CIL Social Housing Relief
Stonewater (2) Ltd v Wealden District Council
Judgement

Date: 22 October 2021
Ref No: 358

Introduction

On 15 October 2021, the High Court handed down a judgement on the Stonewater (2) Ltd v Wealden District Council case in relation to the **Council's refusal of CIL Social Housing Relief** in relation to the development of 169 homes, on the grounds that **insufficient evidence had been provided that all of the dwellings in the scheme qualified for relief**.

The case highlights the considerations that housing developers and registered providers need to be aware of in relation to any applications for CIL social housing relief, particularly where there is an intention to increase the level of affordable housing above that previously permitted.

Background to the Case

Stonewater, an RSL, purchased the site at Oaklands, Ersham Road in Hailsham, which already had planning permission (ref. WD/2018/2543/MAJ) for 169 dwellings, including 35% affordable housing. **The accompanying S.106, dated 20 May 2020, set out a specific requirement for 35% affordable homes (59 units) to be provided. However, as Stonewater intended to bring the site forward as 100% Affordable Housing, they applied for the Social Housing Relief on this basis, i.e., all units**.

Wealden Council subsequently **refused the application for CIL relief**, noting that Schedule 1 of the S.106 required "the submission of a Phasing Plan and Affordable Housing Scheme in order to establish the number and type of affordable housing units coming forward." In refusing the application for CIL relief, the Council **noted that no submissions pursuant to Schedule 1 of the S.106 had been received** by the Council and that "in the absence of approval of these details the development pursuant to the Permission cannot lawfully commence nor has it been established that any dwellings coming forward will be "qualifying dwellings" for the purposes of the CIL Regulations (given that) the Permission and S.106 provides for the provision of affordable housing at a level of 35%."

The Council's response also noted that "in determining any submissions pursuant to the S.106 in relation to the provision of affordable housing which exceeds the proportion considered at the time of the grant of the Permission (being 35%), the Council can properly have regard to the extent to which the submitted level of "qualifying dwellings" would affect the provision of infrastructure." **The Council therefore refused the claim for relief "as it has not been established that any dwellings coming forward would be "qualifying dwellings" for the purposes of the CIL Regulations**."

The Council further argued that the relief was **discretionary** and should **only be applied based on the level of affordable housing permitted**.

It should also be noted that prior to refusing the CIL application, the Council had asked Stonewater to provide a further S.106 Agreement ensuring that the whole site would come forward as affordable housing, but Stonewater did not do so. The Council therefore considered that **there was no legal agreement in place to ensure that the dwellings would be offered/occupied in perpetuity as affordable housing**.

Stonewater, in contrast, argued that a planning obligation was not necessary due to the 7-year claw back period if the scheme ceased to be used for affordable housing.

Approved Judgement

Stonewater judicially reviewed the Council's refusal to grant CIL relief, but the Court upheld the Council's decision. The key considerations were:

i) **Whether the provision of social housing relief is mandatory or discretionary; and**
ii) **Whether a S.106 Agreement is a pre-requisite to the grant of social housing relief under conditions 2 and 3 in Regulations 49 (1).**

Contact us:
107 Clerkenwell Workshops, 27-31 Clerkenwell Close, Farringdon, London, EC1R 0AT
t 020 3761 5390 e london@dlpconsultants.co.uk
www.dlpconsultants.co.uk

The Court held that:

Paragraph 49 - Pursuant to Regulation 51(3)(d)(ii), **an applicant for social housing relief must submit evidence that the development qualifies for social housing relief**. In the case of dwellings which have yet to be constructed this will amount to evidence to demonstrate that the applicant will in fact bring forward a development which will qualify for the relief sought. The logical corollary of the requirement for an applicant to submit evidence is that the relevant decision-making authority must consider the adequacy of that evidence and may reject the application if not satisfied by it. **Whether the evidence is sufficient to demonstrate that one or more of the conditions in Regulation 49 will be satisfied in the future is a matter for the decision maker**, having regard to the specific facts and circumstances of the case, subject to public law principles including Wednesbury reasonableness.

Paragraph 50 - **There is nothing in the CIL regulations which mandates the exact form of evidence required to satisfy the collecting authority under Regulation 51(3)(d)(ii)**. There is no express requirement in either condition 2 or 3, or elsewhere in the CIL Regulations, that the use of the qualifying dwellings in accordance with the terms of those conditions 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 the case of Regulation 49(7A) and (7B) which concerns conditions 5 and 6.

Paragraph 51- **Nevertheless, the inclusion of a Section 106 agreement, or similar legal obligation, as part of the evidence in support of an application for relief under conditions 2 or 3 may be a material factor in the decision maker's assessment of the evidence**. This is because, in practice, a Section 106 agreement committing the developer to the asserted level of qualifying dwellings, is an obvious way in which a developer might demonstrate, evidentially, how the use of the proposed dwellings in accordance with either condition 2 or 3 is to be secured. By the same token, the absence of a Section 106 agreement may be a material matter, as for example where no other evidence is submitted beyond assertion as to a future course of conduct. **Whether the presence of a Section 106 agreement, or its absence, justifies the grant or refusal of a claim for relief will depend on the facts and circumstances of a particular case**.

Paragraph 52 - **Subject to the satisfaction of the procedural requirements in Regulation 51, the grant of social housing relief is mandatory, not discretionary**. If the conditions are met, social housing relief must be granted. There is nothing found in the regulations either expressly, or by implication, which enables the decision maker to consider the effect of granting the relief including, for example, the impact of granting the relief on CIL receipts or the question of whether there would be a perceived over-concentration of affordable housing in a particular locality. These issues are not relevant to the question of whether any condition mentioned in Regulation 49 is satisfied. It is not the expressed purpose of social housing relief to seek to control the number of qualifying dwellings delivered by a chargeable development. Instead, social housing relief, in the context of the CIL Regulations, is intended to facilitate and encourage the delivery of such qualifying dwellings by a mandated form of relief from CIL.

Issues Arising from the Judgement

The first key point is that local authorities are able to take the existence and wording of S.106 Obligations into account when determining whether sufficient evidence has been provided that the housing being delivered will be affordable housing. A scheme which provides less or more units as affordable homes would not comply with the Section 106 Agreement. In the Stonewater (2) Ltd v Wealden District Council case, the result might have been different if the wording of the S.106 had referred to “at least” 35% affordable housing. Similarly, if Stonewater had entered into a second S.106 Agreement or unilateral undertaking for the remaining units on the site in order to bring them forward as affordable units, in advance of making the CIL application, this could have been taken into account.

Secondly, consideration was given to the impact of additional affordable housing on the Council's levels of infrastructure funding. In this case, the amount of CIL levy was in excess of £3 million. Paragraph 33 of the Judgment refers to correspondence from the Chief Executive of the Council which states that "**100% CIL relief at this scale will have a major impact on our evolving infrastructure pot**." The case highlights the fact that there is no linkage between the money CIL raises and the infrastructure that it needs to fund. The CIL pot was so oversubscribed that the Council felt compelled to turn down the opportunity for additional affordable homes in an area where there is already substantial and growing demand. Yet the judgement confirms that such concerns are not relevant to whether the relief should be granted.

Summary and Conclusion

In the past Registered Providers acquiring sites with policy compliant levels of affordable housing or less have then used grant funding to deliver the site for higher levels of affordable housing, and very often this has been seen as an advantage by housebuilders who partner RSLs.

This case highlights the need for the claimant to submit sufficient evidence demonstrating the level of affordable housing at an early stage in order to benefit from the amount of social housing relief; and that it is a matter of judgement by the determining authority whether the claimant's evidence is sufficient as no detailed guidance is provided on this matter in the CIL Regulations.

It also highlights the need in cases where the level of affordable housing may increase to ensure that the S.106 refers to "at least" 35% provision (or whatever the agreed figure is at the time of the planning permission). It will also be important to ensure that any additional units are clearly bound in through an additional Agreement or Unilateral Undertaking prior to making an application for Social Housing CIL relief.

Should you wish to discuss the implications of this, or require any further information or advice please contact either Frances Young or any of our DLP offices.

Frances Young – frances.young@dlpconsultants.co.uk