The Planning Inspectorate

Appeal Decision

Site visit made on 6 February 2024

by A U Ghafoor BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 February 2024

Appeal Ref: APP/P5870/L/23/3316806

[redacted]

- The appeal is made under section 218 of the Planning Act 2008 and Regulation 117(a), (c) and 118 of the Community Infrastructure Levy Regulations 2010 as amended (hereinafter 'the CIL Regs').
- The appeal is brought by [redacted] on behalf of [redacted] against a Demand Notice (the 'DN') issued by the Collecting Authority, the Council of the London Borough of Sutton ('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 5 January 2023. The total amount of CIL payable is [redacted].
- The DN was issued on 11 January 2023. The following surcharges were imposed: [redacted] for a failure to assume liability, [redacted] for a failure to submit a commencement notice (hereinafter 'CN'). The total amount payable is [redacted].

Decisions

1. CIL Regs 118 appeal is allowed but otherwise the 117(a) and (c) appeals fail.

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 implied by the appellant against the Council of the London Borough of Sutton. 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 1 April 2014. 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. S70 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. S73 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(2) administers when a development commences, and sub-section (6) refers to s56 of the 1990 Act. Sub-section (1)(b) is of direct relevance because it relates to a material change in use of land or building. Development shall be taken to be initiated at the time when the new use is instituted. 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 (e), is of direct relevance (any change in the use of any land which constitutes material development).

8. CIL Regs 7(3) explains that the general rule in CIL Regs 7(2) is subject to provisions, such as that stated in 7(5)(a) where development has already been carried out and granted planning permission under s73A of the 1990 Act. In such cases, development is to be treated as commencing on the day planning permission for that development is granted or modified.

9. 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[1].

10. 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[2].

11. Relevant facts are that on 13 December 2022, the LPA granted planning permission, subject to 5 conditions, for the following development: "[redacted][3]. For clarity, I will refer to this permission as 'the 2022 Permission'.

[1] 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.
[2] *Hillside Parks Ltd v Snowdonia National Parks Authority* [2022] UKSC 30, paragraph 74.
[3] Planning permission ref [redacted] cited on the CA's acknowledgement, liability and demand notices.

12. When the application was initially made to the LPA, the development was described as follows: "[redacted]". The change of use sought was for an HMO occupied by more than six unrelated individuals which, in land-use terms, is described as a large HMO and does not fall within any use class in the Schedule to the UCO[4]: it is a *Sui Generis* use. Much is made of the distinction between class C4 of the UCO and a large HMO, but the Schedule simply classifies and groups land-uses. Clearly, there is an error in the description of the development permitted but that does not negate the fact that the 2022 Permission permits the building's use as a large HMO the character of which does not fall within any use classification in the UCO.

13. The 2022 Permission requires some operational development because conditions require the submission of details for refuse, recycling, and cycle storage areas. However, I find the meaning of the development permitted clear as water given the use of the word "larger". To me, there is no ambiguity and the use of the word retrospective suggests the change of use had already been instituted. Taking in combination the operative part of the permission, conditions imposed and the approved plans, the building's conversion and use as a large HMO is specifically authorised by this permission retrospectively granted by the LPA.

14. In the context of this appeal, the evidence before me clearly demonstrates that, at the time when planning permission was granted by the LPA, the care home was already converted into a large HMO and the use permitted by the 2022 Permission had been initiated. However, in effect, the 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. Therefore, as retrospective permission was granted in this case, the general rule in CIL Regs 7(2) is displaced and the correct commencement date should be taken as the date of the grant of planning permission - 13 December 2022.

15. I had the opportunity to conduct an internal and external inspection of the property. While there are a few shared amenities such as large living rooms and kitchens, these areas appeared not to be in use. Alternatively, they are used in a very limited way. Instead, it seems to me each room contains amenity for independent day-to-day living, due to the availability of cooking, washing, and sleeping facilities. Whether the current use of the building falls within the scope of the 2022 Permission is a separate enforcement issue.

16. The appellant appealed to The Planning Inspectorate on the basis condition 1) imposed on the 2022 Permission should be varied or removed. However. the Inspector found there is no power under s78 or s79 of the 1990 Act to amend the description of development and, even if there were a power to do so, there are no good reasons justifying the variation or removal of condition 1) (appeal ref ending in [redacted] dated 29 November 2023). I have no reason to disagree with that approach or finding.

17. For all the above reasons, I conclude that the CA has incorrectly determined the deemed commencement date and the appeal is allowed. In accordance with CIL Regs 118(5), the revised deemed commencement date is 13 December 2022. The appeal succeeds on this ground to this limited extent only.

The appeal under Regulation 117(1)(a)

18. The CA exercised discretionary powers under the CIL Regs and imposed surcharges for failure to assume liability and submit a CN. The ground of appeal is that the claimed breach which led to the surcharge did not occur.

[4] Town and Country Planning (Use Class) Order 1987 as amended ("the UCO").

19. CIL Regs 67(1) of the CIL regulations explains that 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. CIL Regs 31(1) explains that a person who wishes to assume liability to pay CIL in respect of a chargeable development must submit an assumption of liability to the CA. In this case, as the permission was granted retrospectively, it was simply not possible for a CN to be submitted in advance of instituting the change in use of the appeal building from care home to large HMO. The latter had already taken place. So, it was not possible for the appellant to prevent the subsequent surcharges being imposed.

20. The issue of a LN is followed by the submission of a CN by the relevant person. However, by commencing the large HMO use and subsequently applying for planning permission retrospectively, the appellant effectively prevented the normal sequence of events from taking place. As a result, the subsequent permission automatically became liable to CIL and CIL surcharges. This was effectively a situation of the appellant's own making.

21. For all the above reasons, this ground of challenge must fail.

The appeal under Regulation 117(1)(c)

22. The appellant is concerned about the area of calculation for the DN and surcharges and refers to measurements to determine the chargeable amount. However, a review under CIL Regs 113 and a potential appeal to the Valuation Office pursuant to 114 is the appropriate remedy. These arguments cannot be determined under this ground of appeal. I am only assessing whether the CA has correctly calculated the surcharges.

23. CIL Regs 83 explains that where a chargeable development is commenced before the CA has received a valid CN, the CA may impose a surcharge equal to 20% of the chargeable amount payable or [redacted], whichever is the lower amount. Additionally, CIL Regs 80 explains that the CA may impose a surcharge of [redacted] where nobody has assumed liability and the chargeable development has commenced. Both scenarios are the circumstances in this case. I find that the surcharges have not been calculated incorrectly.

Overall conclusions

24. For the reasons given above, CIL Regs 117(a) and (c) appeals fail. The appeal on CIL Regs 118 succeeds as the CA has incorrectly stated the deemed commencement date. The CA has power under CIL Regs 69(3) to serve, at any time, a revised DN on a person liable to pay an amount of CIL.

A U Ghafoor

Inspector