



Appeal Decision

by Mr A U Ghafoor BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 31 December 2020

Appeal Ref: APP/N1920/L/20/1200390

- The appeal is made under section 218 of the Planning Act 2008 and Regulation 117 a), b) and c) of the Community Infrastructure Levy Regulations 2010 as amended (for convenient shorthand, the 'CIL Regs').
- The appeal is made by [REDACTED]
- A Demand Notice ['DN'] was issued by Hertsmere Borough Council as the collecting authority ('the CA') on 11 February 2020.
- The deemed commencement date of development is stated as 19 June 2019.

Details of chargeable development to which the DN relates

- The outstanding amount of CIL payable, including total surcharges of [REDACTED] for a failure to submit a Commencement Notice ['CN'] and late payment, is [REDACTED]

Decision

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

Preliminary matters

2. For an appeal to succeed on CIL Regs 117 sub-section b), the appellant will need to show that the CA did not serve a liability notice ['LN'] in respect of the chargeable development to which the surcharge relates. As the outcome on this ground of appeal has a bearing on 117 a) and c), I will deal with this first. Arguments raised in 117 a) and c) overlap and so I intend to deal with them together.

Inspector's reasons – CIL Regs 117(b) appeal

3. On 28 February 2019, planning permission for residential development, which I have described in the sixth bullet-point above, was granted by the local planning authority and this is subject to 23 conditions [for convenient shorthand 'the 2019 permission']. The

¹ I have taken the appellant's name from the CIL appeal form. CIL Regs 117 states that a person who is aggrieved at a decision of a CA to impose a surcharge may appeal to the appointed person. Although the appeal has been made on behalf of a company by the agent, normally an appeal should be made by a person. The CIL appeal form refers to [REDACTED] and electronic correspondence between Hertsmere Borough Council and the company refer to [REDACTED] who is a person representing the company.

² This figure includes interest of [REDACTED]

latter being subject to an executed planning obligation requiring the creation of 21 affordable housing units³.

4. Liability to pay CIL arises from the development authorised by the 2019 permission. The appellant assumes liability. The chargeable development amount is [REDACTED]. As the development includes affordable homes it was eligible for social housing relief. On 14 May 2019, the CA granted relief for the following amount: [REDACTED]. A LN⁴ was issued for the following amount: [REDACTED]. There is no dispute between the appeal parties that this LN satisfies CIL Regs 65(2).
5. 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 when and how the CN is to be submitted and requires the CA to issue an acknowledgement. If development commences in breach of these requirements, the CA has the power to issue a DN with a deemed commencement date pursuant to CIL Regs 68.
6. Officers from the CA noted works had started following a routine site visit in June 2019. The appellant acknowledges buildings were demolished and trenches were dug. There is no dispute between the appeal parties that the work carried out was pursuant to the 2019 permission. The evidence presented shows that the nature and scale of these operations changed the physical appearance of the site and they marked the beginning of work on the chargeable development. I too concur with the appeal parties that these works fell within the scope of material operation defined by CIL Regs 7.
7. It should be borne in mind that the CA has a general discretionary power to issue a revised LN at any time. On 5 August 2019 the authority issued a second LN⁵, which it must do if there is any material change to the details specified on the first notice. For example, a change to the chargeable amount or any change to particulars. On the second LN, the CIL liability amount is [REDACTED] and the social housing relief is reduced to zero. I find these are material changes to the first LN, which ceased to have effect as soon as the second notice was issued.
8. Pursuant to CIL Regs 69(1) and (2), the CA issued its first DN on 5 August 2019. The reasons for issuing the DN are stated in section 6. The deemed commencement date is 19 June 2019, and it identifies the second LN. The reasons for issuing the DN state the following: "*Development is deemed to have commenced – A surcharge⁶ has been imposed [because of a failure to submit a CN] – A disqualifying event for relief purposes has occurred*". Counsel submits that the DN is invalid because it refers to a "disqualifying event". In the context of social housing relief, a disqualifying event has a specific meaning. The CA acknowledge that it misapplied CIL Regs 53 subs (1) to (10), because the DN erroneously referred to a disqualifying event: I have no reason to disagree.
9. Subsequently, on 11 February 2020, the CA issued a second DN omitting reference to a disqualifying event and imposing surcharges for late payment. As stated elsewhere, the outstanding amount of CIL payable is [REDACTED] which included total surcharges of [REDACTED] and interest amount of [REDACTED]. It is within the CA's gift to issue a revised DN because section 69 sub (3) clearly states the CA "...may at any time serve a revised demand notice on a person liable to pay an amount of CIL", and sub (5) makes

³ Dated 24 February 2019 (appendix 2 to the appellant's bundle of evidence).

⁴ Pursuant to CIL Regs 65. The CA ref: LN00000836.

⁵ Ref: LN00000877. CIL Regs 65 sub (4) and (5) applies.

⁶ Surcharges can be imposed by the CA – CIL Regs Part 9 chapter 1.

clear the earlier DN ceases to have effect. I do not consider the CA acted beyond its powers.

10. Counsel's submissions are that the second LN is unlawful because it does not explain why social housing relief was withdrawn. The claim is that the 11 February 2020 DN refers to an invalid LN. Effectively, the argument is that the first LN is valid and the CA should have demanded the chargeable amount specified therein as social housing relief can't be lost as a disqualifying event has not occurred. Reliance is placed upon application of CIL Regs 51(6), which states that if relief is granted the claimant is deemed to benefit from an amount of relief equal to the qualifying amount.
11. There is nothing before me to indicate a LN must specify the reason as to why relief has been withdrawn. Furthermore, the Government's Planning Practice Guidance, including its model LN, does not suggest a reason must be given. To me, the CIL Regs clearly articulate what must be done by the developer before commencing work on the chargeable development. The requirements must be rigidly followed and satisfied in full otherwise a failure to comply has serious consequences and there is little, if any, room for discretion: hindsight has no role. Commencing operations before submitting a valid CN and obtaining an acknowledgement receipt from the CA marked a significant turning point in the site's history. While failure to comply with CIL Regs 67 was either an unfortunate event or a highly risky strategy, it is, nevertheless, a flagrant breach of the regulations.
12. CIL Regs 51 sets out the procedure for obtaining social housing relief and the circumstances when chargeable development cease to be eligible. For example, sub-section (4) states a claim will lapse where the chargeable development is commenced before the CA has notified the claimant of its decision on the claim. This isn't relevant here because material operation commenced after relief had been granted. Section (7) sub-paragraph (a) states a chargeable development *ceases to be eligible for social housing relief if, before that chargeable development is commenced, a CN is not submitted to the CA* [my emphasis]. On the ordinary meaning of the words, a reasonable person would conclude that a failure to submit a CN triggers a loss in social housing relief; failure to comply means failure to submit a notice under CIL Regs 67.
13. Following the High Court's decision in *Shropshire*⁷, the CIL Regs were amended by statutory instrument⁸, which came into force on 1 September 2019. Part 6 amended CIL Regs 51 sub-section (7) by omitting sub-paragraph (a). Given the transitional provisions and savings, where social housing relief was lost due to a failure to submit a CN before operations comprised in the chargeable development commenced, the amendments did not reinstate any relief. So, the amendments did not apply retrospectively to lost relief. Additionally, regulation 1(4) of the amending statutory instrument state that regulations 6, 7, 8 apply in relation to any LN or revised LN issued by a CA under CIL Regulation 65 on or after the commencement date. By logical extension, the amendments do not apply in relation to a LN issued before 1 September 2019. Contrary to the appellant's claim, CIL Regs 51(7) is engaged in this case.
14. The evidence presented clearly shows to me that the CA did serve a LN in respect of the chargeable development to which the surcharge relates. That service was pursuant to CIL Regs 126. For all the reasons given, I reject the appellant's submissions and conclude that this ground of appeal must fail.

⁷ *Shropshire Council v SSCLG and Lee Jones* [2019] EWCH 16 Admin handed down 16 January 2019.

⁸ The Community Infrastructure Levy (Amendment) (England) (No. 2) Regulations 2019 statutory instrument no. 1103.

CIL Regs 117 a) and c) appeal

15. The challenge is that the claimed breach which led to the imposition of the surcharge did not occur. The first surcharge is imposed because the appellant failed to submit a valid CN. The power to impose the surcharge is derived from CIL Regs 83(1).
16. CIL Regs 85(1) states that where: (a) a person (P) is liable to pay an amount (A) under these [CIL] 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 CA may impose a surcharge on P equal to five per cent of A or [REDACTED] whichever is the greater amount. If any part of payment is not received after the end of the period of six months beginning with the day on which payment is due, the CA may impose a surcharge equal to five per cent of the unpaid amount or [REDACTED] whichever is the greater amount. CIL Regs 87 permits the charging of interest on late payments.
17. Contrary to the appellant's submissions, the day on which the payment is due should be calculated by reference to CIL Regs 31(2) and 70. The former provides that a person who assumes liability is liable on commencement of the chargeable development. The latter makes provision as to how a payment date is to be identified. If the CA has received a CN, the levy is payable in accordance with any instalment policy or otherwise after 60 days. If the CA has determined a deemed commencement date and a CN has not been submitted, the full CIL amount is due on the deemed commencement date. In such circumstances the right to pay in installments is lost. To me, the question of liability to pay, the quantum and date of payment are not determined by service of a LN or DN. It is CIL Regs 70 that determines the payment date and regulation 31(2) that determines the liability.
18. At risk of repetition, the evidence presented clearly shows that the appellant failed to submit a valid CN. The CA determined the deemed commencement date as 19 June 2019. The total levy for the chargeable development was therefore due immediately. The CA issued the first DN in August 2019 demanding payment straightaway and then a revised DN was issued in February 2020 demanding payment to be made immediately. The revised LN records that CIL amount will be payable in "0" days after commencement. The appellant says a payment of [REDACTED] was paid in March 2020, which is well after the day on which the payment was due.
19. Turning to CIL Regs 117 c) appeal, the amount due, including the social housing relief element, became due immediately. Payment was not made the day on which the payment was due, and surcharges were imposed. The evidence presented shows surcharges were correctly calculated.
20. Pulling all the above points together, I find that the claimed breach, which led to the imposition of the surcharges, did occur and the late payment surcharges, as stated on the DN, have been calculated correctly. CIL Regs 117 a) and c) appeals therefore fail.

Overall conclusion

21. The case for the appellant has been eloquently and forcefully argued. However, for all the above reasons, on the particular facts and circumstances of this case, and having regard to all other matters raised, I conclude that the appeal should be dismissed. I have therefore upheld the DN issued by the CA on 11 February 2020.

A U Ghafoor

Inspector