The Planning Inspectorate

Appeal Decision

Site visit made on 28 February 2017

by Hilda Higenbottam BA(Hons) MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 21 April 2017

Appeal Ref: APP/K3605/L/16/1200069

[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 (the Regulations).
- The appeal is made by [redacted] against:
  1. a Demand Notice issued by Elmbridge Borough Council under Regulation 69 on [redacted].
  2. a Liability Notice issued by Elmbridge Borough Council under Regulation 65 on [redacted].
- The date of intended or deemed commencement of development: [redacted].
- The reason for issuing the Demand Notice: the development is deemed by Elmbridge Borough Council to have commenced.
- Reference of relevant planning permission [redacted].
- Description of development[1]: [redacted]' (2016 permission).
- The outstanding amount of CIL payable that the Demand Notice relates to: [redacted]

Decision

1. The appeal is allowed and the Demand Notice and the Liability Notices are quashed.

Main Issues

2. The main issues in this case are whether the Collecting Authority has issued a Demand Notice with an incorrectly determined deemed commencement date and if it has not whether or not a surcharge for the late payment of CIL is payable.

Reasons

3. There is no dispute that the development is CIL liable. However, the appellant considers that an exemption should be or should have been granted because it is being built as a self-build house for the appellant and his family. Section 54A of the Regulations sets out criteria for an exemption from CIL payment if

[1] The description of development in the LN and the DN is different from that stated on the decision notice for application number [redacted]. The description stated on the decision notice is '[redacted]'

the chargeable development is for self-build housing. Section 54B sets out the mechanics to obtain an exemption. The procedure involves an application to be made to the Collecting Authority before commencement of development and on the condition that the claim lapses if the chargeable development is commenced before a decision is made on the self-build exemption.

4. A decision relating to a self-build exemption is not within the scope of Regulations 117 or 118 appeals. As this matter is beyond my remit in this appeal, I am unable to give consideration to it in this decision and it has no bearing on my consideration of the appeals before me.

The appeals

5. Regulation 118 (1) states a person whom a DN is served which states a deemed commencement date may appeal to the appointed person on the ground that the Collecting Authority has incorrectly determined that date. The Collecting Authority must determine the day on which chargeable development was commenced if it: (a) has not received a commencement notice in respect of the chargeable development but has reason to believe it has commenced; or (b) has reason to believe that it was commenced earlier than the intended commencement date. In this case, the Council had not been notified of a commencement date. It follows from (a) that if an appeal is to be successful the appellant should show that the development has not commenced on the date specified in the DN ([redacted]).

6. The Regulation 117 (a) appeal relates to surcharges for failure to pay the CIL in full within 30 days (Regulation 85) in relation to the chargeable development granted under planning permission [redacted].

Planning History

7. Planning permission was granted in December 2015 (reference [redacted]) for a detached two storey house with rooms in the roof space, dormer windows and attached garage following demolition of the existing house. A self-build exemption was granted in relation to this chargeable development.

8. A second application (reference [redacted]) for the same description of development was granted in January 2016, the plans for the second permission show a larger dwelling.

9. A third application (reference [redacted]), for a variation of condition 2 of planning permission [redacted] under section 73 of the Act was approved on [redacted]. The development permitted in this scheme differed from the second application [redacted] in that it extended the kitchen footprint and height, extended the garage footprint and height changed a hip roof to gable at the rear and introduced a new dormer window and rooflight to create residential accommodation over the garage. The informative on this decision stated that condition 5 of application [redacted] was a pre-commencement condition and that as the development had already commenced prior to discharging this condition there was a breach of planning permission and that the applicant should contact the local planning authority.

10. The appellant states that development on site is none of the approved permissions and is another scheme for which a retrospective planning permission is being applied for under section 73A of the Act. At the time of my site visit a submission had been made to the Council for this new application

although I understand it had not been validated as an application and no reference number was available.

Condition Precedent Point

11. I note that Condition 5 of planning permission [redacted] requires tree protection measures to be installed before any development takes place on site and that a pre-commencement meeting is arranged. Similarly in the planning permission [redacted] condition 5 follows the same pre-commencement language, despite the Council being fully aware that the original dwellinghouse had been demolished and works begun on site before this application was submitted. Indeed I note that an informative within that decision states that this is the Council's position.

12. In *R(oao Hart Aggregates Ltd)v Hartlepool BC* [2005] EWHC 840 (Admin) it was held that a distinction had to be drawn between a condition which required some action to be undertaken before development is commenced and a condition which expressly prohibits any development taking place before a particular requirement has been met. In that case Sullivan J. took the view that even so it is necessary for the condition to be expressly prohibitive of commencement of development and to go to the heart of the permission. If that is not the case it would be a breach of the condition and the development would not be development without planning permission. In a subsequent Court of Appeal decision (*Greyfort Properties Ltd v Secretary of State for Communities and Local Government* [2011] EWCA Civ 908 it was specifically endorsed that there should be a need for a condition to go to the 'heart of the matter' to be a true condition precedent. Condition 5 of both permission [redacted] and permission [redacted] concern protection of trees on the site and do not, in my view, go to the heart of the planning permission. As such, the failure to comply with this condition on either permission does not, to my mind, render the whole development unlawful but is a breach of condition.

Commencement of Development/Demolition

13. Regulation 7 (2) of the Regulations states 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. Regulation 7 (6) states that material operation has the same meaning as section 56(4) of the Town and Country Planning Act 1990.

14. A building control demolition notice for the demolition of the original property was submitted on [redacted]. The Council carried out a site visit on 1 August 2016. It was noted at this time that the original house had been demolished and work on the construction of a new dwelling had been undertaken. The Council determined following this site visit that a deemed commencement date of two weeks after the submission of the demolition notice i.e. [redacted], was appropriate.

15. Demolition of buildings is brought expressly with the definition of 'Buildings Operations' in section 55 (1A) of the Act, and while section 55 (2) (g) then excludes from the definition of development any description of buildings specified in a direction given by the Secretary of State, the demolition of the dwelling house at the appeal site was development. However, I accept that the demolition of the dwelling house did not require prior notification under the Town and Country Planning (General Permitted Development) (England) Order

2015 as it fell within 'excluded demolition' because it was demolition on land which is the subject of a planning permission for the redevelopment of the land granted on an application. It is clear to me that the act of demolition of the dwelling house amounts to a constructive start of one or more of the planning permissions for the appeal site. The appellant failed to submit a CIL commencement notice prior to the demolition of the original house.

16. In a letter dated 30 August 2016 Dentons acting for the appellant stated it was the ultimate intention of their client (the appellant in this case) to implement planning permission [redacted]. At that time application [redacted] had not been determined. The Council assumed therefore that the development commenced was that granted under permission [redacted]

17. Planning application [redacted] was submitted on [redacted]. Prior to the determination of planning application [redacted] a site inspection by the planning officer was undertaken. Photographs taken at that time are considered to show that the extensions being applied for under planning application [redacted] were under construction. There is no date stated for the officer visit in connection with this application or the photographs. In my view, it was more likely than not that works were undertaken from the beginning of construction on site following more or less the plans submitted for that application.

18. At my site visit I noted a number of differences from the scheme permitted under reference [redacted]. The principle changes were minor variations to rooflight locations in the second floor area and some increased widths of elements within the overall design such as the width of the projecting front entrance area is shown to be 6363mm on the approved scheme but measured 7014mm at the site visit and the gap between the living room flank and the family room flank elevation is shown to be 4670mm on the approved plan and measured 5154mm on site.

19. The Planning Practice Guidance states there is no definition of what amounts to a non-material amendment or a minor material amendment, but in the case of a minor material amendment it is likely to include any amendment where its scale and/or nature results in a development which is not substantially different from one which has been approved. The overall scale, width, depth and height of the dwelling under construction now are, I understand, as shown on the drawings granted permission under reference [redacted]. Due to the scale of the building permitted [redacted], on the evidence available I consider that the changes in width of the entrance and the slightly wider gap to the rear are de minimis in the overall scheme. The roof light and internal layout alterations do not affect the external appearance of the building. The amendments to the [redacted] scheme that I saw on site are, in my view, non-material amendments to the approved scheme. As such, I consider that what is being constructed on the appeal site is that permitted under [redacted] and is the chargeable development for the purposes of CIL.

20. I was also informed that it is intended to construct a balcony above the single storey projection of the living room to serve the master bedroom. This had not been constructed at the time of my site visit and therefore I have not taken it into account in coming to my conclusions in relation to what has been built. Reference is also made to the swimming pool and ancillary structures including

a patio area. These are detached from the dwellinghouse under construction, albeit the patio would abut the rear wall of the dwelling. Again I consider these matters do not affect the implementation of the scheme pursuant to permission [redacted].

21. In *Lawson Builders Ltd v Secretary of State for Communities and Local Government* [2015] EWCA Civ 122 it is stated that theoretically section 73 enables an application to be made whether the development has not yet commenced or is in progress or has been completed. If the development has not yet commenced a new grant of permission will take effect prospectively. If the development is partially completed the permission may take effect prospectively or upon exercise of the section 73A power both retrospectively and prospectively. Section 73A of the Act may include permission in respect of development that has already been carried out. In Lawson Builders it was further found that it is implicit in the terms of sections 73 and 73A of the Act, read together, that in an appropriate case a planning authority considering an application under section 73 for planning permission to proceed with a development without complying with conditions attached to an existing permission may grant, under section 73A retrospective planning permission for a development already carried out. I consider that the [redacted] approval was part retrospective and part prospective and I believe should be considered to have been granted under section 73A as the informative on the decision notice clearly states that the development had commenced and the Council evidence and understanding was that it was what was being constructed on the site and it was the intention of the appellant to continue to implement that scheme.

22. Regulation 7 (5) states that for planning permission granted under section 73A of the Act commencement of development permitted is to be treated as commencing on the day planning permission for that development is granted or modified. I therefore consider that the Deemed Commencement date of [redacted] is actually the day of the consent which was [redacted].

Conclusions

23. For the reasons given above I conclude that the Collecting Authority has issued a Demand Notice with an incorrectly determined deemed commencement date. The planning permission reference [redacted] was a partially retrospective planning permission and as such the Deemed Commencement date was [redacted]. This part of the appeal therefore succeeds and I will direct that the Demand Notice is quashed.

24. In relation to the surcharge for the non-payment of CIL within 30 days of the Deemed Commencement date in the Demand Notice as this is based on a Deemed Commencement date of [redacted] this appeal also succeeds as I have found that date to be incorrect. As such, the appeal succeeds in so far as it relates to that date and I will direct that the Liability Notice is quashed.

Hilda Higenbottam

Inspector