The Planning Inspectorate

Appeal Decision

Site visit made on 23 September 2024

by A U Ghafoor BSc (Hons) MA MRTPI ACMI fCMgr

an Inspector appointed by the Secretary of State

Decision date: 23 October 2024

Appeal Ref: APP/A2470/L/24/3346994

[redacted]

- 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, Rutland County Council ('the CA'), on 4 June 2024.
- The relevant planning permission to which the CIL relates is [redacted].
- The description of the development is described on the DN as follows: [redacted]. The deemed commencement date is 24 May 2024.
- A Liability Notice (the 'LN') was served on 18 September 2023. The total amount of CIL payable is £[redacted] including surcharge for a failure to submit a commencement notice ('CN').
- An application for costs, pursuant to CIL Regs 121, has been made by the appellant against the CA. This is the subject of a separate decision at the end of the appeal decision.

Decision

1. The CIL Regs 117(a) appeal succeeds, and the surcharge is quashed, but I decline to determine the CIL Regs 118 appeal.

Reasons

2. The planning history of the site, including discussions about exemptions, is well documented and there is little merit in repeating that history here. Planning permission was first granted for the development described above on 9 August 2023: it is CIL liable. The trigger to pay the levy is commencement of the chargeable development. The developer must submit a CN no later than the day before the day on which that development is to be commenced. There are serious consequences if there is a breach of CIL Regs 67(1). In such circumstances the CA must determine a "deemed commencement date" when it issues a DN.

3. On 24 May 2024, the monitoring officer confirmed an access at no. 58 had been constructed. Subsequently, the CA considered material operations had commencement on that date because it had not received a valid CN. The nub of the CA's argument is that the whole CIL amount is due because the development has commenced in flagrant breach of the Regulations. In contrast, the appellant argues the chargeable development has not commenced because conditions precedent imposed on planning permission ref [redacted] have not been discharged. The submission is that a materially different development has in fact commenced and the latter is unlawful. For the following reasons, I disagree with the approach adopted by both appeal parties.

4. The CA refers to several decisions where the appointed person purports to support the view that there is nothing in the Regulations that require commencement of development to be lawful for it to be CIL liable. I fully appreciate that there is a need for consistency in planning decisions because like decisions should be determined in a like manner. However, facts and circumstances differ between appeals. Unlike court judgments, previous appointed person decisions are not binding on me and I can depart from the approach or analysis provided there are good reasons to do so.

5. In this appeal, the question is not whether commencement is lawful but, for CIL Regs purposes, how do we determine if the development permitted by permission [redacted] has commenced? CIL Regs (7) administers when a development commences. Sub-section (2) states that 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. CIL sub-section (6) explains "material operation" has the same meaning as in s56(4) of the Town and Country Planning Act 1990 (as amended) (the '1990 Act'). While CIL Regs (7)(2) refers to "…any material operation…" the latter should be connected and linked to the approved scheme and referrable to the chargeable development otherwise any operation, lawful or otherwise, could be regarded as a material operations sufficient to trigger the payment of CIL: that cannot be right and does not sit well with CIL Regs 8 – time at which planning permission first permits development.

6. For context, s56(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 examples: they are just that. Sub-section (d) explains that any operation in the course of laying out or constructing a road or part of a road amounts to a material operation.

7. There are several legal authorities where the Courts have analysed the meaning and effect of s56 of the 1990 Act: for brevity's sake, I do not set them out here. In one case the making out of the line and width of a road with pegs amounted to an "operation" in the course of laying out part of a road as defined in sub-section (4)(d). Be that as it may, it is necessary not to take a broad-brush and one-size-fits-all approach. This is because the facts of each case are dissimilar. The case law has however established a consistent principle when analysing whether operations commenced a development pursuant to a planning permission. The approach to take is an objective one and firstly examines whether what has been done is in accordance with the relevant planning permission. It is then necessary to consider the operation was material in the sense of not being de minimis on a fact and degree basis.

8. The dropped kerb adjacent to no. 58 is shown on the plans approved by planning permission ref [redacted] and referred to in condition 5), 6) and 7). It facilitates vehicular access to no. 58 because a small section of the site's boundary has been removed. Loose hardcore has been laid to permit the parking of a vehicle. No other building work of substance has been carried out. In fact, at the time of my site visit, the residential plot to the rear was undeveloped and the existing dwelling has not been extended.

9. A reasonable person may conclude that, given the limited and minor extent of the dropped kerb and its location and setting relative to no. 58, the access, in practice,

functions to serve the host dwelling and is unconnected to the erection of a detached dwelling and garage to the rear. It is apparent to me that if the residential development to the rear is not implemented, the access would remain and serve the existing dwelling. Access to the new residential property would be facilitated by a new driveway that would be positioned to the side of the existing dwelling. In addition, one could reasonably conclude that the dropped kerb may be permitted development. I find that the new access to no.58 is self-contained and involved a separate building or discreet engineering operation. Whilst the work might fall within the scope of a material operation and is illustrated on the approved plans, the access is insignificant when considered in the context of the whole residential scheme.

10. Given the nature and scale of the scheme approved by the planning permission, to my mind, more is required to show commencement or implementation of the residential development. Contrary to the CA's submissions, as a matter of fact and degree, the nature and scale of the new access to no. 58 is of limited consequence when considered in the context of the site and whole scheme. The creation of the access to no.58 can reasonably be described as a minor operation. The operations involved in the dropped kerb and access are de minimis and inconsequential. In my planning judgment, the access should not be treated as crystallising the commencement of the chargeable development pursuant to CIL Regs 7(2).

11. Whether commencement of chargeable development without compliance with true conditions precedent triggers CIL, and comply with CIL Regs 7, is arguable. There are strong and persuasive arguments on both sides of the coin. In this case, there is no dispute between the appeal parties that work involved in the construction of the dropped kerb and access to no. 58 commenced in breach of true conditions precedent. It may, nevertheless, be feasible to rectify the breach by submitting details required for approval by the local planning authority. For example, condition 3) requires contamination survey, 5) details of the new vehicular access for the existing dwelling and 14) details about existing trees and landscaping. However, that is a planning enforcement matter.

12. Even if an alternative view is to prevail and it is held that there is nothing in the Regulations that require commencement of development to be lawful in order for it to be CIL liable, this case is distinguishable on its own facts. At risk of repetition, the evidence before me shows that the operation comprised in the creation of the access to no. 58 is de minimis and insignificant when assessed against the residential development of the appeal site. The operations involved in the construction of the access did not trigger the payment of CIL because material operation of significance and directly connected to the chargeable development first permitted by the relevant planning permission had not commenced by 24 May 2024.

13. CIL Regs 118(1) explains that a person on whom a DN is served which states a deemed commencement date may appeal on the ground that the CA has incorrectly determined that date. Although sub-section (6) permits the surcharge to be quashed, the principle of commencement is not within scope unlike CIL Regs 117(a). The latter succeeds because the claimed breach which led to the imposition of the surcharge did not occur. Logically, it follows the surcharge for a failure to submit a CN is also quashed under CIL Regs 118(6). However, my powers are circumscribed by CIL Regs 118. I decline to determine the CIL Regs 118(1) appeal following a finding that the chargeable development has not commenced as a matter of fact.

14. Drawing all the above threads together, I find that the breach which led to the imposition of the surcharge for a failure to submit a CN did not occur. The CIL Regs 117(a) ground succeeds. However, I decline to determine CIL Regs 118 appeal.

Costs Decision

1. The application for an award of costs is refused.

Reasons

2. Perhaps I am stating the obvious, but parties in planning or related appeals normally meet their own expenses in the appeal process. Nonetheless, the applicant needs to show unreasonable behaviour resulting in wasted or unnecessary expense. An award of costs does not follow the outcome of an appeal.

3. Essentially, the applicant's main argument is that the CA has acted unreasonably because it has ignored or failed to grasp well established case law on commencement of development in breach of conditions precedent. The claim is that the CA wrongly issued the DN and imposed a surcharge. However, the applicant commenced work without complying with CIL Regs 67(1), because a CN had not been submitted prior to the creation of the dropped kerb and access: that was their own decision, but the CA reacted by issuing a DN.

4. My Decision explains why I have disagreed with the CA's approach. On the available evidence, I have come to a view that the operation involved in the creation of the access and dropped kerb are minor or de minimis and does not trigger commencement of the chargeable development. This is a matter of fact and degree judgment but neither party applied the correct tests when analysing whether operations commenced a development pursuant to a planning permission.

5. The CA was fixated on the access and dropped kerb shown on the plans approved by planning permission ref [redacted]. On the other hand, the applicant was obsessed with the condition precedent thread. Had the appeal parties focussed their attention on whether the operation crystallised commencement and was material in the sense of not being de minimis, they may have arrived at a different outcome. While I have found in favour of the applicant, I find that the CA submitted sufficient evidence to substantiate its reasons for issuing the DN and imposing a surcharge.

6. The line of authorities the applicant and CA refer to give rise to different interpretations and legal submissions. There is nothing before me to suggest a fundamental misunderstanding or erroneous interpretation or application of the law. The applicant had a fair opportunity to respond to all arguments and voluminous information had been exhibited including previous appeal decisions and a legal opinion. I consider that the CA submitted sufficient evidence to demonstrate its approach to the issues.

7. For the reasons given above, and having regard to the Planning Practice Guidance, I disagree with the claim the CA acted unreasonably in issuing the DN and conclude that no award of costs is justified in the circumstances.

A U Ghafoor

INSPECTOR