The Planning Inspectorate

Appeal Decision

Site visit made on 6 August 2018

by Mr A U Ghafoor BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 August 2018

Appeal Ref: APP/L/18/1200166

[redacted]

- The appeal is made under section 218 of the Planning Act 2008 and Regulation 117 and 118 of the Community Infrastructure Levy Regulations 2010 as amended (CIL Regs).
- The appeal is made by [redacted]
- A Demand Notice (DN) was issued by the Council of the London Borough of Barnet as the Collecting Authority (CA) on 24 January 2018.
- The deemed commencement date of development is stated as 24 April 2017.

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 [redacted]
- The outstanding amount of CIL payable, including total surcharges[1] of [redacted], is [redacted]

Decision

1. The appeal is allowed and it is directed that the DN and LN be quashed.

Inspector's reasons

2. 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, case-law and the site history is necessary in order to address the main issue.

3. 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 Principal Act – The Town and Country Planning Act 1990 as amended. CIL Regs (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.

4. Section 73 of the Principal Act provides a power to determine an application for planning permission to develop land without compliance with conditions previously attached, and s 73a provides for a grant of planning permission for development already carried out. Theoretically s 73 enables an application to be made whether the development has not yet commenced or is in progress or has been completed. In the former case a new grant of permission will take effect prospectively, but if the development is partially completed the permission may take effect prospectively or upon exercise of the s 73a power both

[1] The surcharge is for a failure to submit a commencement notice, late payment and late payment interest.

retrospectively and prospectively. Section 73a may include permission in respect of development that has already been carried out. In an appropriate case a decision-maker considering an application under s 73 for planning permission without complying with conditions attached to an existing permission could grant, under s 73a instead, retrospective permission for a development already carried out without it usually being necessary to forewarn the applicant of this before determination.

5. There is some degree of fluidity between s 73 and s 73a. Where any grant of planning permission had to be retrospective in its effect, the power to make the grant is derived from s 73a. 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.[2]

6. [redacted]
The material facts are that on 13 January 2016 the LPA granted planning permission for extensions to the existing dwelling-house[3] (I will refer to it as the 'first permission'). Subsequently, the CA granted the appellant an exemption certificate pursuant to CIL Regs 42A based upon net additional floor space of 202.08 m^2. The appellant submitted a commencement notice (CN) before works started in May 2016.

7. In June 2016, an application for the conversion of the existing single family dwelling-house into [redacted] flats and associated alterations [redacted][4] was submitted. The meaning of the development permitted is clear on the face of the document and the proposed scheme incorporated extensions pursuant to the first permission which, in practice, facilitated the conversion scheme. The LPA approved the second planning application on 25 August 2016 (I will refer to it as the 'second permission'). There is no dispute between the appeal parties that the development permitted by the first and second permission was CIL chargeable, although the former was CIL exempt.

8. The appellant maintains that, apart from accommodation in the roof space[5], extensions permitted by the first permission have been built out prior to any operations comprised in the conversion of the building. However, planning officers conducted a routine site visit in August 2016 probably before approval of the second permission. The submitted photographic evidence is particularly instructive of the works at the time. This evidence sufficiently supports the authority's claim that the works substantially differed from the scheme approved by the first permission. A detailed survey revealed considerable discrepancies for example the configuration of the extensions changed as the layout suggested that the building was being converted into self-contained flats. Planning officers considered that the partially built extensions were unauthorised as the design and layout did not fully accord with the plans approved by the first permission.

9. The appellant claims that the deviations identified by officers were in fact works carried out pursuant to permitted development rights[6], but I give this argument no weight. There is nothing to substantiate this claim. In my estimation, developers changed the design of

[2] For a fuller discussion about the inter-play between the statutory provisions, see the following legal authority: *Lawson Builders Ltd v Secretary of State for Communities and Local Government* [2015] EWCA Civ 122.
[3] LPA ref: [redacted].
[4] LPA ref: [redacted]
[5] This accounted for 9.94m^2.
[6] Schedule 2, Part 1, Class A to the Town and Country Planning (General Permitted Development) (England) Order 2015 as amended.

the scheme permitted by the first permission as works progressed on the ground. In response to the authority's investigation, it is also reasonable negotiations led to the submission of a further application for planning permission under s 73 in November 2016. That application was approved[7] but the appellant maintains that the latter, together with the second permission, was not implemented.

10. The appellant's evidence about the sequence of events and stage of building works suggest building operations actually started by at least May 2016 the nature and scale of which firmly fall within the meaning of s 56(4) of the Principal Act[8]. In my assessment, there appears to have been an early departure from the scheme previously approved by the first permission because operations were substantially different between the schematics and what was being built in reality. The facts indicate that the design and layout of the building reflected the scheme illustrated on plans approved by the second permission. On the evidence presented, I find that material operations comprised in the works of conversion had, as a matter of fact, started before the second permission was determined by the LPA. It follows therefore that the latter was effectively part-retrospective and part-prospective[9].

11. The CA now suggest that the deemed commencement date is the day when the second permission was granted planning permission, but this line of reasoning overlooks the fact that a third application for the same description of development was made under s 73 in June 2017 following some negotiations. This third scheme sought to vary condition 1) imposed on the extant second permission by substituting plans with a set of revised drawings. Although [redacted] flats were proposed, the revised plans modified the design and layout of the conversion scheme to reflect reality. [redacted] The drawings also illustrated the whole development in complete form. This change probably came about as a result of debate between the appeal parties and threat of enforcement action. Nevertheless, the LPA subsequently granted planning permission on 25 July 2017. The appellant maintains that it was her intention to implement the scheme approved by this planning permission (I will refer to as the 'third permission').

12. To me, there are considerable differences between the scheme approved by the third permission and the second permission, due to significant disparity in terms of design and appearance. The third application sought planning permission for a differently configured layout and revised scheme that modified the amount of floor space: in this regard, it matters not whether the floor space was increased or decreased. The material change to the previous scheme required a planning assessment to be made by the LPA, due to the degree of departures. As a matter of fact and degree, I find that the development allowed by the third permission is substantially dissimilar in nature and scale. I observed that the converted building is more or less consistent with the plans approved by the third permission. The latter was recently commenced and implemented which, incidentally, is consistent with the appellant's intentions.

13. In all probability, material operations comprised in the works of converting the building into self-contained flats as shown on the third proposed scheme had begun on the ground on or before the date of the third application. It must logically follow that the application sought planning permission for a part retrospective development. In other words planning permission was sought to regularise development that had already begun in reality.

[7] LPA ref: [redacted].
[8] CIL Regs 7.
[9] Principles established in *Lawson Builders* applied.

14. While the appeal parties have made reference to s 73, which is unfortunate and probably misleading, it is implicit that the source of power to grant planning permission for development already started in practice derives from s 73a and not s 73. I therefore find that the third permission is in effect, standalone permission for the carrying out of a material change in the use of the dwelling-house facilitated by operational development retrospectively granted under s 73a.

15. Applying the principles summarised elsewhere, the material facts indicate that the scheme approved by the third permission has factually been delivered on the ground. The permission is for part-retrospective and part-prospective development. For CIL purposes the chargeable development is derived from this permission and CIL Regs 7(5) is engaged because planning permission has been granted under s 73a. In this regard, development is to be treated as commencing on the day planning permission is granted or modified. The third permission was granted on 25 July 2017.

16. The Planning Practice Guidance indicates that if the s 73 permission does not change the liability to the levy, only the original consent will be liable. If the permission does change the levy liability, the most recently commenced scheme is liable for the levy. The third permission is the most recently commenced scheme for CIL purposes and, as I have already said elsewhere, there might be a change to the CIL. For reasons that remain unclear, the CA did not issue a LN or DN in connection with this chargeable development but, nonetheless, the agent submitted a CN on 14 August 2017 via electronic mail having discharged planning conditions. The rationale behind this action is that planning permission was granted for a chargeable development and a CN must be submitted to the CA no later than the day before the day on which that development is to be commenced. This action might not avail the appellant because material operations comprised in the third permission had begun on or before 25 July 2017 triggering CIL Regs 7. Having regard to the statutory provisions, it is for the CA to determine whether or not a revised LN and DN should be issued.

Other matters and conclusions

17. The appellant complains about the handling of the planning applications, CIL matters and apparent lack of cooperation. However, these are matters not for my determination.

18. On the particular facts and circumstances of this case, I find that the CA has issued a DN with an incorrectly determined deemed commencement date. The third permission was a partially retrospective planning permission and as such the deemed commencement date is 25 July 2017. This part of the appeal therefore succeeds and I have directed that the DN be quashed.

19. In relation to the surcharges for the non-payment of CIL within a certain period, since this is based on an incorrect deemed commencement date of 24 April 2017, I find that the appeal pursuant to CIL Regs 117 also succeeds in so far as it relates to that date. I have directed that the LN be quashed.

A U Ghafoor

Inspector