



Appeal Decision

Site visit made on 26 October 2023

by A U Ghafoor BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 2 November 2023

Appeal Ref: APP/R0335/L/23/3326090

- The appeal is made under section 218 of the Planning Act 2008 and Regulation 117(a) and 118 of the Community Infrastructure Levy Regulations 2010 as amended (hereinafter 'the CIL Regs').
 - The appeal is brought by [REDACTED] against a Demand Notice (the 'DN') issued by the Collecting Authority, Bracknell Forest Council ('the CA').
 - The relevant planning permission to which the CIL relates is [REDACTED].
 - The description of the development is described on the DN as follows: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
 - A Liability Notice (the 'LN') was served on 30 May 2023. The total amount of CIL payable is [REDACTED].
 - A DN was issued on 14 June 2023. The following surcharges were imposed: [REDACTED] for a failure to assume liability, [REDACTED] for a failure to submit a commencement notice (hereinafter 'CN'), and [REDACTED] for late payment. The total amount payable is [REDACTED].
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Decision

1. The 117(a) and 118 appeal is allowed.

Preliminary matters

2. As the outcome of CIL Regs 118 has a bearing on the 117(a) appeal, I shall evaluate the former first.
3. It appears a surcharge has been imposed because the CA consider development pursuant to an express grant of planning permission had started before a CN was submitted. In accordance with CIL Regs 68, the CA states the deemed commencement date is 16 May 2023. I will proceed on this basis.
4. An application for costs is made by the appellant against Bracknell Forest Council. This is the subject of a separate Decision.

CIL Regs 118 appeal

5. CIL is a tool for local authorities to help deliver infrastructure to support the development of the area. A charging schedule for new development requiring planning permission sets out the levy rates for a charging authority area. The Council, as the CA, adopted its charging schedule, which came effective on 6 April 2016. A planning permission for residential development of this kind is subject to the levy after the schedule came into force unless it is exempt.

6. How is planning permission defined in the CIL Regs? Regulation 5(1), amongst other things, sets out the meaning of planning permission and subsection (a) states that it is granted under section (s) 70, 73 or 73A of the Town and Country Planning Act 1990 as amended (the '1990 Act'). Regulation (6) sets out the meaning of development, regulation (7) provides for interpretation of commencement of development, and regulation (8) sets out the time at which planning permission first permits development. Section 70 of the 1990 Act sets out general principles dealing with application for planning permission. Where an application is made to a local planning authority (the 'LPA'), it may grant planning permission either unconditionally or subject to conditions as it sees fit, or it may refuse permission. Section 73 provides a power to determine an application for planning permission to develop land without compliance with conditions previously attached, and s73A provides for a grant of planning permission for development already carried out.
7. For CIL Regs purposes, how do we determine if development has begun? CIL Regs 7 administers when a development commences. Section 56(1)(a) of the Town and Country Planning Act 1990 (as amended) (the '1990 Act') states development of land shall be taken to be initiated if the development consists of the carrying out of operations, at the time when those operations are begun. Sub-section (2) states that, for the purposes of development granted by a planning permission, development shall be taken to be begun on the earliest date on which any material operation comprised in the development begins to be carried out. Sub-section (4) provides a broad definition of "material operation" and in this context sub-section (a), (aa) and (b) are of direct relevance¹. The bar is low, and the digging of a trench would be sufficient. CIL Regs 7 mimics s56 of the 1990 Act².
8. What is the interplay between s73 and s73A of the 1990 Act? In an appropriate case 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. Where any grant of planning permission had to be retrospective in its effect, the power to make the grant is derived from s73A. Subsection (1) provides that on an application for planning permission, the permission granted may include permission in respect of development that has already been carried out. By subsection (2) retrospective permission may embrace development carried out without planning permission³.
9. Additionally, as the UKSC held in *Hillside*, that a s73 application is an option for a developer who has been granted a full planning permission for one entire scheme but wishes to depart from it in a material way. Despite the limited power to amend an existing planning permission, there is no reason why an approved development scheme cannot be modified by an appropriately framed additional planning permission which covers the whole site and includes the necessary modifications. The position then would be that the developer has two

¹ Section 56(4) - (a) any work of construction in the course of the erection of a building – (aa) any work of demolition of a building and (b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building.

² The same meaning as that given in s 56(4) of the 1990 Act: 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.

³ The principles established in *Lawson Builders Ltd v Secretary of State for Communities and Local Government* [2015] EWCA Civ 122 are relevant although the facts are dissimilar.

permissions in relation to the whole site, with different terms, and is entitled to proceed under the second⁴.

10. What are the rules relating to the issuing of a DN? CIL Regs 69 relates to the service of a DN. The CA must serve a DN on each person liable to pay an amount of CIL in respect of a chargeable development. Amongst other things, sub-section (2) explains what a DN must include. For example, amongst other things it must state: the date on which it was issued; the liability notice to which it relates; the intended commencement date or, where the CA has determined a deemed commencement date and the amount payable (including any surcharges imposed).
11. In addition, CIL Regs 69(3) states that the CA may at any time serve a revised DN. Sub-section (4) states that the CA must serve a revised notice on a person on whom it has previously served if any of the particulars mentioned in paragraph (2)(d), (e) or (f) change (whether on appeal or otherwise). So, the CA has the power to issue a revised DN if the one already served is held to include the wrong deemed commencement date.
12. Turning to some background information and the facts of this case. The appeal site is roughly rectangular in shape and was once used for car sales. On 12 October 2021, the LPA granted planning permission, subject to 23 conditions⁵, for the following development:

" [REDACTED] " ⁶.

For clarity, I will refer to this permission as 'the 2021 Permission'.

13. A planning application pursuant to s73 of the 1990 Act was submitted to the LPA on 27 November 2022 (LPA ref [REDACTED]). The description of development permitted states the following:

" [REDACTED] " [sic].

This application was granted permission by the LPA on 16 May 2023, and I will refer to it as the '2023 Permission'. It is worth noting that in response to the question on the s73 application form: "Has the development already started?" the answer given is "no"⁷.

14. To me, the meaning of the development permitted by the 2021 Permission is clear as water: there is no ambiguity. Taking in combination the operative part of the permission, conditions imposed and the approved plans, demolition was specifically authorised by this permission and is directly referable to the approved scheme. However, when the scheme is considered in the round,

⁴ *Hillside Parks Ltd v Snowdonia National Parks Authority* [2022] UKSC 30, paragraph 74.

⁵ Some of the conditions were pre-commencement conditions. However, there is no dispute about the status of these conditions. For example, the LPA do not advance a case on the grounds that development had commenced in breach of these pre-commencement conditions.

⁶ Planning permission ref [REDACTED].

⁷ The Application for Removal or Variation of a Condition following Grant of Planning Permission or Listed Building Consent Town and Country Planning Act 1990 (as amended); Planning (Listed Buildings and Conservation Areas Act) 1990 (as amended) dated 27 November 2022.

demolition is limited in extent and scope given the size of the existing building. Prior demolition is comprised in the permitted scheme and is part and parcel of the total works necessary to undertake and facilitate the erection of a dwellinghouse.

15. Whilst there are some similarities between the 2021 and 2023 scheme, the latter is, overall, very different. This is due to the proposed dwelling's external appearance and internal layout. The differences include a stark variation in fenestration detail. For example, the inclusion of additional skylights and windows and application of different building materials, which would result in a dissimilar external appearance. Taken in combination, these variations would result in a materially different development when compared to the scheme permitted by the 2021 Permission.
16. Additionally, the proposed 2023 scheme would result in different planning consequences the merits of which required assessment by the LPA. This is due to the potential on and off-site effects for example, perceived impact on the character and appearance of the area and neighbours' living conditions. Having assessed the potential impact of the proposed development on its environment, the LPA granted permission for prospective development in exercise of its powers under s73 of the 1990 Act.
17. The appeal parties agree that the 2021 Permission is CIL liable, and the previous owner of the site assumed liability following the service of a LN on 22 October 2022. The appellant's sworn evidence is that he and his wife purchased the site on 12 August 2022, which is before the previous owner assumed liability. Nonetheless, an intention to demolish notice, pursuant to the Building Act 1984, was submitted to the Council on 2 August 2022; approved on 10 August 2022.
18. The existing building was demolished around October 2022. I observed that a large amount of earth has been excavated and a hole in the ground marks the location of the proposed dwelling. Large amount of soil was excavated probably using heavy plant and machinery. A rectangular shaped foundation with perimeter retaining walls has been constructed to facilitate the lower ground floor. Retaining walls were also constructed and these would form the outer skin of the proposed basement. The CA confirms these works were akin to a significant engineering operation. The layout and location of the partly constructed basement is broadly consistent with the approved plans. The work was undertaken by a builder and specialist contractor. As a matter of fact and degree, I find the work involved in the demolition of the existing building, soil excavation and the construction of structural retaining walls firmly fall within the scope of material operation for the purposes of 1990 Act and CIL Regs.
19. A CN in connection with the development permitted by the 2021 Permission had not been submitted prior to material operations commencing. Therefore, there was a flagrant breach of the CIL Regs. However, instead of issuing a DN pursuant to the 2021 Permission, the notice subject of this appeal refers to the 2023 Permission.
20. Essentially, the CA now submit that the latest permission is, in part, for retrospective development as material operations had already commenced. They contend that the appellant cannot benefit from any exemptions. The CA has made extensive legal submissions all of which I have considered. However,

for the following reasons, I favour submissions made on behalf of the appellant.

21. Given the circumstances surrounding CIL, the appellant maintains that all building work stopped around May 2023. However, the statutory declaration submitted by the CA's officer, which includes photographic evidence, indicates some building work had continued in June 2023. The officer witnessed concrete being poured around the perimeter of the retaining walls. On the other hand, the appellant's sworn evidence is that urgent operations were required to remedy a structural failure caused by water ingress. The work included replacement of some of the concrete walls. I consider this explanation to be plausible, due to the visible repairs made to the retaining walls.
22. The basement remains substantially incomplete, and the foundation brickwork stop just above natural ground level: probably below damp-proof course. The appellant's evidence is clear and unambiguous: I attach great weight to the claim that all building works ceased by May 2023. Cessation of the operations deserves full credit.
23. Given the location of the hole in the ground and retaining walls, those works were probably carried out in accordance with, and pursuant to, the 2021 Permission. In my assessment, by October 2022 material operations comprised in the scheme approved by the 2021 Permission had, as a matter of fact, commenced prior to the submission of a CN. The CA could, and should, have served a DN with an October 2022 deemed commencement date identifying the relevant chargeable development that was first permitted by the 2021 Permission.
24. On the particular facts of this case, in my planning judgment, I find that the material operations commenced in around October 2022, and the work carried out in June 2023, did not mark the commencement of the development permitted by the 2023 Permission. The latter being subject to pre-commencement conditions and was approved about six months after work began in October 2022. It is a standalone planning permission for wholly prospective development and there is nothing in the application form or description of development to indicate otherwise. Because of the LPA's decision to grant the s73 application, the appellant now has an option of developing the entire site in full by either implementing the 2021 scheme or commence material operations comprised in the scheme granted by the 2023 Permission.
25. Even if an alternative view is to prevail and it is held the 2023 permission is, in effect, part-retrospective-and-prospective, I consider that the operations involved in the demolition work and subsequent part building of the basement were limited in type, scale, extent and nature. Considerable amounts of new and additional building operations are necessary and required to bring about the erection of a dwellinghouse pursuant to the plans approved by the 2023 Permission, and thus leading to the implementation of the 2023 Permission.
26. Drawing all the above threads together, on the facts and circumstances of this case and evidence presented, I find that the CA incorrectly determined the deemed commencement date - 16 May 2023. The DN wrongly referred to the 2023 Permission. In accordance with CIL Regs 118(4), the DN issued by the CA in respect of the relevant development ceases to have effect.

CIL Regs 117(a)

27. Given my findings on the CIL Regs 118 appeal, the claimed breach, which led to the imposition of the surcharges, did not occur. This is because material operations comprised in the 2023 Permission had not commenced by the deemed commencement date - 16 May 2023. On the particular facts and circumstances of this case, I find that there has been no failure to submit a CN in connection with the 2023 Permission as alleged, nor can a late payment surcharge be imposed. In accordance with CIL Regs 117(4), I quash the surcharges.

Other matter

28. As an aside, I have, elsewhere, referred to the CA's powers under CIL Regs 69(3) and (4). However, it would be good practice, and wise, to establish, via negotiation between the appeal parties, which chargeable development permitted by each planning permission the appellant intends to implement in full.

Overall conclusions

29. Having regard to all other matters raised, I conclude that the appeal made under CIL Regs 117(a) and 118 succeeds.

A U Ghafoor

Inspector