The Planning Inspectorate

Appeal Decision

by Mr A U Ghafoor BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 1 December 2020

Appeal Ref: APP/C3620/L/19/1200360
[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').[1]
- The appeal is made by [redacted]
- A Demand Notice ['DN'] was issued by Mole Valley District Council as the collecting authority ('the CA') on 13 November 2019.
- The deemed commencement date of development is stated as 7 November 2019.

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 on the DN in the following terms: [redacted]
- The outstanding amount of CIL payable, including total surcharges of [redacted] for a failure to assume liability and submit a Commencement Notice ['CN'], is [redacted]

Decision

1. The appeal is dismissed and the DN issued by the CA is upheld.

Inspector's reasons - CIL Regs 118 appeal

2. The question is this: has the CA correctly determined the deemed commencement date?

3. On 30 April 2015, the local planning authority ['the LPA'] granted permission for the following description of development: '*Erection of part two storey, part first floor front/side extension and erection of 2 no single storey rear extension. Raising roof ridge height and insert dormer windows to front and 2 no dormer windows to rear to facilitate a loft conversion*[3]'. For convenient shorthand, I will refer to it as the '2015 permission'. A second application was granted on 31 July 2019. This is for the following description of development: '*Erect 1 No replacement dwelling*'[4] ['the 2019 permission']. The 2015 and 2019 permissions are full planning permissions for operational development subject to similarly worded conditions. For example, development shall be begun before the expiration of three years and shall be carried out in accordance with approved plans.[5]

[1] The reasons for the appeal did not include the argument that the claimed breach which led to the surcharge did not occur. However, there is an implied appeal on this ground. For completeness' sake, I will evaluate this ground of appeal because the appeal parties have had an opportunity to comment. As the outcome of CIL Regs 118 has a bearing on the 117(a), I shall evaluate the former first.
[2] I have taken the appellant's name from the CIL appeal form.
[3] LPA reference [redacted]
[4] [redacted]
[5] Condition 3) of the 2015 permission states the development shall be carried out and completed in all respects strictly in accordance with the submitted documents and plan number(s) POO1, P01, P02, POO2 RevC, P03, PO4 RevC, PO5 Rev C, PO6 Rev C contained within the application and no variations shall take place. 2019 permission, condition 2), states development shall be carried out and completed in all respects strictly in accordance with the submitted documents and plan numbers P002D, P03D, P04C, P05D, P06C contained within the application and no variations shall take place.

4. Essentially, the appellant asserts that the development the subject of the DN is CIL exempt, because the 2015 permission has been implemented. It is contended material operations commenced in November 2018 in accordance with this permission. The latter was approved before the Council's CIL charging schedule[6] came into force.

5. Although material operations started around November 2018, demolition of the existing building started in April 2019. The appellant maintains that some walls were retained, and photographic evidence is particularly instructive of the reality on the ground. These retained walls amounted to 7.5% of the new structure, and the external flank wall accounted for just 6% of the external walls and 3% of the new structure. But these walls were also demolished on advice from the building control inspector, due to their structural instability. Consequently, the entire dwelling had been demolished and, according to the statutory declaration, works comprised in the erection of a replacement dwelling-house were virtually complete by 7 November 2019[7]. The appellant submits that complete or partial demolition of the existing dwelling should be construed as an immaterial variation[8] falling within the scope of the 2015 permission. For the following reasons, I reject these submissions.

6. An application to make non-material changes had not been submitted to, and approved by, the LPA, which was a route open to the appellant. I acknowledge the LPA could have regarded demolition of the existing dwelling, in whole or in part, as being a material departure from the approved 2015 scheme. Nevertheless, while Counsel makes much of the immaterial variation concept, there is no plausible explanation as to why the statutory framework wasn't followed in this particular case.[9]

7. To me, there is no ambiguity as to the meaning and effect of the 2015 permission. It clearly relates to the extension and alteration of the existing dwelling, because of the clear terminology in the description of development permitted. A simple comparison between existing and proposed plans show the 2015 permission envisaged the extension and alteration of the existing dwelling-house. In my assessment, demolition in whole or in part does not fall within the precise ambit of the permission.

8. My interpretation of the 2015 permission is consistent with the conditions and reasons imposed. For example, condition 2) reads: "*The materials to be used in the construction of the external surfaces of the development hereby permitted shall match with those used in the existing building*" [emphasis added]. The use of the words "existing building" suggests the external surfaces of the extensions need to match what exists on site at the date of the decision. If the latter was to be demolished and replaced in its entirety, I would expect the imposition of a different type of condition having regard to usual development control practice. For instance, a pre-commencement condition requiring the submission of sample materials to the LPA for its approval. There is no such condition imposed on the 2015 permission.

9. I find some comfort in the wording of an informative imposed on the 2015 permission. This states the following: "*The development hereby permitted must be carried out in accordance with the approved plans and specifications unless the prior approval in writing of the local planning authority has been obtained. If changes are proposed* [sic] *you should first contact the local planning authority to obtain the necessary approval.*

[6] The charging schedule was approved by Mole Valley District Council on 11 October 2016. It took effect on 1 January2017.
[7] Page 124 of the bundle of evidence and paragraph 27 to the statutory declaration.
[8] *Lever (Finance) v Westminster City Council* [1971] 1 QB 222 (CA) and *R (Mid-Counties Co-Operative Ltd) v Wyre Forest DC* [2009] EWHC 964 (Admin). I have considered these legal authorities in my deliberations above.
[9] The power to make non-material changes to planning permission is found in section 96A of the Town and Country Planning Act 1990 (as amended) ['the 1990 Act'].

Any changes carried out without permission may render the applicant/developer liable to enforcement, stop notice or other legal proceedings in order to rectify the matter". While the informative isn't determinative of the issue, it is reasonable to assume the appellant, who was professionally represented[10], was reasonably aware of the consequences should he deviate from the approved scheme without first obtaining written approval from the LPA.

10. The appellant intended to implement the scheme approved by the 2015 permission, but intention can change with a heartbeat. The facts show that there was an early departure from the 2015 scheme probably around the time when the existing dwelling was substantially demolished. In addition to that, there were some alterations to the design of the dwelling compared to the permitted scheme. For example, the external appearance of the dwelling is visually different due to the divergence in fenestration detail and includes several new rooflights and opening amendments. So, what was being built on site was significantly different to the approved 2015 scheme.

11. Taking all the above points together, I consider that the demolition of the existing dwelling and subsequent rebuilding with a significant change to the external appearance of the dwelling had a visual impact upon the site, and the character and appearance of the street scene. The demolition of the dwelling, in whole or in part, combined with amendments to the external appearance represented a material and significant departure from the precise terms of the 2015 permission and can't reasonably be regarded as neither trivial in nature and extent nor immaterial variations.

12. Alarm bells were likely triggered when planning enforcement officers conducted a site visit in June 2019, because operations comprised in erecting a replacement dwelling-house were progressing. Officers determined a breach of planning controls had, in fact, occurred due to the demolition of the existing dwelling and its subsequent rebuilding with a different external appearance. They determined that a fresh application for permission was necessary to regularise the unauthorised development. On facts of this case, I believe that initial assessment to be correct given the planning situation on the ground. Having realised that the development required fresh planning permission, the appellant sought to regularise the situation and made an application on 17 July 2019.

13. In contrast to the 2015 permission, the second application is for carrying out operational development comprised in the erection of a replacement dwelling with a different external appearance. The terms of the permission are clear and precise. The conditions imposed include some pre-occupation stipulations which confirm the development comprises new build rather than extension of the existing dwelling. Furthermore, the plans approved clearly show the erection of a new building; a new dwelling-house. There are similarities in footprint and size yet there are stark and major differences between the two schemes I have outlined elsewhere. Contrary to the appellant's submissions, I find that demolition and rebuilding falls within the scope of the 2019 permission. A reasonable person, in possession of all relevant facts, would probably arrive at the same conclusion.

14. The evidence presented indicates that the development more-or-less complies with the scheme approved in 2019. The appellant maintains that a general application for planning permission was made to the LPA; there was no intention to make a s73 or s73A application, but this is not determinative. Additionally, the decision notice issued by the LPA does not refer to the retrospective nature of the development. However, I am not persuaded by the argument that the decision notice must refer to the retrospective

[10] Page 129 of the bundle of evidence includes a copy of the application for planning permission submitted in April 2015.

nature of the permitted development, and there is nothing before me to indicate the notice must specify the source of the LPA's powers. The key is that the power exists to grant planning permission retrospectively.

15. Counsel argues that the imposition of condition 1) suggests the 2019 permission isn't retrospective in nature. I am not persuaded by this line of argument. At risk of repetition, condition 1) requires development to be begun within 3 years. It should be borne in mind that a significant amount of new building work was necessary to complete the replacement dwelling. These works were prospective in nature and scale. On the particular facts and circumstances of this case, it is apparent to me that, on or before the date of the 2019 application and subsequent permission (31 July 2019), building operations comprised in the scheme had already begun on the ground but the building was not substantially completed. Logic indicates the application sought planning permission for a part-retrospective-and-part-prospective development. To my mind, condition 1) is justified.

16. Turning to the source of the power to grant retrospective planning permission, it derives from s73A of the 1990 Act and it does not matter if the LPA did not state this on its decision notice. The 2019 permission is in effect, a standalone permission for the carrying out of operational development including demolition and rebuilding of the dwelling, which had been retrospectively granted. Contrary to the appellant's submissions, a decision-maker considering an application for planning permission could grant, under s73A, retrospective permission for a development already carried out without it usually being necessary to forewarn the applicant of this before determination. Clearly, the power to grant planning permission for a part-retrospective-part-prospective development exists and that is what is necessary.

17. Having examined the history and planning permissions granted by the LPA, I find that, for CIL purposes, the chargeable development is derived from the 2019 permission. CIL Regs 7(5) states that development for which planning permission is granted under s73A (planning permission for development already carried out); or granted or modified under s177(1) (grant or modification of planning permission on appeals against enforcement notices), *is to be treated as commencing on the day planning permission for that development is granted or modified (as the case may be)* [my emphasis]. In this case, CIL Regs 7(5) is engaged. Thus, it follows that the CA has issued a DN with a correctly determined deemed commencement date.

18. Even if an alternative view is to prevail, that is that the 2015 permission has effect as a standalone permission for the carrying out of operational development including demolition, this line of argument does not assist. This is because, having materially departed from the terms of that permission, development was not being carried out in accordance with the scheme approved by the 2015 permission. So, a new standalone planning permission was required to regularise the operations and fully complete the development. The permission was subsequently granted for chargeable development after a charging schedule had come into force. There is nothing before me to indicate a CN was submitted before material operations comprised in the later permission started.

Implied CIL Regs 117(a) appeal

19. CIL Regs 83 states that where a chargeable development is commenced before the CA has *received* a valid CN in respect of that development, it *may* impose a surcharge [my emphasis]. In exercising its discretionary powers, the CA has imposed surcharges because a CN had not been served and there was a failure to assume liability. On the

balance of probabilities, I find that the claimed breach, which led to the imposition of surcharges, did occur. Therefore, this implied appeal also fails.

Other considerations

20. For consistency's sake, I should address an appeal decision[11] promulgated as a material consideration. Planning permission was granted for renovation of farm buildings and a standalone barn. During works it was found that most, if not all, the farm buildings' walls were unsafe such that building control advised they be knocked down. The enforcement notice alleged the erection of new dwelling-house.

21. The Inspector found that, while the permission is expressed as the renovation of existing farm buildings and conversion to a bungalow, the terms 'renovation' and 'conversion' only applied to the free-standing barn element in the permission. All other buildings proposed were either totally new structures, for example, the garage and the connecting buildings, or new structures incorporating parts of two existing walls. Rebuilding parts of those walls which were found to be defective and unsafe did not represent a material departure from the planning permission. In contrast, demolition of the existing dwelling, in whole or in part, did not fall within the scope of the 2015 permission's precise terms. I do not consider the circumstances before me are analogous to the appeal case and attach little, if any, weight to the precedent argument. In any event, I am faced with a totally different task and I have found the CA correctly determined the deemed commencement date for the purposes of CIL Regs.

Conclusion

22. For all the above reasons, I conclude that the appeal should fail and the DN is upheld as set out above.

A U Ghafoor

Inspector

[11] APP/C/90/V0130/28-29/P6 dated 4 October 1991.