The Planning Inspectorate

Appeal Decision

by Ken McEntee

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

Decision date: 27/09/2017

Appeal ref: APP/G5750/L/17/1200092

[redacted]

- The appeal is made under Regulations 117(1)(a),(b) and (c) and Regulation 118 of the Community Infrastructure Levy Regulations 2010 (as amended).
- The appeal is brought by [redacted]
- A Demand Notice was served on 12 December 2016.
- A revised Demand Notice was served on 1 February 2017.
- The relevant planning permission to which the CIL surcharge relates is [redacted], granted on [redacted].
- The description of the development is "[redacted]".
- The alleged breaches of planning control are: the failure to assume liability and the failure to submit a Commencement Notice.
- The outstanding surcharge for failure to assume liability is [redacted].
- The outstanding surcharge for failure to submit a Commencement Notice is [redacted].
- The outstanding surcharges for late payment of the CIL are [redacted]

Summary of decision: **The appeal on Regulations 117(1)(a) and (c) is dismissed and the surcharges of [redacted] are upheld, but the appeal on Regulation 117(1)(b) is allowed and the late payment surcharges of [redacted] plus interest of [redacted] are quashed.**

Procedural matters

1. Part of the appellants' case concerns the issues of CIL exemption and the CIL calculation. For the avoidance of doubt, these are not matters that are within my remit to consider and I can only determine the appeal on the grounds made.

Appeal on ground 117 (1)(b)[1]

2. I shall address this ground of appeal first as it has a bearing on the appeal on ground 117 (1)(a). The outcome of this ground rests on whether or not the

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

Council (Collecting Authority) served a Liability Notice (LN) as required by Regulation 65. On the one hand, the Council insist that a LN was posted on 5 August 2016. They contend that 'Exacom', the system they use to generate notices, reveals that a LN was generated on 5 August 2016. They have also produced a written statement by a staff member verifying that once it was generated, a notice was printed and placed in the Out Tray for collection by the Royal Mail. On the other hand, the appellants insist that they only became aware of the existence of a LN on 8 December 2016 after being alerted to it by the appellants' lawyers, who were in turn alerted by [redacted] who were acting for a potential purchaser of one of the properties. This prompted the appellants to contact the Council to query the situation but they did not receive a copy of the LN until 17 January 2017 upon request. They have produced a daily record of the company's incoming mail for the whole of August 2016 in support of their case and have also provided a written statement from the member of staff responsible for opening and recording the daily post to verify that the record provided is a true account.

3. It is very difficult in situations such as this, where neither party can actually prove their case but both have produced evidence to support it. In such a situation, I have no option but to determine the case on the balance of probabilities. It is ultimately the Council's responsibility to ensure a Liability Notice is correctly served. Regulation 126 (1) explains the options open to the Council for serving documents. One of the options is to send the document by post to the relevant person's usual or last known address, as per Regulation 126 (1)(c), and it is this option the Council chose to take. However, while they were entitled to do so, by sending the notice by standard post, it means there is no proof of postage, where there would have been had the Council chosen to serve the notice by registered post, as per Regulation 126 (1)(d), which requires a signature of receipt. Therefore, the standard post option entails an element of risk as it cannot be guaranteed that the intended recipient will actually receive the document. In these circumstances, I take the view that I have no option but to give the appellants the benefit of the doubt in this case. On the evidence before me, and on the balance of probabilities, I cannot be satisfied that a Liability Notice was correctly served.

4. Having said all that, normally the failure to submit a LN would mean that the appellants would be disadvantaged as they would not be aware of their CIL responsibilities as the LN provides this information. However, in this case I note that the Council issued an informative with the planning permission of 9 December 2015, which clearly refers the appellants to the CIL guidance, procedures and their responsibilities. The informative makes clear the requirement to assume liability and to submit a Commencement Notice (CN). Therefore, in this respect, I am satisfied that the appellants were not prejudiced by not receiving a LN earlier in the process as they would have been fully aware of the requirement for them to assume liability and to submit a CN before beginning works on the chargeable development. Indeed, the appellants contend that they submitted the latter on 19 May 2016 and this is addressed in my consideration of the appeal on ground 117(1)(a) below.

5. However, I consider the appellants were prejudiced by not receiving a LN in respect that they would not have been aware of the specific CIL amount payable and when payment was required. The Council argue that the appellants should have been aware of the existence of the LN due to the response to local land charge search by [redacted] on 27 October 2017. However, as mentioned in paragraph 1 above, this search was carried out by [redacted] solely on behalf of a potential buyer of one of the properties and had nothing to do with the appellants. Therefore, having not received formal notification of the LN, it's reasonable to conclude they would not have been aware they were incurring late payment surcharges until they received a copy of the original Demand Notice on 12 December 2016.

6. The overall conclusion reached therefore, is that I shall allow the appeal on this ground and quash the late payment surcharges, but I shall uphold the surcharges for failure to assume liability and failure to submit a CN, for the reasons explained below.

Appeal on ground 117 (1)(a)[2]

7. In view of my findings above on the matter of postage, I have to reach the same conclusion concerning the issue of whether or not a Commencement Notice was issued before starting works on the chargeable development. The appellants' contend that they submitted a CN to the Council on 19 May 2016 but the Council insist that they have no record of having received one. As with the Council concerning the LN, it was the appellants' responsibility to ensure a CN was submitted before starting work on the chargeable development. As there is no proof of postage before me, I have no option but to take the Council's assertions at face value that they did not receive a CN. Consequently, on the evidence before me, and on the balance of probabilities, I cannot be satisfied that a CN was submitted to the Council before works began on the chargeable development as required by Regulation 67(1). There is also no evidence that an Assumption of Liability Notice was submitted as required by Regulation 31(1). I am satisfied therefore that the breach which led to the surcharges occurred. The appeal on this ground fails accordingly.

Appeal on ground 117 (1)(c)[3]

8. Regulation 80 explains that the Collecting Authority may impose a surcharge of [redacted] on each person liable to pay CIL where nobody has assumed liability and the chargeable development has commenced. Regulation 83 explains that where a chargeable development is commenced before the collecting authority has received a valid Commencement Notice the Collecting Authority may impose a surcharge equal to 20 per cent of the chargeable amount payable or [redacted], whichever is the lower amount. As the appellants did not assume liability, the [redacted] surcharge for failing to assume liability is correct. With regards to the surcharge for failure to submit a Commencement Notice, as 20% of the CIL amount of [redacted], the surcharge of [redacted] is obviously the lower amount. It follows therefore that this

[2] The claimed breach which led to the surcharge did not occur
[3] The surcharge has been calculated incorrectly

surcharge has also been calculated correctly. The appeal on this ground fails accordingly.

Formal decision

9. For the reasons given above, the appeal on Regulations 117 (1)(a) and (c) is dismissed and the surcharges of £50 for failure to assume liability, [redacted] for failure to submit a Commencement Notice are upheld. However, the appeal on Regulation 117 (1)(b) is allowed and the surcharges of [redacted] for late payment, plus [redacted] late payment interest are quashed.

K McEntee