The Planning Inspectorate

Appeal Decision

Site visit made on 4 January 2018

by Mr A U Ghafoor BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9 February 2018

Appeal Ref: APP/L/17/1200115

[redacted]

- The appeal is made under section 218 of the Planning Act 2008 and Regulation 117a and 118 of the Community Infrastructure Levy Regulations 2010 as amended (for convenient shorthand, the 'CIL Regs').
- The appeal is made by [redacted].
- A Demand Notice ['DN'] was issued by Elmbridge Borough Council as the collecting authority ('the CA') on 26 April 2017.
- The deemed commencement date of development is stated as 7 October 2016.

Details of chargeable development to which the DN relates

- The relevant planning permission to which CIL and the surcharge relates is [redacted]
- The description of the development is described in the DN in the following terms: [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 dismissed and the DN issued by the CA on 26 April 2017 is upheld.

Inspector's reasons

2. [redacted] is [redacted] located in a mainly residential area. There is no dispute between the appeal parties ('the Parties') that the development is chargeable for the purposes of the CIL Regs; I concur. Essentially, the appellants, [redacted], argue that the deemed commencement date specified on the face of the DN is incorrect, because full planning permission for the chargeable development, which I will come to later, was granted and subsequently varied. They maintain that, as building work pursuant to a valid planning permission started in April 2016 or thereabouts, the deemed commencement date should therefore be stated as the 14 of April 2016.

3. I consider that the main issue is whether the deemed commencement date is correct and whether the claimed breach, which led to surcharges being imposed, occurred. An assessment of the relevant planning principles, the case-law and the site history is necessary in order to address the main issue.

4. For the CIL regime regulation 5(1), amongst other things, sets out the meaning of planning permission and subsection (a) states that it is granted by a local planning authority ('the LPA') under section (s) 70, 73 or 73A of the Town and Country Planning Act 1990 as amended (the '1990 Act'). Regulation (6) sets out the meaning of development, regulation (7) provides for interpretation of commencement of development, and regulation (8) sets out the time at which planning permission first permits development.

5. Section 73 of the 1990 Act provides a power to determine an application for planning permission to develop land without compliance with conditions previously attached, and s73a provides for a grant of planning permission for development already carried out. The Parties are aware of the following authority: *Lawson Builders Ltd v Secretary of State for Communities and Local Government* [2015] EWCA Civ 122. The facts are different but, contrary to [redacted] submission, I think the judgment is a relevant consideration as it explains the interplay between s73 and s73a.

6. In *Lawson*, Pitchford LJ, giving the leading judgment of the Court of Appeal, held that in an appropriate case, a decision-maker considering an application under s73 for planning permission without complying with conditions attached to an existing permission, could grant, under s73a instead, retrospective permission for a development already carried out without it usually being necessary to forewarn the applicant of this before determination. In addition, the Court found that there is some degree of fluidity between s73 and s73a that earlier authorities had perhaps overlooked. Where any grant of planning permission had to be retrospective in its effect, the power to make the grant is derived from s73a. Subsection (1) provides that on an application for planning permission, the permission granted may include permission in respect of development that has already been carried out. By subsection (2) retrospective permission may embrace development carried out without planning permission.

7. The LPA refer to s73 of the 1990 Act in its formal decision notice, and I understand that [redacted] were under an impression permission had been applied for, and granted, under s73. I also note that much is made about a lack of communication and apparent forewarning about the determination of that application, but I attach little weight to that line of argument. The important issue is whether or not it is within the decision-maker's power to determine a planning application for development already carried out. Clearly that power does exist, namely, s73a.

8. The material facts are that a full planning permission was first granted in December 2015 for the carrying out of operational development comprising the erection of [redacted] (the 'first permission')[1]. [redacted] obtained a self-build exemption in respect of that chargeable development; a zero-rated LN was subsequently issued. CIL Regs 54B sets out the mechanics to obtain a self-build exemption. The procedure involves an application to be made to the CA before commencement of development and on the condition that the claim lapses if the development is commenced before a decision is made on the self-build exemption. A person who is granted an exemption for self-build housing also ceases to be eligible for that exemption if a CN, pursuant to CIL Regs 67(1), is not submitted to the CA before the day the development is commenced.

9. There then followed another application for full planning permission which was granted on 27 January 2016 for a similar description of development (the 'second permission')[2]. There is no dispute between the Parties that a substantially different development had been permitted because a materially larger [redacted] was approved. On the available information it appears to me that a self-build exemption was not obtained in respect of this particular development. It is chargeable for CIL purposes. Consequently, the CA issued a LN for [redacted] plus interest on 1 February 2016.

[1] LPA reference [redacted] granted on 10 December 2015.
[2] LPA ref: [redacted] granted on 27 January 2016.

10. On 1 August 2016, some six months after the grant of the second permission, compliance officers conducted a routine site visit and discovered that the original house had been totally demolished. Building operations for the erection of a new building were progressing. Clearly, material operations had started by that time. A detailed survey revealed some discrepancies between the building 'as built' and the scheme approved in the second permission. Officers considered that the building did not fully accord with the plans in terms of design and scale. It appeared to officers that the operations carried out were not authorised by any of the previous planning permissions.

11. I pause here. On the evidence it seems to me that building operations had started by at least 1 August 2016 the nature and scale of which firmly fall within the meaning of s56(4) of the 1990 Act[3]. There appears to have been an early departure from the previously approved scheme given the substantial differences between what was being built on the ground and what had actually been permitted. The unchallenged evidence is that a CN had not been submitted to the CA pursuant to CIL Regs 67(1) before development started, which results in a serious contravention of the CIL Regs. For example, the loss of any self-build exemption. Since the development carried out did not benefit from any planning permission previously granted, [redacted] found themselves in a most difficult and unfortunate position.

12. Subsequently, on 2 August 2016, following some negotiation, a third application for planning permission was made under s73 of the 1990 Act on behalf of the appellants. This revised third scheme sought to vary condition 2) imposed on the second permission by substituting plans with a set of amended drawings. Clearly, it appears that the latter were modified to reflect the change in the design, layout, scale and external appearance of development on the ground which, probably, came about as a result of debate between the Parties. The drawings also illustrated the [redacted] in complete form. The unchallenged evidence is that the CA was informed by [redacted] it was their intention to implement this revised scheme from the outset. Having assessed the planning merits of the third application, it was granted planning permission on 7 October 2016 (I will refer to it as the 'third permission') [4].

13. [redacted] concede, quite rightly in my view, that there are stark and substantial differences between the third permission and the scheme allowed in the second permission[5]. This is mainly because of a substantial difference in the design and external appearance of the [redacted]. The third application sought planning permission for [redacted]. A totally and materially different [redacted] was proposed in the amended plans. As a matter of fact and degree, the development allowed by the third permission is significantly different in nature and scale than the previous approved scheme in the first and second permission. Apart from some minor variations to the scheme approved in the third permission, I observed that the 'as built' development is more or less consistent with the approved plans[6]. The third permission has clearly been implemented which, incidentally, is consistent with [redacted] declared intentions.

[3] CIL Regs 7.
[4] Planning permission ref: [redacted]
[5] E-mail communication received by The Planning Inspectorate on 3 January 2018.
[6] The agent confirmed the differences between the house that has been built and completed and that authorised by the third permission on 2 February 2018.

14. The CA duly issued a DN on 11 October 2016 for CIL [redacted]. Since no CN had been submitted to the CA, it was incumbent on the CA to determine the commencement date. It stated the deemed commencement date as 14 April 2016 about two weeks after the submission of a demolition notice. [redacted] successfully appealed that decision on 21 April 2017. Essentially, the previous Inspector found that the deemed commencement date was incorrectly determined. She opined that the third permission was in part retrospective and therefore granted under s73a of the 1990 Act[7]. She concluded that the deemed commencement date should be 7 October 2016.

15. Now, [redacted] disagree with the previous Inspector's decision and sought to challenge it by way of a judicial review. At risk of repetition, they maintained that the third permission should be construed as permission granted under s73 of the 1990 Act that varied the second permission. They argued that material operations had started in April 2016. However, the application to the High Court was withdrawn[8]; I cannot conduct a judicial review of the previous Inspector's findings but her decision is material. Nonetheless I am not bound to reach the same conclusions provided there are sound reasons for departing from her approach.

16. On the particular facts and circumstances of this case it is apparent to me that, on or before the date of the third application, material operations comprised in the third proposed scheme had already begun in reality. It must therefore logically follow that the application sought planning permission for a part retrospective and part prospective development. In other words planning permission was sought to regularise unauthorised development. While the erroneous reference to s73 of the 1990 Act by the LPA is most unfortunate and probably misleading, in practice it is implicit that the source of its power derives from s73a and not s73. I too, therefore, find that the third permission is in effect, standalone permission for the carrying out of operational development retrospectively granted under s73a.

17. I find that, for CIL purposes, the chargeable development is derived from the third permission. CIL Regs 7(5) is engaged where planning permission is granted under s73a. The relevant part states that development for which planning permission is granted under s73a is to be treated as commencing on the day planning permission for that development is granted or modified. The third permission was granted on 7 October 2016. Thus, it follows that the CA has issued a DN with a correctly determined deemed commencement date.

18. A secondary argument advanced is that, if the deemed commencement date is 7 October 2016, a self-build exemption should have been granted for the chargeable development. This is because a valid application had been submitted to the CA in accordance with CIL Regs 54(B). I shall not rehearse all of the arguments advanced because such a decision is not within the scope of this appeal.

19. CIL Regs 83 states where a chargeable development is commenced before the CA has *received* a valid CN, it *may* impose a surcharge [my emphasis]. Late payment surcharge provisions are set out in CIL Regs 85. In exercising its discretionary powers, the CA has imposed surcharges because of late payment. Evidently, [redacted] failed to discharge their responsibility in accordance with the Regulations. On the balance of probabilities, I find that the claimed breach, which led to the imposition of the surcharges, did occur.

[7] Applying the principles established in *Lawson Builders*.
[8] CIL appeal ref: APP/L5240/L/16/1200069 allowed 21 April 2017.

20. I have reviewed all of the arguments advanced in support but the submissions are both counter-intuitive and unpersuasive. On the facts and circumstances presented, the CA has correctly determined the deemed commencement date and the claimed contravention, which led to surcharges being imposed, occurred.

21. For all of the above reasons, I conclude that the appeal should fail and the DN is upheld as set out above in paragraph 1.

A U Ghafoor

Inspector