The Planning Inspectorate

# Appeal Decision

Site visit made on 28 July 2020

**by Mrs H M Higenbottam BA (Hons) MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 8 December 2020**

## Appeal Ref: APP/X1165/L/19/1200351

[redacted]

- The appeal is made under section 218 of the Planning Act 2008 and Regulations 117(1)(a), (b) and (c) and 118 of the Community Infrastructure Levy Regulations 2010.
- The appeal is made by [redacted]
  i) against a Demand notice issued by Torbay Council and
  ii) against surcharges imposed by Torbay Council.
- The relevant planning permission to which the CIL surcharges relate is [redacted]
- A Liability Notice (LN) was served on 2 July 2018.[1]
- A Demand Notice was served on 30 October 2019.[2]
- The description of the permission is [redacted]
- The alleged breaches are the late payment of the CIL chargeable amount and the failure to submit a Commencement Notice (CN) before commencing works on the chargeable development.
- The surcharge for failure to submit a Notice of Chargeable Development is [redacted]
- The surcharge for failure to submit a Commencement Notice is [redacted]

## Decision

1. The appeal fails in relation to Regulation 117 (b) and the appeal is allowed under Regulations 117(1)(a) and 118. The appeal under Regulation 117(1)(c) does not fall to be considered. The surcharges of [redacted] are quashed.

## Preliminary Matters

2. I have dealt with the appeal under Regulations 117(1)(b) and 118 first due to the consequences of the decisions on those matters to the appeals under Regulations 117(1)(a) and (c).

3. The appellant has raised the issue of exemption from CIL liability. The Collecting Authority (CA) record that on 23 May 2019 it received a Notice of Chargeable Development and supporting documents from the appellant's new agent. In that submission it was claimed that the building had been lawfully occupied for office purposes for at least 6 months in the previous 3 years and sought an exemption from liability to pay CIL on that basis. Further information was requested by the CA and received. The CA note that no Commencement Notice was received from the appellant. Following a site visit the CA concluded that works had commenced and that the date for commencement was stated at the site visit to be 1 December 2018. While I

[1] The LN was revised due to indexation and a revised Liability Notice was issued and the CA state that these were sent on 27 June and 6 August 2019.
[2] The CA originally issued a DN dated 6 August 2019. However, this was re-issued on 30 October 2019 as no surcharges had been specified in the original DN. It is the re-issued DN which is the subject of this appeal.

record these points in this decision, I do not have jurisdiction over matters of exemption. I therefore cannot consider this issue as part of this decision.

## Appeal under Regulation 117(1)(b)[3]

4. Prior approval for a change of use from B1 office to 43 residential flats (Class C3) was granted on 2 July 2018 [redacted] The Council state that as the CA it issued a Liability Notice (LN) to the appellant's then agent [redacted]) and that an electronic link to the LN was contained within the informative on the decision notice for the prior approval decision. The electronic link did not allow the document to be opened as it was indexed as 'confidential' on the public access system. This was subsequently amended, and the document is now stated to be accessible via the link.

5. In the original appeal submissions, the appellant stated that a LN was not received. However, the appellant has since confirmed that the LN was forwarded by [redacted] (stated to be the planning agents) in July 2018 to an email address that was not routinely monitored at that time.

6. On the evidence available I consider that the LN was correctly issued by the Council, albeit the arrangements between the appellant and his agent appears to have failed to ensure that the LN reached the appellant as it should have. This does not mean that the LN was not correctly served. I am satisfied that the LN was correctly served and complied with Regulation 126(1) (e) and 126(2). The appeal under Regulation 117(1)(b) therefore fails.

## Appeal under Regulation 118

*Has the development commenced?*

7. 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(6) explains that 'material operation' has the same meaning as section 56(4) of the Town and Country Planning Act 1990 (the Act). I will return to what constitutes a 'material operation' below.

8. Where prior approval is required and approved paragraph W(12) of Part 3 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 2015 as amended (GPDO) states:

'The development must be carried out-

(a) Where prior approval is required, in accordance with the details approved by the local planning authority;

unless the local planning authority and the developer agree otherwise in writing.'

9. The CA and the appellant have confirmed that the documents submitted with the prior approval application [redacted] were:

- Planning Portal notification for prior approval for proposed change of use of a building from Office Use (Class B1(a)) to a Dwellinghouse (Class C3). Section 4 of the form 'Description of Development' was blank.

[3] The Collecting Authority failed to serve a Liability Notice in respect of the development to which the surcharges relate.

- OS map entitled [redacted] dated May 2018.
- Flood risk assessment dated 12 April 2018.
- Proposed internal floor plan prepared by [redacted] reference [redacted] and dated 16 March 2018.

10. The plan reference [redacted] formed part of the documents submitted with the prior approval application. It therefore formed part of the details approved by the local planning authority. There has been no agreement to alternative details and, as such, the layout on plan reference [redacted] is the layout that was approved.

11. An internal site inspection was undertaken at the site visit and it is clear that the layout of what is on the site does not accord with the layout plans submitted as part of the details of the prior approval reference [redacted] Internal partitions had been erected within the building and the subdivision of the floors was generally understandable but did not accord with the layout plan details. This included units that were shown as one bedroom on the plan reference [redacted] having an additional room[4]. In particular Flat 10 (referred to on site) was shown as a one bedroom unit on the prior approval drawings and it clearly had an additional room as laid out at the time of the site visit. As such, the layout I saw at the site visit is in breach of paragraph W(12).

12. The appellant has created two 'show flats' within the building which have internal walls and kitchen units, but no services are connected up and there was no evidence the services are in place to actually connect any of the facilities within the 'show flats'. It is not merely a case of not being connected but one of the services are not there to connect to, because the 'show flats' have merely been created to provide an impression of what the finished development would look like. The 'show flats' are in effect mock-ups of the intended residential units but do not contain the facilities within them to support the day to day private domestic living for occupants.

13. Where prior approval is expressly granted under Class O of Part 3 of Schedule 2 of the GPDO the development subsequently undertaken is only lawful if it is carried out in accordance with the submitted details and complies with all the conditions and limitations relevant to Class O. The internal floor layouts I saw on site do not accord with the layout approved under [redacted] shown on plan reference [redacted] As such, the physical conversion works taking place on site, on the evidence available, is not that which was granted prior approval under reference [redacted] and that scheme has not commenced.

*Has a Material Operation or Material Change of Use Taken Place?*

14. The CA rely upon the layout of one of the show flats being in accordance with the layout for that unit set out on plan reference [redacted] While I have concluded that the prior approval that has been granted has not commenced because what is on site, looked at in the round, is not the layout for the prior approval scheme, for completeness, I will consider whether or not a material operation and/or material change of use have taken place at the appeal site. These are the principal issues between the parties.

[4] At the site visit the additional room to various units was referred to as a second bedroom. However, there was nothing in the layout of the subdivisions to indicate a specific use for the space.

*Material Operation*

15. The CA relies on the following matters in concluding that a material operation had been carried out:

    a. The CA refer to an appeal decision [redacted] in support of its conclusions. In relation to that appeal development they state it is not clear what the development which was the subject of the appeal involved, however internal heating and electrical works are materially different from creating and fully fitting out a residential flat and marketing it for sale. Whether works are internal or not is not a conclusive answer to the question of whether development has commenced.

    b. A flat has been constructed within Roebuck House in accordance with the details submitted in connection with prior approval [redacted] Formation of this flat constitutes the creation of a new planning unit. The Council confirmed following the site visit that it appeared that the 66m²2 bed flat nearest the lift on the lower ground floor (the show flat) had been constructed in accordance with the prior approval layout for that unit.

    c. With a kitchen, living room, bedroom, and bathroom the flat has all of the facilities required for day to day private domestic existence and therefore a 'dwellinghouse' per *Gravesham BC v Secretary of State for the Environment* (1984) 47 P&CR 143.

    d. Although the flat was not occupied at the time of the site visit, change of use to residential use can commence prior to actual use as such. Both the physical state of the premises and the actual, intended or attempted use of them are important; but neither consideration is decisive *Impey v Secretary of State for the Environment* (1984) 47 P&CR 157 (which involved a change of use from kennels to residential). See also *Welwyn Hatfield Council v Secretary of State for Communities and Local Government* [2011] JPL 1183 (barn permitted but used for residential purposes) where it was held that undue stress should not be placed on the need for "actual use", with its connotations of familiar domestic activities. In dealing with a subsection which spoke of "change of use of any building to use as a single dwelling-house" the Supreme Court held that it was more appropriate to look at the matter in the round and ask what use the building had or of what use it was, and that the Court of Appeal was wrong to say that a building had no use when it had been built to live in (and in that case the owner was about to move in).

    e. In this case the physical attributes of the flat are clearly residential, and the sales particulars for the site (see appendix A1) make it clear that the Appellant's intention is that the flat (and others in the building) shall be sold and occupied for residential purposes.

16. The Council consider that a material operation was carried out on 1 December 2018. The term 'material operation' is defined by Regulation 7(6) as having the same meaning as in section 56(4) of the Act.

17. Section 56(2) states that development is taken to have begun on the earliest date on which any 'material operation' comprised in the development begins to be carried out. Material operations are defined under subsection 4 and

constitute, in the main, forms of operational development except for paragraph (e) which includes any change in the use of any land where the change constitutes material development.

18. 'Material Development' is in turn defined under section 56(5) as excluding development for which planning permission is granted by a general development order and which is carried out so as to comply with any condition or limitation subject to which planning permission has been granted. This therefore excludes from the meaning of 'material operation' any development granted prior approval under Class O of Part 3 of Schedule 2 of the GPDO if it is carried out so as to comply with any condition or limitation subject to which planning permission is so granted, such as paragraph W of Part 3. I therefore conclude that where the layout of the works in the building are in accordance with the approved layout which is the case with the show flat, albeit the remainder of the building subdivision does not necessarily follow that of the approved prior approval layout, a material operation has not taken place.

19. I therefore find that the works which have been carried out at the property, which are all internal works and are not in accordance with the conditions and limitations of the prior approval reference [redacted] have not resulted in a material operation.

*Material Change of Use*

20. The act of development to which the commencement relates in this appeal is a material change of use. Whether a building is or is not a dwellinghouse is a question of fact and degree. A building can include part of a building, such as the show flat referred to by the CA.

21. In the judgement in *Gravesham Borough Council v Secretary of state for the Environment and Another* (1984) 47 P. & C.R. 142 it was held that a distinctive characteristic of a dwellinghouse was its ability to afford those who used it, the facilities required for day-to-day private domestic existence.

22. In the *Welwyn Hatfield* Supreme Court judgment, it was found that that 'Aside from its appearance, the present building was in every respect designed and built as a house.'. It was held in that case that there was not a material change of use of a building to a dwellinghouse. It was built as a dwellinghouse.

23. In the *Impey* judgement it was concluded that the physical state and the actual, intended, or attempted use were important in deciding whether or not a material change of use had taken place, but none was decisive. All these matters had to be looked at in the round.

24. In the current case the 'show flat' relied on by the CA is not capable, in my view, of providing facilities for the day to day living of a person for the reasons set out above. It could not be occupied and lived in, unlike the suggestion in *Impey* of flats for sale and ready for occupation.

25. The building as a whole is in the process of undergoing conversion works. The building is in transition. It could with further fittings, fixtures, services etc become residential in use, but did not at the time of my site visit have enough fittings, fixtures and services to have become a residential use in the show flat relied on by the CA or any of the subdivided spaces. The show flat is not a viable dwelling and could not be occupied and used for residential purposes.

26. I appreciate that there are some sales particulars, but these appear to be of a mock-up flat, which I have found cannot sustain day to day living. It is not unusual for a developer to create sales particulars before a development is capable of being occupied.

27. The works to subdivide the spaces within the building are not such that I am satisfied that it could not revert to an office use. That is not to say that is what would be done, but just that the physical conversion works have not reached the stage where the change of use, as a matter of fact and degree, has actually taken place.

28. The lack of viable facilities for day to day living, taken together with the early stage of works within the building, such that I cannot conclude that the building could not still revert to an office use, lead me to conclude that the material change of use to residential of the building, or part of it, has not occurred. I therefore find that the material change of use to a residential use had not taken place at the time of my site visit and it had not taken place on 1 December 2018 as stated by the CA.

*Conclusion on Regulation 118 Appeal*

29. It therefore follows that the deemed commencement date is incorrect and the appeal under Regulation 118 is allowed. In accordance with Regulation 118(4) the Demand Notice ceases to have effect.

**Appeals under Regulations 117(1)(a) and (c)**

30. The appeal under Regulation 117(1)(a) is that the claimed breach which led to the surcharge did not occur. The appeal under Regulation 117(1)(c) is that the surcharge has been calculated incorrectly.

31. The claimed breaches that led to the surcharges are the failure to a submit a Notice of Chargeable Development and the failure to submit a Commencement Notice before starting works on the chargeable development as required by Regulations 64(2) and 67(1) respectively. The Council imposed a surcharge of [redacted] for each alleged breach.

32. As I have found that the development has not commenced it follows that the date of deemed commencement stated as 1 December 2018 is incorrect and consequently the alleged breaches that led to the surcharges did not occur. The appeal under Regulation 117(1)(a) therefore succeeds.

33. In view of my findings above on the grounds of appeal under Regulations 117(1)(a) and 118, the appeal under Regulation 117(1)(c) does not fall to be considered.

*Hilda Higenbottam*

Inspector