



Appeal Decision

by **Ken McEntee**

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

Decision date: 8 October 2019

Appeal ref: APP/D1590/L/19/1200262

- The appeal is made under Regulations 117(1)(b) and 118 of the Community Infrastructure Levy Regulations 2010 (as amended).
- The appeal is brought by [REDACTED] against CIL surcharges imposed by Southend-on-Sea Borough Council.
- Planning permission was granted on 10 December 2018.
- A Liability Notice was issued on 22 January 2019.
- A Demand Notice was issued on 22 January 2019.
- The relevant planning permission to which the surcharges relate is [REDACTED].
- The description of the development is [REDACTED].
- The alleged breaches are the failure to assume liability and the failure to submit a Commencement Notice before starting works on the chargeable development.
- The outstanding surcharge for failing to assume liability is [REDACTED].
- The outstanding surcharge for failing to submit a Commencement Notice is [REDACTED].

Summary of decision: The appeal is dismissed under Regulation 117(1)(b) and the surcharges are upheld, but the appeal under Regulation 118 is allowed.

Procedural matters

1. An application for costs has been made by the appellantS. This is the subject of a separate decision accompanying this one.


The appeal under Regulation 117(1)(b)

2. An appeal under this ground is that the Collecting Authority (Council) failed to serve a Liability Notice (LN) in respect of the development to which the surcharge relates. Much of the appellants' arguments concern their contention that the Council should have issued LNs in relation to Prior Approval permissions [REDACTED]. For the avoidance of doubt, I can only consider whether the Council issued a LN solely in relation to planning permission [REDACTED], the subject of this appeal.
3. In this case, the Council served a LN, on 22 January 2019, some 6 weeks after planning permission was granted. Regulation 65(1) explains that the Council must issue a LN as soon as practicable after the day on which planning

permission first permits development. It is open to debate whether 6 weeks can reasonably be interpreted as meeting the requirements of Regulation 65(1). However, as the permission granted in this case was retrospective, it would not have made any difference if the Council had issued a LN any earlier as it was simply not possible for a Commencement Notice to be submitted in advance of starting works due to the retrospectivity of the permission, and thus it was not possible for the appellants to prevent the subsequent surcharges being imposed. It is envisaged by the CIL guidance that the issue of a LN will be followed by submission of a Commencement Notice by the relevant person. However, by carrying out the works before obtaining the required planning permission, the appellants effectively prevented the normal sequence of events from taking place. The Council therefore correctly served a LN and Demand Notice together as the appellants immediately became liable for CIL and CIL surcharges. In other words, this was effectively a situation of the appellants' own making.

4. In these circumstances, the appeal on this ground fails accordingly.

The appeal under Regulation 118

5. An appeal under this ground is that the Council has issued a Demand Notice with an incorrectly determined deemed commencement date. The date given in the Demand Notice is 18 October 2018. It appears the Council settled on this date as that is when they became aware that works had begun due to an e-mail exchange between the appellants and their agent on the same date. However, CIL Regulation 7(2) explains 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. Regulation 7(3) explains that this general rule is subject to provisions, such as that stated in Regulation 7(5)(a) where development has already been carried out and granted planning permission under section 73A of the Town & Country Planning Act. In such cases, development is to be treated as commencing on the day planning permission for that development is granted or modified. Therefore, as retrospective permission was granted in this case, the general rule in Regulation 7(2) is displaced and the correct commencement date should be taken as the date of the grant of planning permission, which in this case was 10 December 2018.
6. Consequently, the appeal on this ground succeeds and, in accordance with Regulation 118(4), the Demand Notice ceases to have effect. If the Council are to continue to pursue the CIL they must now issue a revised Demand Notice in accordance with Regulation 118(5).
7. 
8. For the avoidance of doubt, while the appeal under Regulation 118 succeeds, I see no justification to use my discretionary powers under Regulation 118(6) to quash the surcharges imposed, for the reasons explained in paragraph 3 above.

Formal decision

9. For the reasons given above, the appeal under Regulation 117(1)(b) is dismissed and the surcharges of [REDACTED] are upheld, but the appeal under Regulation 118 is allowed.

K McEntee