



# Appeal Decision

by **Ken McEntee**

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

Decision date: 5 August 2020

**Appeal ref: APP/N5660/L/20/1200373**

**Land at 44 Clapham Common, South Side, London, SW4 9BU**

- The appeal is made under Regulation 117(1)(a) of the Community Infrastructure Levy Regulations 2010 (as amended).
- The appeal is brought by [REDACTED] against surcharges imposed by the London Borough of Lambeth.
- Planning permission was granted on 29 March 2018.
- A Liability Notice was served on [REDACTED] on 23 May 2018.
- A Liability Notice was served on the appellants on 22 November 2018.
- A Demand Notice was served on 23 November 2018.
- A revised Demand Notice was served on 26 February 2019.
- Planning permission for a non-material amendment was granted on 18 September 2019.
- A revised Liability Notice was served on 2 October 2019.
- A revised Demand Notice was served on 2 October 2019.
- A revised Liability Notice was served on 15 October 2019.
- A revised Demand Notice was served on 15 October 2019.
- A revised Liability Notice was served on 27 November 2019.
- A revised Demand Notice was served on 27 November 2019.
- A revised Demand Notice was served on 10 December 2019.
- The relevant planning permission to which the CIL surcharge relates is [REDACTED].
- The description of the development is [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
- The alleged breaches to which the surcharges relate are the failure to pay the CIL within 30 days and within 6 months.
- The outstanding surcharge for failure to pay within 30 days is [REDACTED].
- The outstanding surcharge for failure to pay within 6 months is [REDACTED].

**Summary of decision: The appeal is allowed and the surcharges are quashed.**

## Procedural matters

1. A significant amount of supporting representations have been submitted by both parties' counsels. As these representations have been copied to the parties, I do not propose to summarise them in any detail.

## Reasons for the decision

2. CIL Regulation 85 – Surcharge for late payment, explains:

(1) Where — (a) a person (P) is liable to pay an amount (A) under these Regulations; and (b) A is not received in full after the end of the period of 30 days beginning with the day on which payment of A is due, the collecting authority may impose a surcharge on P equal to five per cent of A or £200, whichever is the greater amount.

(2) If any part of A is not received after the end of the period of six months beginning with the day on which payment of A is due, the collecting authority may impose a surcharge on P equal to five per cent of the unpaid amount or £200, whichever is the greater amount.

(3) If any part of A is not received after the end of the period of 12 months beginning with the day on which payment of A is due, the collecting authority may impose a surcharge on P equal to five per cent of the unpaid amount or £200, whichever is the greater amount.

3. The CIL liability has now been discharged as full payment of the amount due has been paid. The main thrust of the appellants' case is that they are not liable for late payment surcharges, because:

- a) The Collecting Authority (Council) did not demand payment of the surcharge after 30 days from which the payment was first due following issue of the valid Demand Notice of 26 February 2019;
- b) The granting of the Non-Material Change Application on 18 September 2019 meant that the calculation for CIL had changed.
- c) The issuing of a revised Demand Notice on 27 November 2019, meant that by the operation of Regulation 69(5) the Demand Notice of 26 February 2019 ceased to have legal effect, so the right to impose a surcharge for late payment within this first period is no longer possible; and
- d) The Council were not legally entitled to impose a late payment surcharge, either by way of their Demand Notice of 27 November or 10 December 2019, because 30 days had not expired since the CIL payment became due.

4. The Council's argument is essentially that the only trigger for CIL money to be payable is the commencement of the development, which they contend is supported by the decision of the High Court in the case involving Oval Estates v Bath & North East Somerset Council, that relates to phased development. Furthermore, they argue that the power to impose a surcharge is dependent on the time of commencement of the development and that the statutory periods in the CIL Regulations in relation to imposing a surcharge are determined with reference to the commencement date, and not by reference to Liability and Demand Notices.

5. However, I take the view that while it is correct that liability for CIL does occur when the development commences, the issue of when it would be legally possible to

impose a surcharge, must be related to when the money is due to be paid. The mechanism for notifying developers of how much payment is required and when it is due, relates to the mandatory requirement to issue a Demand Notice under Regulation 69. It is established caselaw that the Demand Notice must comply with the statutory requirements to have legal effect. Regulation 69(5) is clear that in circumstances where there is already a valid notice in place, the subsequent issue of a further valid notice will mean that the previous notice ceases to have effect. This means that the amount due, and the day of due payment will be set by reference to the new Demand Notice. Therefore, I find the appellants' argument that the legal right to impose the surcharge for late payment is linked to the amount to be paid and the due date for payment, which must be stated on the Demand Notice by virtue of Regulation 69(2)(e), to be persuasive.

6. On the evidence before me, I agree with the appellants that the Council has acted prematurely, and that there does not appear to be a lawful authority for them to have imposed a late payment surcharge before 30 days had expired after the Liability Notice of 27 November 2019 had been issued, as it is only once 30 days has expired that there is power under Regulation 85(1) to impose a surcharge. The same principle obviously applies to the imposition of the 6-month late payment surcharge, as per Regulation 85(2). I conclude that the Council has acted prematurely by not waiting the required 30 days from when payment was due before imposing the late payment surcharges and therefore the Demand Notices of 27 November and 10 December 2019 are invalid.
7. In these circumstances, and on the evidence before me, I conclude that the alleged breaches have not occurred. The appeal succeeds accordingly.

### **Formal Decision**

8. For the reasons given above, the appeal is allowed and the surcharges ■■■■■ are quashed.

*K McEntee*