The Planning Inspectorate

Appeal Decision

Site visit made on 24 October 2017

by Jean Russell MA MRTPI

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

Decision date: 21 December 2017

Appeal Ref: APP/W0340/L/17/1200113

[redacted]

- The appeal is made under section 218 of the Planning Act 2008 and Regulations 117(1)(a) and 118(1) of the Community Infrastructure Levy Regulations 2010 (CILR).
- The appeal is made by [redacted] against the decision of West Berkshire District Council to issue a Demand Notice under CILR 69.
- The Demand Notice was issued on 16 May 2017.
- The planning permission to which the Demand Notice relates, dated 18 November 2016, is ref: [redacted].
- The description of the development permitted is: [redacted]
- The date of intended or deemed commencement of the development is 3 March 2017.
- The Demand Notice imposes surcharges in respect of: failure to assume liability, apportionment of liability and failure to submit a commencement notice.
- The appeal is made on the grounds that the claimed breaches which led to the imposition of the surcharges did not occur and the Collecting Authority (CA) has incorrectly determined the deemed commencement date.

DECISION

1. The appeal is allowed, the Demand Notice ceases to have effect and the surcharges in respect of failure to assume liability, apportionment of liability and failure to submit a commencement notice are quashed.

PRELIMINARY MATTERS

Floorspace

2. The Council or CA issued a CIL Liability Notice (LN)[1] on 6 December 2016 in relation to the 'the café and gym permission' described above. The LN was based on the 'proposed ground floor plan' subject to the permission, but it transpired that this had been drawn at the wrong scale, and the liability had been miscalculated.

3. The appellant and the CA ascertained in correspondence that the floorspace had been described or shown correctly in the planning application forms, 'existing ground floor plan' and the officer's report on the application. Thus, the Demand Notice (DN) sets out a liability based on the correct floorspace[2]. It is also agreed that the liability can only relate to the floorspace put to café use.

The Lawful Development Certificate (LDC) Application

4. Before the DN was served, the appellant applied for a LDC under s192 of the Town and Country Planning Act 1990 (the 1990 Act) to ascertain that the proposed use

[1] Reference LN00000177
[2] The CA's letter of 28 April 2017 indicates that this was a revised DN. I have only seen the DN dated 16 May 2017 but it refers to what must be a revised LN (ref: [redacted]) also dated 16 May 2017.

of the ground floor of the appeal building for a café and gym as 'ancillary' uses to the B1(a) use of the upper floors would be lawful. The application was under consideration during the course of this appeal and both parties have referred to it.

5. Whether the appeal uses would be lawful on the basis claimed is a matter outside of my remit. The scope of this appeal is as set out in CILR 117(1)(a) and 118(1). I cannot go behind or question the necessity for the café and gym permission. Nor can I comment on whether the appellant should request that the CA suspends the DN under CILR 69A. However, I shall have regard to the evidence submitted by both parties in respect of the LDC application insofar as it is relevant to this appeal.

MAIN ISSUES

6. The main issues are whether the deemed commencement date is correct and the claimed breaches which led to the surcharges had occurred by the date of the DN.

REASONS

The Deemed Commencement Date

The Café and Gym Permission

7. In order to ascertain when the development subject to the DN commenced, it is necessary to ascertain the scope of the café and gym permission. As noted above, the development permitted was described in the permission as a 'change of use' only; the description of development on the Council's decision notice does not allude to operational development – and that is consistent with the description on the planning application forms, and information in the supporting statement.

8. However, condition no. 2 imposed on the café and gym permission required that the development is carried out in accordance with the approved plans – and they indicated that new external doors would be installed in the building[3]. The officer's report on the application noted (but did not otherwise comment) that 'external works proposed consist of the insertion of 5 doors'.

9. In their LDC statement, the appellant suggested that the installation of the doors would be permitted under [Article 3, Schedule 2, Part 7,] Class F of the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO – but that concerns extensions or alterations to office buildings. The DN relates to a planning permission for a change of use **from** office use, and the new doors were shown on the plans that were subject to that permission.

10. The appellant also planned to undertake internal alterations to the building. On their own, those works might have been exempt from the meaning of development and any requirement for planning permission under s55(2)(a) and s57(1) of the 1990 Act. In this instance, however, the works were to be carried out in order to facilitate the material change of use for which planning permission had been sought and granted. I shall discuss the implications of this below.

What Constitutes Commencement?

11. CILR 7(2) provides 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; CILR 7(6) provides that 'material operation' has the same meaning as in s56(4) of the 1990 Act – and the relevant definition at sub-section (e) is 'any change in the use of any land which constitutes material development'.

[3] Condition no. 3 required use of the materials specified in the application, but none were so far as I can see.

12. The meaning of 'material development' is given in s56(5) as including development other than (a) that for which permission is granted by Order, and which is carried out to comply with any condition or limitation subject to which the permission is so granted. If the installation of the new doors was not permitted by the GDPO, as may have been the case, the works could be taken as material development.

13. Internal alterations could not be taken as 'material development' if they would not be 'development' at all. However, it is a well-established principle that whether there has been 'any change in the use of any land which constitutes material development' should be assessed as a matter of fact and degree. There needs to be some significant change in the character of the activities taking place, and regard may be had to any building works which facilitate the change.

The Evidence of Commencement of the Change of Use Permitted

14. The CA visited in the site on 3 March 2017 and observed that 'the gym was in place and…sports equipment was turned on…' That representation in the statement of case is corroborated by a photograph. If there had been a change in the use of the land on 3 March 2017, so that the gym element of the permitted use had begun, this would have been a material operation and fatal to this appeal – despite the fact that CIL liability related only to the café floorspace. This is because the DN related to commencement of a planning permission for a mixed use.

15. However, the appellant has shown to my satisfaction that the CA's photograph was not of any actual gym; it was instead a photograph of an advertisement formed of film covering the large ground floor windows in the building. The photograph does not show real equipment but an image of equipment.

16. The CA also stated that 'building works internally had commenced' on 3 March, and submitted a photograph of construction vehicles outside of the premises on that date. That representation is consistent with the advertisement, which included text that said: 'gym with exercise studio under construction'. A business park brochure also indicated that the café and gym would be open in 'Q1' of 2017.

17. In a letter dated 29 March 2017, the appellant's agent conceded that works were taking place but stated that they only comprised 'soft strip'. That claim would seem to be right because the CA did not say, imply or show in any photograph that the new external doors had been inserted, or that any other external alterations had taken place. Moreover, the CA did not describe the internal works in any detail.

18. The Council noted in an email dated 28 June that, only the day before, skips and vans were outside of the building, which had been fenced off, meaning that there had been 'an escalation of activity since 3 March'. There is no evidence to refute the appellant's claim that the café and gym were not open even by 12 July 2017.

19. Thus the evidence suggests that, on 3 March 2017, the developer had commenced but not completed internal alterations. Most of the works required to facilitate the change of use had not taken place, and neither the café nor gym was operational. Even if account is taken of the 'soft strip' alterations, there had not been 'any change in the use of' the building which could constitute 'material development' as a matter of fact and degree.

Conclusion and the Revised Deemed Commencement Date

20. For the reasons given above and with regard to all other matters raised, I conclude that the CA has incorrectly determined the deemed commencement date. It follows that the claimed breaches which led to the imposition of surcharges had not occurred on that date and there is no need for me to address further the second

main issue. The appeal should be allowed on both grounds, the DN should cease to have effect and all surcharges should be quashed.

21. Where an appeal is allowed under CILR 118(3), CILR 118(4) provides that the appointed person must determine a revised commencement date for the relevant development. It may be the case that the appellant slowed down works after hearing from the CA, and pending a decision on the s192 LDC application. Whether or not that is right, the café and gym were both open for business on the date of my visit, but that was some months after 12 July 2017, when the use to my knowledge had not commenced.

22. Neither party has suggested a revised commencement date that the other party or I could consider. Despite the imperative in CILR 118(4), I cannot determine the revised commencement date but this cannot alter my decision to allow the appeal.

Jean Russell

INSPECTOR