIL regulations have been amended every year since their introduction in 2010.

The CIL Review 2016 recommended replacing CIL with a hybrid system of a low level tariff for all developments, to be topped up with negotiated s106 agreements for larger developments.

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