Case Name: *City of York Council, R (on the application of) v Secretary of State for Housing, Communities and Local Government & Anor* [2018] EWHC 2699 (Admin) (22 October 2018)

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Commentary: The Court refused the application for judicial review by York City Council of the decision by the Secretary of State to allow an appeal by a developer (Trinity) under s106BA. The application under s106BA was made the day before the repeal of s106BA and the Council's first ground was that the right to appeal to the Secretary of State was extinguished by the repeal. The development had been completed by the time that the application was made and the Council's second ground was that this meant that it was no longer possible to argue that the development was "not economically viable". The Court rejected both grounds of challenge.

This case is related to the Court of Appeal judgment handed down in August 2018 (York City Council v. Trinity One (Leeds) Ltd [2018] EWCA Civ 1883) which resulted from the claim brought by the Council in the Chancery division seeking to enforce Trinity's affordable housing obligations. The Court of Appeal had upheld the judgment that, although the contract was enforceable (despite the method of calculation being based on Social Housing Grant which no longer existed), s106BA was retroactive in effect so that it applied to affordable housing obligations where the obligation to provide affordable housing or pay a commuted sum had already been triggered at the date of the application under section 106BA. Therefore, if Trinity were successful in its appeal to the Secretary of State under section 106BA, it would not be required to pay the contributions. Trinity was successful in that appeal as the amount of the contribution was reduced. The current case concerned the Council's judicial review of that appeal.

The Court rejected the Council's first ground that the right to appeal had been extinguished by the repeal of s106BA. The Court reviewed the relevant case law on s16 of the Interpretation Act 1978. Under the statute, for a right to be preserved, it must be "acquired" or "accrued". Per Simon Brown LJ, as he then was, in Chief Adjudication Officer v. Maguire [1999] 1 WLR 1777-8:

"A mere hope or expectation of acquiring a right is insufficient. An entitlement, however, even if inchoate or contingent, suffices. The fact that further steps may still be necessary to prove that the entitlement existed before repeal, or to prove its true extent, does not preclude it being regarded as a right. (1787H)
…
… whether or not there is an acquired right depends upon whether at the date of repeal the claimant has an entitlement (at least contingent) to money or other certain benefit receivable by him, provided only that he takes all appropriate steps by way of notices and/or claims thereafter." (1788F)

The Court held that it was artificial and wrong to characterise the pre-repeal "right" of the developer under the repealed provisions as merely a hope of persuading a decision maker to

exercise discretion in its favour because s106BA(3)(a) mandates an outcome in favour of the developer if the exercise of economic judgment leads to the conclusion that the development is not economically viable as it stands. Evaluation of the factual position and exercising judgment on economic viability is not the same thing as exercising a discretion. "The true nature of the developer's right up to 30 April 2016 is that it was an inchoate right to require a statutory interference with its prior contractual obligation, so as to modify or discharge it, contingent upon persuading the local authority (or on appeal, the inspector) that the development would not otherwise be economically viable." However, the making of the application before repeal was an essential step that had to be taken in order to create and establish the contingent right to modification or discharge of the obligations.

The second ground, that a completed development could not be economically unviable, was also rejected. The Court held that although it is the activity of carrying out the development works that must be economically viable, economic viability is not necessarily established by the successful completion of the physical works. The Court agreed that the test should be applied as at the date of the initial determination or appeal. Whether the works have been completed by then may be a matter of chance and the developer should not be encouraged to halt building works until after the application has been determined, nor to apply protectively to hedge against the risk of a drop in the market.

The Court accepted that there was therefore no time limit placed on the developer to apply to modify or discharge its affordable housing obligations however long ago the building works were completed. However, since the provisions have been repealed it is not open to developers to make further applications at this point.

Case summary prepared by Town Legal LLP