



Appeal Decision

by **Ken McEntee**

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

Decision: 19 July 2017

Appeal ref: APP/K0235/L/16/1200082

- The appeal is made under Regulations 117(1)(a),(b) and (c) and 118 of the Community Infrastructure Levy Regulations 2010 (as amended).
- The appeal is brought by [REDACTED] against surcharges imposed by Bedford Borough Council.
- A Liability Notice was issued on 20 June 2016.
- A Demand Notice was issued on 13 July 2016.
- A further Demand Notice was issued on 19 October 2016.
- A revised Demand Notice was issued on 8 December 2016.
- The surcharges concern late payment of the CIL and late payment interest.
- The outstanding surcharge for failure to assume liability is [REDACTED].
- The outstanding surcharge for late payment is [REDACTED].
- The outstanding late payment interest surcharge is [REDACTED].
- The relevant planning permission for which the CIL surcharges relate is [REDACTED].
- The description of the development is [REDACTED].

Summary of decision: The appeal on all grounds is dismissed and the surcharges of [REDACTED] and [REDACTED], plus the late payment interest charge of [REDACTED] are upheld.

Procedural matters

1. Each party has made an application for costs against the other. These applications are the subject of separate decision documents accompanying this letter.

The appeal on Regulation 117 (1) (a)¹

2. The main basis of the appellant's case is that the Council (Collecting Authority) issued a Demand Notice, with late payment surcharges, while the appellant was still awaiting the outcome of a request to pay the CIL by instalments. A Liability Notice was issued on 20 June 2016, followed by a Demand Notice on 13 July 2016 requiring the payment by 19 August 2016. However, an appeal under Regulation 114 was submitted to the Valuation Office Agency in the meantime, thus putting matters on hold. After the Valuation Office's decision of 26 September 2016 not to entertain the appeal, a further Demand Notice was issued on 19 October 2016 requiring payment of the CIL by 2 November 2016.

¹ The claimed breach which led to the surcharge did not occur

3. The appellant then made a request by letter of 22 October 2016 to pay the CIL by instalments. The Council responded on 7 November 2016 confirming that they had an instalment policy in accordance with Regulation 69(B) and although the request fell outside the criteria of the policy, they would nonetheless consider it. However, they required further information to be submitted by 21 November 2016 for the request to be fully entertained. The appellant duly provided the information to support his request on the due date. However, on 8 December 2016 the Council sent a letter to the appellant, refusing his request for an instalment plan, but on the same day sent a Demand Notice, including a late payment surcharge and interest.
4. I note that the Council have not responded to the appellant's point that by issuing both the decision on the instalment plan request and a Demand Notice, including a late payment surcharge and interest, at the same time, it did not give the appellant the opportunity to pay the CIL without incurring late payment surcharges. I take the view that the appellant had a reasonable expectation for the matter to be put on hold while his application to pay by instalments was being considered. While it was not unreasonable for a Demand Notice to be issued on the same day as the decision on the instalment plan request, I agree with the appellant that it appears perverse to demand a late payment surcharge when the appellant was clearly waiting for a decision on whether he could pay the CIL by instalments or whether he would have to pay in full; indeed, the Council gave no indication to the appellant that they considered that to be necessary if a late payment surcharge was to be avoided. It clearly would not be logical to have expected the appellant to pay the full CIL upfront while the Council considered his request to pay by instalments.
5. The appellant eventually paid the outstanding CIL and its surcharges on 22 December 2016. The Council contend that by doing so the appellant has accepted he was liable to pay the surcharges. However, I do not agree with this argument and accept the appellant's reasonable assertion that he decided to pay the full amount as he was concerned that if he did not do so he could be faced with having to pay further surcharges and/or have legal action being taken against him, as explained in the decision letter of 8 December 2016 refusing the request to pay by instalments.
6. Having said all that, I have to determine under the terms of Regulation 117(1) (a) whether or not the claimed breach which led to the surcharge occurred. With that in mind, irrespective of the sequence of events described above, the inescapable fact is that the appellant did not pay the CIL by the deadline given in the Demand Notice of 19 October 2016. While it may seem perverse to choose to do so, the Council were nevertheless entitled to use their discretionary powers to impose a surcharge and interest for late payment under the terms set out in Regulation 85. Therefore, while I have sympathy with the appellant and take the view he has considerable mitigation for not paying the CIL on time, I have no option but to dismiss this element of the ground 117(1) (a) appeal.
7. Nevertheless, if the appellant is unhappy with the conduct of the Council in dealing with this case, it is open to him to submit a complaint through the Council's established complaints procedure in the context of local government accountability.
8. With regards to the alleged breach of failing to assume liability, there is no evidence before me that the appellant submitted an assumption of liability form

(Form 1) to the Council before commencing works on the chargeable development as required by Regulation 31. Consequently, I am satisfied that the breach of failing to assume liability occurred.

9. The overall decision reached therefore is that the appeal on Regulation 117(1) (a) fails and the surcharges and late payment interest charge are upheld.

The appeal of on Regulation 117(1) (b)²

10. A copy of a Liability Notice issued on 20 June 2016 was included with the appellant's grounds of appeal. Therefore, it is not clear why an appeal on this ground has been made. In these circumstances, the appeal on ground 117(1) (b) fails accordingly.

The appeal on Regulation 117 (1) (c)³

11. Regulation 83 states that where a chargeable development (D) is commenced before the collecting authority has received a valid Commencement Notice in respect of D, the collecting authority may impose a surcharge equal to 20 per cent of the chargeable amount payable of D or ██████, whichever is the lower amount. As ██████ is clearly lower than ██████, I am satisfied the Council have correctly calculated the surcharge.
12. With regards to the surcharge for failing to assume liability, Regulation 80 explains that a collecting authority may impose a surcharge of ██████ on each person liable to pay CIL in respect of a chargeable development if nobody has assumed liability to pay CIL and the chargeable development has commenced. Therefore, I am satisfied that this surcharge has also been calculated correctly.
13. However, the Council have confirmed that they incorrectly calculated the late payment interest surcharge. They have imposed a charge of ██████ but contend that the correct charge should have been ██████. However, Regulation 87(2) (b) explains that such interest must be calculated at 2.5 percentage points above the Bank of England base rate. As that currently stands at 0.25%, the correct percentage charge of the CIL is 2.75%. The CIL in this case is ██████ and 2.75% of ██████. Therefore, the Council also appear to have recalculated the charge incorrectly. Nevertheless, as the Council point out, Regulation(2)(a) explains that the collecting authority is not required to repay an overpayment where it is satisfied that the amount of the overpayment is less than any reasonable administrative costs which it would incur in making the repayment. Therefore, as the overpayment was less than ██████, I am satisfied it would not be reasonable for the late payment interest surcharge to be quashed or recalculated. In these circumstances, the appeal on ground 117 (1) (c) fails accordingly.

Appeal on Regulation 118⁴

14. The appellant submitted a Commencement Notice on 6 July 2016 stating a commencement date of 20 June 2016, which is the date of when planning permission was granted. Consequently, that is the date the Council stated as the deemed commencement date in the Demand Notice. However, the appellant sent

² The collecting authority failed to serve a liability notice in respect of the development to which the surcharge relates

³ The surcharge has been calculated incorrectly

⁴ The Collecting authority has issued a demand notice with an incorrectly determined deemed commencement date

a further Commencement Notice on 1 August 2016 giving a commencement date of 9 August 2016, which the Council refused to accept. The appellant contends that the original commencement date was given in error due to ill health and the correct date is 9 August 2016. The appellant has supported his claim with documentary evidence, such as letters from Diabetes UK and a Consultant Diabetologist at Bedford Hospital. In the latter, when referring to the appellant's condition, the letter states "*When patients' blood sugars are low, this can affect their ability to reason and perform tasks correctly and if one was not aware that one's blood sugar was low at the time of completing forms, it would be possible to put incorrect information on the forms without realising this*".

15. In view of the medical evidence provided I accept that it is possible for the appellant to have made an error in completing the original Commencement Notice. However, this has to be weighed against other conflicting evidence that is before me. For example, I note that in the Council's statement in relation to the Regulation 114 appeal (submitted by the appellant), they point out that Bedford Local Taxation received correspondence from Right Homes Sales & letting Agents advising that tenants had moved into the appeal property the previous day (20 June 2016). Added to this, although I note that a Building Regulations 'Final Certificate' was issued on 30 August 2016 by PWC Building Control Services, the same company stated in an e-mail to the Council on 17 August 2016 that "*The project was completed for Building Regulations on 11 August 2016*", which is only two days after the appellant's claimed commencement date. When this evidence is added to the Revenues and Benefits Service findings from a site visit conducted on 19 May 2016, where it was concluded "*...as most work is completed with only a few fixtures, fittings and painting to be completed*", it places considerable doubt on the appellant's contention that the works did not commence until 9 August 2016.
16. Therefore, on the evidence before me and on the balance of probabilities, I am not satisfied that the works on the chargeable development commenced on 9 August 2016. In view of the evidence, I consider it reasonable that the Council deemed the commencement date to be 20 June 2016 and therefore I do not consider the Council have issued a Demand Notice with an incorrectly deemed commencement date. In these circumstances, the appeal on Regulation 118 fails accordingly.

Formal Decision

17. For the reasons given above, the appeal on the grounds made is dismissed and the surcharges are upheld.

K McEntee