The Planning Inspectorate

Appeal Decision

by A U Ghafoor BSc (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 16 August 2024

Appeal Ref: APP/H5390/L/22/3313170

[redacted]

- The appeal is made under section 218 of the Planning Act 2008 and Regulation 117(a), (b) and (c)[1] 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, the Council of the London Borough of Hammersmith and Fulham ('the CA'), on 10 November 2022.
- 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 revised Liability Notice (the 'LN') was served on 2 August 2022. The total amount of CIL payable is £[redacted], which includes surcharges amounting to £[redacted] for failure to assume liability, submit a commencement notice ('CN') and late payment.

Decision

1. The appeal is dismissed.

Reasons

2. On 27 September 2017, the appellant company made a planning application for the following description of development:

   "[redacted]".

3. The application form, at section 3, indicates building work or change of use had already started. In response to the following question the agent indicates "no": has the building, work or change of use been completed? The application form states building work commenced on 17 July 2017, which is about two months before the date on which the planning application was submitted to the local planning authority (LPA).

[1] As these grounds of challenge are interlinked, I will determine them together.

4. Subsequently, the LPA granted planning permission for the description of development referred to in the banner header above on 17 July 2018 (the 2018 Permission). The description of the development in the LPA's decision notice sightly varies from that given in the planning application form. Nonetheless, they are essentially the same. There is agreement between the parties that the development is subject to CIL. The appellant company maintains that the 2018 Permission is part prospective-and-part-retrospective in meaning and effect. The CA provides no evidence or argument to make less than credible that claim.

5. The grounds of appeal refer to the Court of Appeal's decision in *Gardiner*[2]. The Court found that the exemption from liability to CIL for self-builders was not available where the development had been authorised by retrospective planning permission. The combined effect of the relevant provisions was that to claim the exemption for self-built housing, a person had to assume liability after planning permission had been granted but before development commenced. Where development had been undertaken which required retrospective planning permission, there would be no period in which the person who sought to claim the exemption could effectively assume liability to CIL.

6. The submission is that this should, by analogy, apply to a failure to submit a CN because both cases relate to retrospective development. I disagree. The facts in this case are dissimilar because *Gardiner* relates to a self-build claim whereas this appeal relates to the imposition of a surcharge. The approach advanced by the appellant company seems to stretch the effect of *Gardiner* and fly in the face of the statutory code set out in the CIL Regs.

7. The Regs permitting the imposition of a surcharge should be given natural and ordinary meaning, having regard to the context, and bearing in mind that statutory provisions for taxation should be strictly construed, and effect given to the terms in which parliament had enacted them. There is a credible policy aim to be served by ensuring that a discretionary power to impose a surcharge for a failure to assume liability or submit a CN would be available to the CA where development had begun without planning permission as it might discourage breaches of planning control[3].

8. CIL Regs 31(7) makes clear that a person may not assume liability to pay CIL in respect of a chargeable development after that development has been commenced. CIL Regs 67(1) also requires the submission of a CN no later than the day on which the chargeable development is to be commenced: failure to do so has serious consequences and is a flagrant breach of the Regs. So, the discretionary power to impose a surcharge is available where such breaches occur.

9. CIL Regs (80)(a)(b) explain that a CA may impose a surcharge of £50 on each person liable to pay CIL in respect of a chargeable development if nobody has assumed liability to pay CIL and the chargeable development has been commenced. In a similar vein, CIL Regs 83(1) gives discretionary power to the CA to impose a surcharge for a failure to submit a CN if chargeable development is commenced.

[2] *Gardiner v Hertsmere Borough Council* [2021] EWHC 1875 (Admin) and [2022] EWCA Civ 1162.
[3] See *Gardiner*, paragraph 50.

10. In this case, knowingly or unwittingly, development commenced and retrospective planning permission for chargeable development was granted afterwards. There was no opportunity to assume liability or submit a CN, but that was the appellant company's own making. CIL Regs (7) explains when chargeable development is treated as commenced. The relevant parts of sub-section (5) clearly say that where development for which planning permission is granted under section 73A of Principal Act[4], permission for development already carried out, then development is to be treated as commencing on the day planning permission for that development is granted. Clearly, the claimed breach which led to the imposition of the surcharge for failure to assume liability and submit a CN did occur and the surcharges are correctly calculated.

11. CIL Regs 85 states a CA may impose a late payment surcharge after the end of the period of 30 days beginning with the day on which payment is due. In a similar vein, it can also be imposed if the payment is not received after the end of the period of 6 and 12 months respectively. A crucial element in determining whether this surcharge can be imposed involves fixing the start date for the three statutory periods: this depends on when the amount of CIL falls due. The trigger for CIL liability falling due is the commencement of development. At risk of repetition, on the company's own evidence, liability to pay CIL for chargeable development immediately arose on the grant of the 2018 Permission.

12. Much is made about the LN. An incorrect LN was served on 14 August 2018. That notice was defective in that the CA incorrectly calculated the amount of CIL. A revised LN was served in August 2022. The purpose of a LN is to record and inform a party of liability. The purpose of a DN is to record and inform when payment is due and how much including surcharges and interest: their role is not to determine when a liability arises but only to record the liability and terms of payment. A revised LN or DN may reflect and record a change to the quantum of the CIL liability or payment dates, but it does not itself change the genesis or origin of the liability.

13. Furthermore, the consequence of a revision is that earlier notices cease to have effect but not that they never had effect. A revised LN or DN does not extinguish liability for a late payment surcharge which has already been incurred because chargeable development is treated as commenced on the day when planning permission had been granted. I find that the liability for a late payment surcharge is not contingent on the service of either a LN or DN[5].

Overall Conclusions

14. Drawing all the above threads together, on the particular facts and circumstances of this case, I conclude that the appeal on CIL Regs 117 ground (a), (b) and (c) must fail.

A U Ghafoor Inspector

[4] The Town and Country Planning Act 1990 as amended.
[5] Applied - *Lambeth LBC v SS Housing, Communities and Local Government* [2021] EWHC 1459 (Admin).