CIL CHARGING SCHEDULES – MID DEVON AND GENERALLY

OPINION

1. Currently, Departmental advice simply states that it is not necessary to carry out a Sustainability Appraisal in the course of preparing, submitting for examination and then adopting a Charging Schedule under the Community Infrastructure Levy Regulations 2010 and 2011, with the primary legislative authority deriving from the Part II of the Planning Act 2008.

2. The purpose of this advice is to advance two propositions as follows:

   (i) that advise is wrong because it is too dogmatic. There may be charging schedules which do not require a SA but it is at least necessary to investigate the possibility that it might in order to comply with the Strategic Environmental Assessment Directive (SEA); and

(ii) that the Mid Devon CIL Charging Schedule should have been supported by a SA but wasn't and, as such, it would not be lawful to adopt it.

THE LAW

3. Most of the legislative framework necessary to understand these arguments (and all of the supporting jurisprudence at the European level) is to be found in the speech of Lord Reed in Walton v. The Scottish Ministers [2012] UKSC 44 at paragraphs 10-30 inclusive and any reader of this opinion is invited to consider these paragraphs with care as they provide the foundation for the argument set out below.

4. The first matter which must be emphasised is that the directive looks to substance and not to form so the noun used to identify the document in question is not significant:

> *"What's in a name. That which we call a rose by any other name would smell as sweet"*.

5. Lord Reed expressed this matter more directly in Walton at paragraphs 20-22 inclusive as follows:

"*20. The terms "plan" and "programme" are not further defined. It is however clear from the case law of the Court of Justice that they are not to be narrowly construed. As the court stated in Inter-Environnement Bruxelles ASBL, Pétitions-Patrimoine ASBL and Atelier de Recherche et d'Action Urbaines ASBL v Région de Bruxelles-Capitale (Case C-567/10) [2012] CMLR 909, para 37, "the provisions which delimit the directive's scope, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly". The interpretation of the directive, in this respect as in others, has been based primarily upon its objective rather than upon its literal wording.*

21. Adopting therefore a purposive approach, the complementary nature of the objectives of the SEA and EIA Directives has to be borne in mind. As Advocate General Kokott said in Terre Wallone (points 29- 30):

> *"According to Article 1, the objective of the SEA Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and*

adoption of plans and programmes by ensuring that an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.

The interpretation of the pair of terms 'plans' and 'projects' should consequently ensure that measures likely to have significant effects on the environment undergo an environmental assessment."

It is also necessary to bear in mind that the directive is intended to be applied in member states with widely differing arrangements for the organisation of developments affecting the environment. Its provisions, including terms such as "plan" and "programme", have therefore to be interpreted and applied in a manner which will secure the objective of the directive throughout the EU.

22. In relation to the stipulation in the second indent that plans and programmes must be required by legislative, regulatory or administrative provisions, it appears from the judgment of the Court of Justice in Inter-Environnement Bruxelles that that requirement is not to be understood as excluding from the

scope of the directive plans or programmes whose adoption is not compulsory. The court noted at para 29 that such an interpretation would exclude from the scope of the directive the plans and programmes concerning the development of land which were adopted in a number of member states. Accordingly, as the court stated at para 31, "plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as 'required'".

6. The obvious questions which arise from this are: What is the scope of the SEA Directive? And how is it to be ascertained? Lord Reed addresses those questions at Walton paragraphs 15-19 inclusive as follows:

15. The scope of the SEA Directive is defined by article 3. Paragraphs (1) and (2) provide:

"1. An environmental assessment, in accordance with articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.

2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,

(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to [the EIA Directive] …"

16. The obligation to carry out an SEA arises under article 3(1) in relation to plans and programmes referred to in article 3(2) to (4). Those provisions are concerned with plans and programmes "which set the framework for future development consent of projects". In relation to article 3(2)(a), the projects listed in Annex I to the EIA Directive include the construction of motorways, express roads and other roads with four or more lanes (Annex I, point 7), and therefore include the road with which these proceedings are concerned.

17. When member states require to determine whether plans or programmes are likely to have significant environmental

effects, they are directed by article 3(5) to apply the criteria set out in Annex II, the first of which is "the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources". It is implicit in that criterion that a framework can be set without the location, nature or size of projects being determined. As Advocate General Kokott explained in Terre Wallone (points 64-65):

"Plans and programmes may, however, influence the development consent of individual projects in very different ways and, in so doing, prevent appropriate account from being taken of environmental effects. Consequently, the SEA Directive is based on a very broad concept of 'framework'.

This becomes particularly clear in a criterion taken into account by the member states when they appraise the likely significance of the environmental effects of plans or programmes in accordance with article 3(5): they are to take account of the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by

allocating resources (first indent of point 1 of Annex II). The term 'framework' must therefore be construed flexibly. It does not require any conclusive determinations, but also covers forms of influence that leave room for some discretion."

18. Article 2 of the directive is headed "Definitions", and provides:

"For the purposes of this Directive:
(a) 'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:

- which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and

- which are required by legislative, regulatory or administrative provisions."

19. Although article 2(a) is headed "Definitions", it does not in fact define the terms "plan" or "programme", but qualifies

them. For the purposes of the directive, "plans and programmes" means plans and programmes which fulfil the requirements set out in the two indents: that is to say, they must be "subject to preparation and/or adoption by an authority at national, regional or local level or … prepared by an authority for adoption, through a legislative procedure by Parliament or Government", and they must also be "required by legislative, regulatory or administrative provisions".

7. Thus the broad scope of the SEA Directive is to be given effect by reference to its objectives which are to provide a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes. The fact that a document under consideration is not called a plan or a project does not disqualify the application of the Directive.

8. A CIL Charging Schedule satisfies the primary threshold of Article 3(2)(a) because it is prepared for town and country planning and sets the framework for future development. This is clearly so when the term "framework" is construed flexibility as Lord Reed says it must be in the final sentence of paragraph 17.

9. It is clear that a CIL Charging Schedule meets the two formal criteria in the Article 2 definition of "*plans and programmes"* quoted and discussed by Lord Reed at paragraph 18 and following.

10. Article 3 makes clear that the only plans or programmes which need to be subject to a SA are those which are "*likely to have significant environmental effects"*.

11. It follows that the proper application of SEA directive requires two questions to be asked and answered; one of fact, the other of judgment. The question of fact is; whether the document under consideration meets the formal criteria for potentially requiring a SA? The question of judgment is whether the document under consideration is likely to have significant environmental effects.

12. A CIL Charging Schedule meets the formal criteria and this explains why the departmental advice is wrong. It either fails to analyse the requirements of the Directive correctly in accordance with Lord Reed's judgment in Walton or it assumes without evidence that the discretionary question is answered negatively in every case.

13. The proper approach should be to advise local authorities to consider whether the CIL Charging Schedule is likely to have significant environmental effects. If the answer is negative then an SA does not have to be prepared. There may be cases in which a CIL Charging Schedule is brought forward simultaneously with a Core Strategy which examines, through its SA, all the possible implications of the Charging Schedule. In this example the Charging Schedule would not by itself give rise to any significant environmental effects and would not have to be the subject of a separate SA. A further example would involve a CIL rate set at nil.

14. On the other hand there may be CIL Charging Schedules which independently give rise to the likelihood of significant environmental effects which would not arise but for the Charging Schedule. Those which fall into that category must be the subject of a SA as a necessary condition of lawful adoption. The Mid-Devon Charging Schedule is a case in point.

MID-DEVON CHARGING SCHEDULE

15. On the undisputed and incontestable evidence this document is likely to give rise to significant environmental effects in two important ways.

16. The CIL rate proposed in the Draft Charging Schedule is £90 per m^2 for dwelling houses (C3). This figure derives from a viability calculation which concedes that at this level the likely proportion of affordable housing which may be successfully negotiated is 22.5%. It is conceded by the Council that this is likely to be the usual figure with variations (both up and down) depending on the particular circumstances prevailing in each site specific context.

17. In this regard it must be noted that the Allocations and Infrastructure DPD is a recently adopted part of the development plan and it contains policy AL/DE/3 which sets a target for 35% affordable housing.

18. The effect of adopting the CIL at this level is to override and contradict adopted development plan policy. The adopted policy sets a normative target of 35% recognising that there may be variations in a particular case. The CIL Charging Schedule resets that normative target to 22.5% recognising there may be variations in a particular case.

19. In this context it must be remembered that article 3(5) of the SEA Directive requires member states to decide whether a plan or

programme is likely to have significant environmental effects by applying the criteria set out in Annex II. The first of these is "*the degree to which the plan or programme sets a framework for projects…by allocating resources"*. The adopted development has a policy which allocates resources to address an affordable housing need by requiring a 35% contribution to this category from each new development. The effect of the CIL Charging Structure is to unilaterally change that allocation of resources by reducing the primary target in adopted policy to a substantially lower figure. In this way the CIL Charging Schedule is likely to have a significant environmental effect in the way explained in Walton. It needs a SA.

20. The second obvious effect of the CIL Charging Schedule which triggers the need for a SA arises from its impact on previously developed land (PDL).

21. The Core Strategy contains a policy COR7 which sets a target of 30% of new dwellings being developed on PDL. The examiner asked whether the evidence satisfactorily assesses the potentially different consequences for the imposition of the charge on Greenfield and PDL. The Council provided an equivocal answer to this question pointing out that the numerical implications of

losing all of the PDL allocations is 6.6% and therefore easily addressed by a contingency reserve. For this reason, it was said, "*…the assessment of brownfield sites was not given as a priority to the Council's consultants…"*.

22. This is a further example of the CIL Charging Structure subverting adopted development plan policy. There is, in this, implicit recognition that the CIL Charging Schedule may frustrate the development of PDL and therefore restrict or eliminate the achievement of COR7. This is likely significant environmental effect by itself but the matter goes further than that. The CIL Charging Structure is recalibrating the balance between Greenfield and PDL sites which come forward to meet the housing requirements of the plan by increasing the former and reducing the latter. The impact of these different locations of housing development has significant implications for the character of development in the locality and this point has been overlooked by the Council in responding to the examiner's question where the focus is confined to the numerical considerations. Clearly, the redistribution of development to favour Greenfield locations more prominently than planned for is a likely significant environmental effect which gives rise to the need for a SA applying the reasoning in Walton.

CONCLUSION

23. It is clear from the Cala litigation and the Walton case itself that national planning authorities are still coming to grips with the scale, range, depth and reach of the SEA Directive. The first part of this opinion seeks to argue that a CIL Charging Schedule is capable of coming within the strong gravitational pull of the SEA Directive. Whether it does in any particular case will depend on the circumstances. It follows that a generally applicable and dogmatic assertion that a SA is never required for a CIL Charging Schedule is an imperfect reflection of the current state of the law in this area.

24. The second argument advanced here is that the Mid-Devon draft charging schedule is a paradigmatic example of one which requires an S.A. Firstly because it fundamentally re-orders priorities set out in key policies of the adopted development plan and secondly because it has real and serious implications for character, appearance and sustainability of new development which are likely to give rise to significant environmental effects.