The Planning Inspectorate

Appeal Decision

by Mr A U Ghafoor BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9 July 2020

Appeal Ref: APP/L/19/1200356

[redacted]

- The appeal is made under section 218 of the Planning Act 2008 and Regulation 118 of the Community Infrastructure Levy Regulations 2010 as amended [the 'CIL Regs'].
- The appeal is made by [redacted]
- The Demand Notice ['the DN'] was issued by East Suffolk Council as the collecting authority ['the CA'] on 25 November 2019.
- The deemed commencement date of development is stated as 20 November 2019.

Details of chargeable development to which each DN relates

- The relevant planning permission to which the levy relates is [redacted]
- The description of the development described on the DN is as follows: [redacted]
- The outstanding amount of levy payable for a failure to submit a Commencement Notice ['CN'] is [redacted]

Decision

1. The appeal is allowed, and the Demand Notice is quashed.

Inspector's reasons[1]

2. The main issue is as follows: Has the CA correctly determined the deemed commencement date?

3. For reasons that will become clearer later, I will briefly set out background information and planning history. On 1 July 2016, the local planning authority ['the LPA'] granted a planning permission[2] for the following description of development: [redacted] subject to conditions [for convenient shorthand I refer to this permission as 'the 2016 permission']. Condition 1) required commencement of the approved scheme before the expiry of three years. Condition 2) states development shall be carried out in accordance with plans numbered [redacted] The schematics and floor plans show two buildings referred to as [redacted]

4. In construing the effect of the 2016 permission, it allowed the carrying out of operational development comprising demolition of existing outbuildings and rebuilding. Since existing buildings had already been demolished, the application was

[1] Having reviewed all the evidence and further comments, I am satisfied that a physical site visit is unnecessary to determine the appeal. I proceed on this basis.
[2] LPA ref [redacted]

in part retrospective and prospective. This development was zero-rated for CIL purposes[3].

5. [redacted] forcefully argues that upon the grant of the 2016 permission building work commenced pursuant to the approved scheme. He considered that, since the scheme was exempt, submitting a CN was unnecessary[4]. [redacted] The argument is that [redacted] s all accord with the original application permitted in 2016. The claim is that the building is a bare shell without services and is in use for storage purposes. The building work carried out appear to fall within the definition of a "material operation"[5]. However, the dispute between the appeal parties is whether the scheme permitted in the 2016 permission has been implemented.

6. There is some disagreement between the appeal parties as to the exact height of the barn as built. For example, [redacted] evidence is that the barn is 3.850 metres while the LPA suggest it is slightly taller than the permitted ridge height. Be that as it may, a detailed survey revealed some discrepancies between the as built building and the scheme approved in the 2016 permission. Officers considered that the building did not fully accord with the plans in terms of design and layout. The location and size of the openings were different to those illustrated on the approved plans which would, when complete, serve a substantially altered internal configuration. The revised fenestration detail altered the external appearance of the buildings. A detailed comparison indicates to me that the development implemented on the ground significantly and substantially differs from the scheme approved in the 2016 permission. In my planning judgement, irrespective of [redacted] intentions, there was an early departure from the approved scheme. Given the extent of the amendments, I agree with the CA that the development had not been carried out in accordance with the terms of the 2016 permission.

7. After some negotiations a fresh application for planning permission was submitted to the LPA. This was for a [redacted]. Whilst there is a dispute as to whether the application was for a material change in the use of an existing building, it is apparent to me that planning permission was sought to regularise the carrying out of unauthorised building operations. This is because the building work did not accord with the scheme permitted in the 2016 permission. Subsequently, on 15 November 2019, the LPA granted planning permission[6] for the following description of development: [redacted] ['the 2019 permission'].

8. The 2019 permission is subject to a condition requiring development to be carried out in accordance with plans numbered [redacted] The schematics and floor plans show [redacted] Clearly, it appears that drawings were changed to reflect the reality on the ground in terms of the design, layout, scale and external appearance of the whole development. Compared

[3] CA's statement referred to charging schedule (takes effect 1 August 2013) and rates summary.
[4] CIL Regs 67(1A) and 42.
[5] Section 56(4) of the Town and Country Planning (1990) Act as amended ['the 1990 Act'] and CIL Regulation 7(2) and (6).
[6] LPA ref [redacted]

to the scheme permitted in the 2016 permission, the 2019 development is substantially different in nature and design. The evidence presented illustrates that the as built development is broadly consistent with the scheme approved in the 2019 permission.

9. On the particular facts and circumstances of this case it is apparent to me that, on or before the date of the 2019 application and subsequent permission, building operations comprised in that scheme had already begun on the ground. To my mind, the 2019 permission has been implemented. Logic indicates that the application sought planning permission for a part-retrospective-and-part-prospective development. In other words, and at risk of repetition, planning permission was sought to regularise unauthorised building work which, once complete, would result in a building used as a residential annexe and storage purposes. The source of the power to grant retrospective planning permission derives from s73A of the 1990 Act. I therefore find that the 2019 permission is in effect, a standalone permission for the carrying out of operational development retrospectively granted. Contrary to [redacted] submissions, a decision-maker considering an application for planning permission could grant, under s73A, retrospective permission for a development already carried out without it usually being necessary to forewarn the applicant of this before determination.

10. Even if an alternative view is to prevail, that is development permitted by the 2019 permission is CIL exempt, this line of argument does not assist [redacted] CIL Regs 42A exempts residential annexes or extensions from the levy. The procedure to obtain an exemption is clearly explained in CIL Regs 42B. There is nothing before me to show that an exemption had in fact been applied for, or granted by the CA, before building work commenced on site. I attach very limited, if any, weight to this line of argument. In any event, this appeal is not the right procedure to seek an exemption retrospectively or challenge the validity of the CN on that ground.

11. Having examined the history and planning permissions granted by the LPA, I find that, for CIL purposes, the chargeable development is derived from the 2019 permission. CIL Regs 7(5) states that development for which planning permission is granted under s73A (planning permission for development already carried out); or granted or modified under s177(1) (grant or modification of planning permission on appeals against enforcement notices), *is to be treated as commencing on the day planning permission for that development is granted or modified (as the case may be)* [my emphasis]. In this case, CIL Regs 7(5) is engaged.

12. Now then, here is the problem for the CA. The DN states deemed commencement date as "20 November 2019" but planning permission for part retrospective and prospective development was in fact granted on 15 November 2019. The former was stated on the DN because that is when the Council's Infrastructure Team were first made aware permission was granted for chargeable development. In these proceedings, the CA realised its mistake, which is elaborated in its written representations. It submits that no disadvantage is caused to [redacted] as a result of the apparent error, but on appeal to the Secretary of State there is no power to correct or vary the DN within the CIL Regs. The CA has not made me aware of any such powers.

13. I'm afraid the CA has erred as a matter of law. It manifestly failed to comply with CIL Regs 7(5) and 69(2)(d). As soon as the mistake was realised, the CA could have, and should have, exercised its powers under CIL Regs 69 sub (3) by serving a revised DN. The earlier DN in respect of the same chargeable development would

have ceased to have effect pursuant to CIL Regs 69(5). Thus, it must follow that the DN is technically flawed and the CA has incorrectly determined the deemed commencement date.

Other matters

14. I acknowledge [redacted] concerns and his lack of awareness of the law, but he was represented by an agent. CIL Regs are formulaic in that certain action is required before the commencement of development and failure to meet with the procedures can have significant consequences including the loss of exemption granted. Concerns about the handling of matters relating to the planning application and enforcement, including floor calculations, are not within the scope of this appeal.

Conclusions

15. I have reviewed all the arguments advanced in support of the CIL Regs 118 appeal, and evidence presented. However, these arguments are both counter-intuitive and unpersuasive. On the facts and circumstances presented, development permitted by the 2019 permission had commenced for which permission was retrospectively granted by the LPA under s73A of the 1990 Act. Nonetheless, for reasons set out in paragraph 11 to 13 above, the CA has incorrectly determined the deemed commencement date.

16. CIL Regs 118 sub (5) states that the appointed person must determine a revised deemed commencement date for the relevant development where an appeal is allowed. Clearly, the deemed commencement date is 15 November 2019.

17. For all the above reasons, I conclude that the appeal should be allowed and the DN is quashed as set out above in paragraph 1.

A U Ghafoor

Inspector