PUBLIC ART AND THE PLANNING SYSTEM

FURTHER ADVICE

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1. In May 2009 I provided advice to ixia, the public art think tank, in relation to various issues which had emerged in respect of public art and the planning system. Much of that advice remains directly relevant to present circumstances. However, I have been asked to review my advice in the light of the commencement in force of the Community Infrastructure Levy Regulations 2010.

2. These Regulations came into force on 6 April 2010. They serve the purpose of providing a legislative framework for the introduction of the Community Infrastructure Levy ("CIL"). In addition, in order to focus local planning authorities' attention upon the need to initiate a CIL in their area, restrictions were placed by the Regulations on the use of planning obligations under Section 106 of the Town and Country Planning Act 1990. Regulation 122 of the 2010 Regulations provides as follows:

   "122(1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.

(2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is–

(a) necessary to make the development acceptable in planning terms;

(b) directly related to the development; and

(c) fairly and reasonably related in scale and kind to the development."

3. The Regulation goes on to apply this Regulation to a Section 106 planning obligation, and to make any determination granting planning permission after 6 April 2010 a relevant determination for the purposes of the Regulation. Regulation 123 provides further as follows:

"123(1) This regulation applies where a relevant determination is made which results in planning permission being granted for development.

(2) A planning obligation may not constitute a reason for granting planning permission for the development to the extent that the obligation provides for the funding or provision of relevant infrastructure.

(3) A planning obligation ("obligation A") may not constitute a reason for granting planning permission to the extent that–

(a) obligation A provides for the funding or provision of an infrastructure project or type of infrastructure; and

(b) five or more separate planning obligations that–

(i) relate to planning permissions granted for development within the area of the charging authority; and

(ii) which provide for the funding or provision of that project, or type of infrastructure, have been entered into before the date that obligation A was entered into.

(4) In this regulation–

'charging authority' means the charging authority for the area in which the development will be situated; 'funding' in relation to the funding of infrastructure, means the provision of that infrastructure by way of funding;

...

'relevant determination' means–

(a) in relation to paragraph (2), a determination made on or after the date when the charging authority's first charging schedule takes effect, and

(b) in relation to paragraph (3), a determination made on or after 6 April 2014 or the date when the charging authority's first charging schedule takes effect, whichever is earlier; and 'relevant infrastructure' means–

(a) where a charging authority has published on its website a list of infrastructure projects or types of infrastructure that it intends will be, or may be, wholly or partly funded by CIL, those infrastructure projects or types of infrastructure, or

(b) where no such list has been published, any infrastructure."

4. Clearly, for the purposes of advising in relation to the present circumstances, Regulation 122 is already in point. It is worthwhile noting the provisions of Regulation 123 since, amongst other things, they indicate clearly the purpose of the legislation which is to seek to ensure that all pooled infrastructure contributions or tariffs are instigated deploying the CIL Regulations rather than through a planning obligation pursuant to Section 106.

5. The effect of Regulation 122 is to enshrine in law, as opposed to policy, the essence of the tests contained in Circular 05/2005. Thus, greater rigour is required in ensuring that as a matter of law the planning obligation which accompanies or justifies the grant of consent is closely related to the impacts to which it gives rise.

6. To place this in the context of my previous Advice, it reinforces the need for evidence to demonstrate that the requirement for public art is necessary, and directly and reasonably related to the development which has been proposed. Evidence of the impact of the development and the requirement to which it gives rise must be clearly demonstrated to substantiate the tests which are now legal as opposed to purely policy-

related. In effect it means that the tests must be complied with and the opportunity provided by policy for exceptions to the tests has been removed.

7. Since I advised previously there have been decisions reached by the Secretary of State after the 2010 Regulations came into force. For instance, the Secretary of State on 10 June 2010 refused planning permission in relation to a site at Stoke Road, Leighton Linslade and, in the course of doing so, afforded no weight to a planning obligation in relation to the provision of £10,000 towards public art. This was on the basis that in applying the policy and the Circular, the Inspector had concluded that whilst a Supplementary Planning Document provided policy support for the provision of public art on the site or for a known opportunity in the locality, the contribution of £10,000 was not towards any identified project and therefore did not meet the test of the Circular (or, for that matter, the Regulations).

8. In my previous Advice I expressed concern in relation to the provision of generic formulae (Percent for Art and public art tariffs) in respect of the provision of public art as opposed to provision which was supported by policy and directly related to impacts associated with the development proposed. The coming into force of the 2010 Regulations reinforces this advice and makes it essential, if planning permission is to be granted lawfully, for public art provision to be directly necessary and properly related to the impact generated by the development proposed.

9. I trust that I have dealt with all of those matters concerning those instructing me in relation to this case but, needless to say, if there are any further matters with which I could assist, I shall of course be pleased to help if necessary.

IAN DOVE QC

6th December 2010

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