



Appeal Decision

Site visit made on 17 July 2017

by **Mr A U Ghafoor BSc (Hons) MA MRTPI**

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

Decision date: 08 August 2017

Appeal Ref: APP/L3245/L/17/1200095

- The appeal is made under section 218 of the Planning Act 2008 and Regulation 117a and 118 of the Community Infrastructure Levy Regulations 2010¹.
- The appeal is made by [REDACTED].
- A Demand Notice ['DN'] was issued by Shropshire Council (which is the collecting authority ['the CA']) on 27 January 2017.
- The deemed commencement date of development is stated as 13 August 2015.

Details of chargeable development to which the DN relates

- The relevant planning permission to which CIL and the surcharge relates is [REDACTED].
- [REDACTED]
- The outstanding amount of CIL payable, including total surcharges of [REDACTED] for a failure to submit a Commencement Notice ['CN'] and late payments, is [REDACTED]

Decision

1. The appeal is allowed and the DN is quashed.

Inspector's reasons

2. On 2 July 2014 the local planning authority ['the LPA'], Shropshire Council, granted outline planning permission ([REDACTED]) for the erection of [REDACTED]. This permission is subject to a planning obligation for the provision of offsite affordable housing. A reserved matters planning application (ref: [REDACTED]) was withdrawn due to access issues. Subsequently, on 5 June 2015 a full application for planning permission was approved for the erection of [REDACTED]. Condition 1) imposed on that permission states development shall be begun before the expiration of three years. The undisputed evidence is that liability for the payment of CIL arose in respect of this chargeable development however a self-build exemption certificate together with a LN was issued in respect of that development.
3. [REDACTED] acknowledges operations started on 11 July 2015 but, he says that pursuant to CIL Regulation 67 the CA has been notified of this commencement date by email communication, dated 10 July 2015, before building work started on site. While acknowledging receipt of the email, the CA on the other hand maintains an invalid commencement has been made. This is because CIL Form 6: *Commencement Notice* had not actually been submitted before operations started. The CA maintains that the deemed commencement date is 13 August 2015 as specified in the DN. It argues the project no longer qualifies as a self-build development². Subsequently, because of invalid commencement and default in payment,

¹ As amended by statutory instrument 2014 no. 385 The Community Infrastructure Levy (Amendment) Regulations 2014.

² CIL Regulation 54B(6) - A person who is granted an exemption for self-build housing ceases to be eligible for that exemption if a CN is not submitted to the CA before the day the chargeable development is commenced.

surcharges have been imposed. All building work at site stopped as soon as ██████ realised there was a conundrum.

4. Now, ██████, on behalf of ██████, submits that, even if the approach adopted by the CA is correct, material operations comprised in the development permitted did not actually commence in July 2015. This is because foundations for the new dwelling are located in the wrong place. The building operations carried out thus far are unauthorised and not permitted by the terms of any planning permission. My observations are that trenches and footings have been constructed some 9 m west of the approved site layout. Nevertheless, for the following reason, I do not accept ██████'s extensive submissions on this point. The parties have, apparently, failed to appreciate a body of planning related case law of relevance to this topic. The main principle being that it is possible to commence a development for the purpose of s56 of the Principal Act³, and thereby meet a deadline forming a condition of the planning permission, and deviate from the permitted works in a manner that becomes an enforcement issue later without retrospectively altering the fact that the commencement of the development had occurred for s56 purposes. It appears to me that is what has happened in this case and, should it transpire that a breach of planning control has occurred as a matter of fact, and that it is expedient to take enforcement action, it is within the purview of the LPA to take formal enforcement action.
5. However, having said all of the above, in these proceedings the determinative issue is the following: Whether the CA has incorrectly determined the deemed commencement date and whether the claimed breach, which led to surcharges being imposed, occurred.
6. CIL Regulations include provision for determining when development is treated as commencing. Regulation 67 states that, where planning permission is granted for a chargeable development, a CN must be submitted to the CA no later than the day before the day on which the chargeable development is to be commenced. The purpose of the Regulations is to make the CA aware of the intended start date of development permitted before work begins, which then sets in motion a number of actions or requirements as specified in the Regulations. Indeed, as ██████ notes, there are set of regulatory consequences that follow where a liable party fails to submit a valid CN. For example, interested parties may be liable for a surcharge and lose any ability to pay by instalments, as well as disqualify for any self-build exemption. The Planning Practice Guidance suggests that, if a CA knows development has commenced, but has not received a CN – or has received a notice, but considers that the development began earlier – it must determine when the development commenced. This is known as 'the deemed commencement date' under Regulation 68. The authority uses this date as the basis for subsequent demand notices.
7. CIL Regulation 67(2) states that a CN must be submitted in writing on a form published by the Secretary of State (or a form to substantially the same effect), identify the LN issued in respect of the chargeable development, state the intended commencement date of the chargeable development, and include the other particulars specified or referred to in the form⁴. CIL Form 6 has been published by the Department and is available online, and it should be used by those wishing to notify the CA of their intention to start work in a chargeable development.
8. In this case, the material facts are that, instead of submitting the published Form 6, ██████ emailed Gay Goodwin, a Planning Obligations Support Officer at the authority, on 10 July 2015 about the section 106 agreement. The email also cites planning permission reference ██████ and ██████: the latter is identified in the LN and DN. The email states:

³ Section 56(2) and (4) of the Town and Country Planning Act 1990 as amended.

⁴ Article 2 – Interpretation – states in these Regulations "intended commencement date" means the intended commencement date of a chargeable development as specified in a commencement notice submitted under regulation 67.

'Further to your mail of 17 June [I think this is a typographical error because Gay Goodwin's email is actually dated 18 June 2015], please be advised that site clearance works will begin on site tomorrow 11 July for site [REDACTED]'. There is nothing before me suggesting that the CA promptly notified [REDACTED] of its specific requirement to submit Form 6 so as to constitute valid commencement. In my opinion, failure to submit Form 6 should have set alarm bells off and, if the CA required that form to be submitted, being a responsible authority it should and could have expressly notified [REDACTED] of that requirement as soon as it received his email communication.

9. On a literal interpretation of the Regulations, I accept that [REDACTED] email did not include particulars specified or referred to in Form 6, and it failed to identify the LN reference. I do not consider that oversight is fatal to his case however. This is because the email clearly identified the site at [REDACTED], referred to the chargeable development relevant planning permission and, more importantly and crucially, in my judgement, unequivocally specified the intended date of commencement. I therefore reject an implied argument that the CA was misled because officers were well aware of the development.
10. Taking a common sense and pragmatic approach to the circumstances I find that in practice, substance, form and all intent and purposes the email communication has the same effect as Form 6. This is because it unambiguously notified the CA of the intended commencement date the day before material operations actually started, and functioned as a CN. In all probability, [REDACTED] actions confirm that he intended to properly notify the CA of the intended commencement date. I am therefore content that the purpose behind CIL Regulation 67 has been satisfied in spirit at least, due to the email communication dated 10 July 2015. On this occasion the apparent failure to strictly comply with the terms of Regulation 67(2) should be put aside, as the CA was fully aware of the intended commencement date prior to works starting.
11. In my assessment, [REDACTED] technical error has caused no prejudice to the CA; indeed, it could not have resulted in any injustice because the authority was aware of the intended start date before operations actually started on site. The failure to serve Form 6 has not disadvantaged the CA. I therefore find favour with the submission that [REDACTED] is entitled to rely on the email as his notification of commencing development and benefit from the self-build exemption, as well as act upon the terms of the planning permission although, in reality, development started not in strict accordance with the approved plans. I consider that a reasonable person, in possession of all of the relevant facts, is likely to arrive at the same findings.
12. On the particular facts and circumstances of this case, pulling all of the points in the preceding paragraphs together in my judgement the CA has issued a DN with an incorrect deemed commencement date of 13 August 2015; the date of commencement of development was actually 11 July 2015.
13. I shall briefly turn to the merits of the Regulation 117(a) challenge. For all of the reasons given above I take the view that [REDACTED] managed to notify the CA of his intended start date by email dated 10 July 2015. In practice, the authority was aware of development starting on 11 July 2015. It therefore follows that he should not now be penalised just because he failed to submit CIL Form 6. On the balance of probabilities, I find that the claimed breach, which led to the imposition of the surcharges, did not occur.
14. For the reasons given above and having considered all other matters, I conclude that the appeal should succeed on both grounds made. Accordingly, I reject the authority's submissions and the DN is quashed.

A U Ghaffoor

Inspector