The Planning Inspectorate

Appeal Decision

by Ken McEntee

a person appointed by the Secretary of State for Communities and Local Government

Decision date: 29/03/2017

Appeal ref: APP/Z2830/L/16/1200075

[redacted]

- The appeal is made under section 218 of the Planning Act 2008 and Regulations 117(a) and 118 of the Community Infrastructure Levy Regulations 2010 (as amended).
- The appeal is brought by [redacted].
- A Liability Notice was served on the appellants on 9 November 2016.
- A Demand Notice was served on the appellants on 9 November 2016.
- The relevant planning permission to which the CIL surcharge relates is [redacted].
- The description of the development is: "[redacted]".
- The date on which planning permission was issued is [redacted].
- The alleged breach of planning control is the failure to submit a Commencement Notice before commencing works on the chargeable development.
- The outstanding surcharge for failure to submit a Commencement Notice is [redacted]

Summary of decision: **The appeal under Regulation 117(a) is dismissed but the appeal under Regulation 118 is allowed.**

The appeal under Regulation 117 (a)

1. The alleged breach which led to the surcharge in this case is the failure to submit a Commencement Notice (CN) before the chargeable development commenced, as required by Regulation 67. This case presents the situation where the original planning permission was granted in 2012 when there was a CIL schedule had not been adopted for South Northamptonshire Council (the Collecting Authority). However, it appears the development was not built entirely in accordance with the approved plans and retrospective permission was required. However, when retrospective permission was granted on [redacted] a CIL schedule was now in place and the appellants immediately became liable.

2. The main basis of the appellants' case is that as the Liability Notice (LN) and Demand Notice (DN) were served at the same time, they did not have the opportunity to respond to the requirements of the LN and submit a CN. In normal circumstances, the correct time for a LN to be served by the Collecting Authority is after planning permission has been granted. It is envisaged by the guidance that the LN will be followed by the submission of a CN by the relevant person. However, in this case the relevant development was begun before planning permission was granted and consequently before the Council could serve a LN. By not carrying out the works in accordance with the original approved plans and

consequently requiring retrospective planning permission on what amounted to a materially different development, the appellants effectively prevented the normal sequence of events from taking place. The Council correctly served a LN and DN at the same time and the appellants immediately became liable for CIL and a surcharge as it was clearly not possible for a CN to be submitted before beginning works as a result of their actions. In other words, this was a situation of the appellants' own making.

3. The appellants' agent argues that if the Council are correct there is a void in the system as "…*since it follows that the grant of every application for retrospective consent where an earlier consent for the same development exists but did not attract a levy due to the fact that it predated the adoption date of the CA's CIL will automatically attract a surcharge for failure to submit a CN – a requirement that can never be fulfilled in such circumstances as the development being the subject of a retrospective application will by its very definition have already commenced."* However, what has been built in this case is not what the original permission allowed and therefore a planning permission did not exist for the "same development" to that applied for retrospectively.

4. The agent also contends that the retrospective permission could have been consented via Section 73 of the Town and Country Planning Act by amending a condition of the original permission. This would have tied the development to the previous permission that pre-dated the introduction of CIL, thus making it not liable for CIL. However, no such application was before the Council to consider and whether one will be submitted in the future can only be considered as a matter of speculation at this stage. Should the appellants decide to follow this route as they contend they will, it will be a matter for the Council to consider at that time and is not one for me to consider in determination of this appeal.

5. The overall conclusion reached on the appeal on ground 117 (a) is that it is an inescapable fact the appellants did not submit a CN before commencing works on the chargeable development. Therefore, the appeal cannot succeed on this ground as the breach occurred as a matter of fact and I am satisfied the Council have imposed the correct surcharge in accordance with Regulation 83. The appeal under Regulation 117 (a) fails accordingly.

The appeal under Regulation 118

6. An appeal on this ground is that the Collecting Authority has issued a Demand Notice with an incorrectly determined deemed commencement date. Regulation 68 explains that a Collecting Authority must determine the day on which a chargeable development was commenced if it has not received a commencement notice in respect of the chargeable development but has reason to believe it has been commenced, which it clearly has been in this case.

7. With that in mind, CIL Regulation 7(2) explains that development is to be treated as commencing on the earliest date on which any material operation begins to be carried out on the relevant land. However, as pointed out by the appellants, Regulation 7(3) explains that this general rule is subject to provisions, such as that stated in Regulation 7(5) (a) where development has already been carried out and granted planning permission under section 73A of the TCPA. In such cases, development is to be treated as commencing on the day planning permission for that development is granted or modified. Therefore, as

retrospective permission was granted in this case, the general rule in Regulation 7(2) is displaced and the correct commencement date should be taken as the date of the grant of planning permission, which in this case was 9 November 2016.

8. The Council accept that the date of 8 November 2016 was an error and the correct deemed commencement date should be 9 November 2016. In these circumstances, the appeal under Regulation 118 succeeds and, in accordance with Regulation 118(4), the Demand Notice ceases to have effect. As required by Regulation 69(4), the Council must now serve a revised Demand Notice with a revised deemed commencement date of 9 November 2016.

9. However, while the appeal under Regulation 118 succeeds, I see no good reason to use my discretionary powers under Regulation 118 (6) to quash the surcharge imposed for the reasons given in paragraphs 1 to 5 above.

Formal decision

10. For the reasons given above, I hereby dismiss the appeal under Regulation 117 (a) and uphold the CIL surcharge, but allow the appeal under Regulation 118.

K McEntee