The Planning Inspectorate

Appeal Decision

Site visit made on 30 August 2023

by A U Ghafoor BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 7 November 2023

Appeal Ref: APP/X0360/L/23/3321626

[redacted]

- The appeal is made under section 218 of the Planning Act 2008 and Regulation 119(1)(b) of the Community Infrastructure Levy Regulations 2010 as amended (hereinafter 'the CIL Reg').
- The appeal is brought by [redacted] against a Demand Notice ('the DN') issued by the Collecting Authority, Wokingham Borough 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]
- A Liability Notice (the 'LN') was served on 9 November 2022. The total amount of CIL payable is [redacted]
- A revised DN was issued on 20 February 2023 and the deemed commencement date is stated as 2 November 2022. A late payment surcharge of [redacted] has been imposed. The total amount payable is [redacted]

Decision

1. The appeal is dismissed.

Preliminary matters

2. The first DN is dated 11 January 2023 with a deemed commencement date of 2 November 2022. Subsequently, a late payment (30 days) surcharge notice and revised DN was issued and is dated 20 February 2023, but the same deemed commencement date is stated. A warning notice and stop notice were issued on 18 April 2023.

3. The appeal form is dated 4 May 2023 and included ground 117(a) that the claimed breach which led to the surcharge did not occur. However, an appeal under that ground must be made before the end of the period of 28 days beginning with the day on which the surcharge is imposed. The latter was out of time and there is no discretionary power available to the Secretary of State to allow an extension of time.

4. An application for costs is made by the appellant against the Council. This is the subject of a separate Decision.

Inspector's reasons

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 2015. A planning permission for residential development is subject to the levy after the schedule came into effect 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? Section 56(1)(a) of 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 relevance[1]. The bar is low and the digging of a trench may be sufficient. CIL Regs 7 administers when a development commences and mimics s56 of the 1990 Act[2].

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 permission[3].

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 permissions in relation to the whole site, with different terms, and is entitled to proceed under the second[4].

10. The appellant acquired the appeal site in around September 2020. Having successfully obtained planning permission for extensions and alterations, material operations commenced in around May 2022. The appellant maintains they started work pursuant to two planning permissions and the development is exempt.

[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. To add emphasis, I have italicised.
[4] *Hillside Parks Ltd v Snowdonia National Parks Authority* [2022] UKSC 30, paragraph 74.

11. The first is householder development for the [redacted] dated 12 April 2022). The second is for the following description of development: [redacted]" [redacted] dated 26 May 2022).

12. To me, the meaning of these permissions is clear as water: there is no ambiguity. Having regard to the permission documents, the operative parts, conditions imposed and the approved plans, it is reasonable to conclude that these permissions solely relate to the extension and alteration of the existing dwellinghouse. As work progressed and prior to the service of the DN, there was a joint CIL and planning enforcement investigation into an alleged breach of planning control involving the demolition work. The quantum of evidence presented, including the appellant's written submissions which, incidentally, includes a detailed structural engineer's report, clearly shows the existing dwelling had been substantially demolished by June 2022, or thereabouts. I find the photographic evidence particularly instructive of the nature and scale of the operations involved in the demolition and subsequent rebuilding of the foundations and outer walls resulting in the erection of a partly built dwelling with new cavity walls, new sub and super structure including a roof. The evidence is consistent with what I saw at the time of my site visit.

13. At face value, there is nothing to indicate demolition and constructing a replacement dwellinghouse is permitted by any earlier planning permission. The LPA therefore invited an application to regularise unauthorised development. The appellant avers the application was invited so the CA could impose a tax, but responsibility for the planning conundrum squarely lies with the appellant. Operations continued despite a flagrant breach of planning controls. Instead of ceasing work and applying for a potentially modified scheme, a two-storey partly built dwelling has been erected having substantially demolished the existing bungalow.

14. Be that as it may, the new application for planning permission described the proposal as follows: [redacted]. This description is broadly consistent with the one given on the permission document which states: "[redacted][5]. It is worth noting that in response to the question on the application form: "Has the development already started?" the answer given is "yes" and the date given is 15 May 2022. It also states that the work remains incomplete, which, again, is consistent with what I observed at my site visit. The new application was granted, subject to 10 conditions, by the LPA on 2 November 2022, and I will refer to it as 'the 2022 Permission'.

15. I take the view that the 2022 Permission creates a new chapter in the site's history. At risk of repetition, the meaning of the development permitted is clear as water and there is no ambiguity as to its meaning. Taking the operative part of the permission, conditions imposed and the approved plans in combination, demolition and subsequent building operations fall within its scope and were authorised: these are directly referrable to the scheme.

16. In the context of the whole scheme, prior demolition is essential and rebuilding work is part-and-parcel of the total works necessary to undertake the erection of a dwellinghouse. I consider that the 2022 Permission is materially different from

[5] LPA ref [redacted].

permission reference [redacted] and [redacted]. The planning merits of the later scheme required assessment given the potential effect upon the local area, character and appearance of the street scene and neighbours' living conditions. Consequently, the 2022 Permission first granted permission for chargeable development.

17. The difficulty for the appellant is that material operations comprised in the approved scheme had commenced as soon as the existing bungalow was substantially demolished. Work continued resulting in the erection of a partly built dwelling and those operations are directly referrable to the approved scheme. I observed that the partly built dwelling looks like the one illustrated on the approved plans. Its location, positioning, external appearance, and internal layout is consistent with the approved plans.

18. Adherence to the approved plans deserves full credit, but, in my planning judgement, the 2022 Permission authorises works which have already been carried out. The 2022 Permission is for part-retrospective-and-part-prospective development. It has been granted by the LPA in exercise of its powers under s73A of the 1990 Act: there is no requirement to forewarn the applicant when exercising these legislative powers.

19. The claim is that CIL Regs is punitive, and the appellant is unaware of how they operate, but they are professionally represented. The assertion is the appellant did not intend to construct a replacement dwelling, but it is an automatic consequence of the appellant's actions that the permission is granted for, in part, retrospective development. The 2022 Permission covers past operations that are integral to the approved scheme. CIL Regs 7(5) indicates that in the case of a part retrospective permission, the development will be deemed to commence on the date of the grant, which is 2 November 2022.

20. Even if an alternative view is to prevail, and it is held that building operations commenced in about May 2022 marked the beginning of development permitted by the permission ref [redacted] and [redacted], the existing dwelling had been substantially demolished in around June 2022. A new replacement dwelling has, in part, been constructed. The latter is not permitted by these permissions, and they are no longer capable of completion or implementation. As I have already found elsewhere, the 2022 Permission, granted on 2 November 2022, authorises demolition and construction of the replacement dwelling: this development is CIL chargeable.

Other matters

21. The self-build exemption should have been claimed before development comprised in the 2022 Permission commenced[6]. Concerns have also been expressed about the handling of planning applications, enforcement, and CIL matters, but these are not for my determination.

Overall conclusions

22. Having regard to all other matters raised, on the particular facts and circumstances of this case, I conclude that the development for which a CIL stop notice was imposed has commenced and the appeal made under CIL Reg 119(b), therefore, fails. The CIL stop notice is upheld.

A U Ghafoor

Inspector

[6] CIL Regs 54B.