The Planning Inspectorate

Appeal Decision

by Mr A U Ghafoor BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 27 July 2020

Appeal Ref: APP/F0114/L/19/1200323

[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] [I will refer to the appellant as [redacted]].
- A Demand Notice ['DN'] was issued by Bath and Northeast Somerset District Council as the collecting authority ('the CA') on 1 August 2019.
- The deemed commencement date of development is stated as 4 October 2018.

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]

Summary of Decision: The CIL Regs 117(a) and 118 appeals fail as set out in the Formal Decision below.

Procedural matters

1. There were a few matters that required clarification and so I invited additional comments within certain timescales ending on Friday 24 July 2020. I am grateful for all these comments, which I will consider. [redacted] made an appeal against the issuing of a previous DN, but no action was taken, and the appeal was undetermined[1]. The appeal parties rely on evidence previously submitted. I will proceed on this basis. As the outcome of CIL Regs 118 has a bearing on the 117(a) appeal, I shall evaluate the former first. For reasons that will become clearer later, I will first set out some background for information purposes.

Background information

2. On 2 March 2016 the Local Planning Authority ['the LPA'] granted outline planning permission for [redacted] subject to conditions[2] [the '2016 permission']. On 6 April 2017, approval of the reserved matters was granted and by this time the Plans List included reference to [redacted] (Proposed Phasing Plan) as one of the drawings to which the decision related [the '2017 permission']. This drawing identified three phases of development at the [redacted]. On 8 February 2019, the LPA approved an application to make a non-material amendment to the planning permission by adding drawing no [redacted] to the approved plans list. The

[1] Planning Inspectorate ref is APP/F0114/L/19/1200295 [redacted] notified by e-mail 30 August 2019.
[2] LPA ref: [redacted].

development is also subject to a planning obligation pursuant to section [s] 106 of the Town and Country Planning Act (1990) as amended [the '1990 Act'].

3. CIL Regs 67(1) states that, where planning permission is granted for a chargeable development, a CN must be submitted to the CA no later than the day before the day on which the chargeable development is to be commenced. The Regulations stipulate how the CN is to be submitted and, if development commences in breach of this requirement, the CA has the power to issue a DN with a deemed commencement date pursuant to CIL Regs 68. Failure to comply with the law has serious consequences.

4. [redacted] assumes liability to pay the levy for the chargeable development. It therefore follows responsibility to notify the CA when development commenced in writing squarely falls on [redacted]. The CA had reason to believe material operations commenced on site in October 2018, but it had no notification of development commencing.

5. In exercising its powers, the CA issued a Liability Notice ['LN'] and DN pursuant to CIL Regs 65 and 69 and both were dated 28 May 2019. As I have already said elsewhere, [redacted] appealed to The Planning Inspectorate under CIL Regs 117 sub (a) and 118. During the appeal proceedings the CA conceded that the deemed commencement date is 4 October 2018 and not 5 October 2018. Pursuant to CIL Regs 69(4), the CA re-issued the DN on 1 August 2019 and this supersedes the previous DN.

6. There were extensive and lengthy negotiations between [redacted] and the LPA regarding the effect of the 2016 and 2017 planning permission. Essentially, [redacted] claimed the DN was incorrect because a phased planning permission had in fact been granted for chargeable development. Subsequently, [redacted] challenged the CA's decision to issue the notices in the High Court for judicial review. The claim was that the notices issued on 28 May 2019 were incorrect, because the amount stated as being payable should have been calculated on the basis that planning permission had been granted for a phased development. Each phase was a separate chargeable development and that the only levy payable at the start was in respect of the first phase. [redacted] The Court held that the CA's liability notices were correct. Even though a phasing plan had been part of the reserved matters application and indeed referred to in a planning obligation, at outline stage [redacted] did not have a phased planning permission. Liability to pay CIL arose from the outline planning permission[4].

CIL Regs 118 appeal

7. Against the above background information, the main issue is whether the deemed commencement date is correct.

8. CIL Regs 67(2) indicates that a CN must be submitted in writing on a form published by the Secretary of State (or a form to substantially the same effect), identify the LN issued in respect of the chargeable development, state the intended commencement date of the chargeable development[5], and include the other particulars specified or referred to in the form. CIL Regs 7 sub (2) states 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. "Material operation" has the same meaning as in s56(4) of the 1990 Act.

[3] After the judgement I invited the appeal parties to comment on its effect. I am grateful for all of the comments.
[4] [redacted] as at 15 October 2018, the chargeable development was the development permitted by the March 2016 planning permission. That planning permission was not a phased planning permission (paragraph 23).
[5] Article 2 – Interpretation – states in these Regulations "intended commencement date" means the intended commencement date of a chargeable development as specified in a commencement notice submitted under regulation 67.

9. The CA insist that on the 4 October 2018 the Council's Building Control Officer ['BCO'] noted presence of heavy plant and machinery on the site. Contemporaneous notes indicate the work involved earth-moving and levelling. Although no piling work had begun, the officer noted that an area of poor-quality fill was holding up piling in area of plots 70 to 74, which suggests significant operations were underway at the time.

10. In contrast, [redacted] maintain work was being done to trace a buried manhole so that engineers could complete their drainage design. These exploratory works were needed to aid embankment design. Additionally, topsoil pile was condensed into a taller heap to move it off the area where existing drains and cables from a sub-station were located. The claim is that land-levels had not changed and the BCO had assumed that a new shelf-level had been created. Photographic evidence shows vegetation and no shelf at lower level had been excavated. [redacted] submission is that these site investigations do not fall into any of the categories listed in s56(4) of the 1990 Act and so no material operation had been carried out at the time. The submission is that development did not commence on 4 October 2018 and so the deemed commencement date is erroneous as the work commenced on 15 October 2018.

    For the following reasons, I reject [redacted] submissions.

11. As a general proposition, whether a planning permission has been implemented is to be judged objectively from the facts on the ground and the compliance of what has been done with the permission and its conditions. Whether the developer intended to build out the permission or was simply seeking to keep the permission alive isn't determinative. In *Field*[6] the Court held that development may be begun by works which are not material operations in the list given at s56 sub (4) of the 1990 Act. The definition of "material operation" at 56(4) is not exclusive because some planning permissions would not involve any of these actions. It therefore must be possible to implement any type of planning permission such as consent for the construction of embankments. Material operations must be wider than the listed operations. It includes actions which are insufficient in themselves to be development. Another example is *Malvern*. In that case it was held that the pegging out of a line of a road, where the pegs were not a permanent feature, fell within the ambit of action under s56(4)(d). Any working activity on the land in the course of laying out a road, whether that activity resulted in a change in the character of the land or in anything that might be called development, can amount to a material operation[7].

12. It is apparent to me that the description of the work undertaken in October 2018, which I refer to above, is suggestive of site investigations or exploratory work required to aid technical drawings, the design of drainage system or embankments. The purpose behind these operations was to prepare the site for residential development. It is hardly surprising that the operations required a significant element of pre-planning and use of heavy plant and machinery, due to the kind and scale of residential development permitted by the 2016 permission. In assessing whether or not these works constitute material operations, who or which contractor carried out the work is not determinative of the issue. In my assessment, the nature and scale of the work resulted in a considerable change to the site's layout, make-up and profile. For example, operations resulted in the movement of large amount of earth and part of the land had been re-levelled for access purposes. I do not consider the work can be reasonably described as 'de minimis'.

[6] *Field v First Secretary of State* [2004] JPL 1286.
[7] *Malvern Hills District Council v Secretary of State for the Environment* [1983] 46 P & CR 58 and *Aerlink Leisure Ltd (in liquidation) v First Secretary of State* [2004] EWHC 3198 (Admin).

13. The facts and evidence presented show the site investigations carried out in late 2018, and witnessed by the BCO, firmly fell within the ambit of a material operation. The work was for the purposes of genuinely carrying out the development permitted. In my assessment, the quantum and physical nature of work combined with the significant and substantial alteration to the site's appearance suggests material operations had commenced on 4 October 2018.

14. Drawing all the above points together, I find that the CA correctly determined the deemed commencement date. The CIL Regs 118 appeal must fail.

CIL Regs 117(a) appeal[8]

15. The mechanics of the CIL regime are elaborated in the National Planning Practice Guidance, which confirm the legislative requirements and advise that once the liable parties submit a valid CN, the CA must send an acknowledgement to the sender pursuant to CIL Regs 67 sub (4). The Secretary of State has established a standard "Form 6: Commencement Notice", which is commonly used by developers to notify the CA of work commencing on the chargeable development. The form clearly warns the liable person the notice must be received by the charging or CA prior to commencing development. It emphasises the need to ensure the form is promptly submitted and received by the CA before starting work. Failure to do so could result in loss of any exemption or relief.

16. The CA insist it has not received the CN. The CIL Monitoring Officer, who is responsible for administering the system for the CA, has interrogated the database and confirms an acknowledgement was not sent. Had the form been received, the system would have generated an acknowledgement. Consequently, in exercising its discretionary powers, the CA has imposed the surcharge[9]. On the other hand, [redacted] state that it posted a Form 6 on 5 October 2018 by first class post. The intended commencement date was stated as 15 October 2018. Having regard to s7 of the Interpretation Act (1978), [redacted] submit that once the form had been posted by its employees, it discharged its responsibility. However, in my judgement the presumption that service is deemed to have effect by properly addressing, pre-paying and posting a notice is rebuttable by evidence that the notice was not in fact received[10]. For the following reasons, I reject [redacted]'s submissions.

17. Statutory declarations by employees have been submitted and it is apparent to me that the importance of the Form 6 was clear to [redacted]. The statements indicate that a Form 6 had been completed and sent by first-class post with a properly addressed letter to the CIL Monitoring Officer on 5 October 2018 stating the commencement date as 15 October 2018. A copy of the submitted form is exhibited in the bundle. However, despite the explanation as to how the form was downloaded from the Internet, completed and physically posted, in an email communication dated the 7 February 2019 it is claimed that the form was served on the 15 of October 2018. This conflicting information undermines the claim that the Form 6 was in fact submitted on 5 October 2018.

18. In addition, there is a further unexplained anomaly. This is because the Form 6 does not state the LN reference number LN00001809, which is surprising to me given the importance of the form. In the absence of cogent explanation as to why the reference has been omitted, I do not accept it as a simple oversight. There is no clear or plausible explanation as to why the CN was submitted when the LN to which it relates was issued

[8] CIL Regs 117 sub (a) states that a person who is aggrieved at the imposition of a surcharge may appeal on the ground that the claimed breach, which led to the imposition of the surcharge, did not occur.
[9] CIL Regs 83.
[10] The appeal parties refer to the Interpretation Act (1978) and the CA has submitted *Calladine-Smith v Saveorder Ltd* [2011] EWHC 2501.

by the CA on 28 May 2019. That event occurred about six months after the claimed submission date of the Form 6. A lack of precise and unambiguous explanation casts doubts over the veracity of the version of the events.

19. It appears to me that the system requires a developer to submit a notice telling the CA the intended date when chargeable development commences, but it also places a duty upon the CA to promptly acknowledge receipt of the CN. Where there is a failure to issue an acknowledgement, it is a reasonable expectation a developer will investigate why a receipt in the form of an acknowledgement has not been issued. This is because this failure to acknowledge the Form 6 may indicate it has not been received. [redacted] commenced work on the chargeable development simply assuming the CN would have been received by the CA the next working day, but I find that to be a highly risky strategy.

20. The LN clearly states the following: *"Please do not commence development until you receive a valid acknowledgement of Commencement Notice from the Council"*. In my opinion, the lack of written acknowledgement should have triggered alarm bells. It should have prompted the company to make rigorous and robust enquiries as to why the form had not been acknowledged, due to the potential consequences such as the loss in social housing relief. Given the very important nature of the CN and implications if it had not been received by the CA, it is not unreasonable to expect searching questions and investigations. Details of who to contact is given in the explanatory notes attached to the LN.

21. [redacted] has not exhibited a valid receipt for the CN nor has it produced any evidence to show enquiries had been made. [redacted] concede it did not investigate why an acknowledgement had not been sent by the CA which, in hindsight, it could have done so. While the company was quick to challenge the CA's decision to issue the LN via judicial review, it is unclear as to why it failed to vigorously pursue the lack of an acknowledgement. Instead of ploughing on with the building work on the site, I consider that reasonable steps should have been taken to find out if the CN had in fact been received before the commencement of development. Evidently, [redacted] cannot now demonstrate that it submitted a valid CN nor can it show that the form had been acknowledged as being received by the CA.

22. I understand that the Form 6 could not be scanned and emailed at the time due to problems with scanning, but [redacted] chose to send the form by first-class post. There is no conclusive evidence of delivery or receipt, which undermines the claim that the CN was served on the CA by [redacted] on 5 October 2018. I am not persuaded by the assertion that the form may have been lost or mislaid. Past correspondence between the appeal parties which, incidentally, spans several years, suggests letters and emails as well as CIL forms have been received without difficulty. There is nothing before me to indicate the CA has a habit of misplacing important documents such as the CN.

23. There is an added complexity. As I have already said elsewhere, CIL Regs 67(2) indicates that a CN must identify the LN issued in respect of the chargeable development. [redacted]'s Form 6 does not state the LN reference to which it relates. In response to the following question on the form: "*(c) Liability Notice Reference*" the reply reads "*T.B.A.*" which normally means "to be arranged". In this case, the LN (ref LN00001809) too which the CN relates was in fact issued in May 2019 and not October 2018. Even if an alternative view prevails in that [redacted]'s service claims are made out and it had indeed discharged its

responsibility by posting the CN via first-class postal service before chargeable development commenced the exhibited CN is invalid as it fails to state the LN reference[11].

24. Drawing all the above threads together, on the balance of probabilities, I find that that the claimed breach, which led to the imposition of the surcharge, did occur. The decision to impose the surcharge was well-founded. CIL Regs 117(a) appeal fails.

Overall conclusions

25. For the reasons given above, I conclude that the appeals on CIL Regs 117(a) and 118 fail.

Formal Decision

26. The appeal is dismissed, and the DN issued by the CA on 1 August 2019 is upheld.

A U Ghafoor

Inspector

[11] Applied: *Shropshire Council v SSCLG and Lee Jones* [2019] EWCH 16 Admin.