The Planning Inspectorate

Appeal Decision

Site visit made on 1 October 2024

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

an Inspector appointed by the Secretary of State

Decision date: 25 October 2024

Appeal A and B Refs: APP/H5960/L/24/3345075 and 3345532

[redacted]

- The appeals are made under section 218 of the Planning Act 2008 and Regulation 117(a), (b), (c)[1] and 118 of the Community Infrastructure Levy Regulations 2010 as amended (hereinafter 'the CIL Regs').
- The appeal is brought by [redacted] (Appeal A) and [redacted] (Appeal B) against a Demand Notice (the 'DN') issued by the Collecting Authority, the Council of the London Borough of Wandsworth ('the CA').
- The relevant planning permission to which the CIL relates is [redacted].
- The description of the development is described on the DN is [redacted]
- A Liability Notices (the 'LN') were served on 19 April 2024.
- The DN was issued on 24 April 2024 and the deemed commencement date stated is 1 August 2020.
- The DN imposes the following surcharges: for a failure to assume liability, for a failure to submit a commencement notice (hereinafter 'CN'), and late payment surcharges. The total amount payable, including late payment interest, is £[redacted].
- An application for costs, pursuant to CIL Regs 121, has been made by the appellants against the CA. This is the subject of a separate decision at the end of the appeal decision.

Summary of Decisions: The appeals are allowed on CIL Regs 118 and the surcharges are quashed.

Reasons – *CIL Regs 118 appeals*

1. This ground of appeal has a bearing on the outcome of the CIL Regs 117(a) and (c) grounds, and I will determine it first. The planning history of the site, including discussions about exemptions, is well documented and there is little merit in repeating that history here in full. I will refer to the most relevant aspect of that history. Planning permission for the description give above was first granted on 27 February 2015, subject to six conditions (for convenient shorthand, the "2015 permission"). Condition 1) required the work to commence within 3 years from the date of grant. To preserve the grant of permission, the appellants confirm material operations for the chargeable development commenced on 23 February 2018. The work described in the grounds of appeal included an enlarged opening into the attic and the installation of an internal staircase. All work was agreed with building control officers as recorded in February 2018 and December 2019 by electronic mail.

[1] The grounds of appeal take a scattergun approach and refer to CIL Regs 117(b) although the appeal form did not include this ground of appeal. Since the appeal parties have addressed this matter, I will include ground (b) 117. The appellants refer to matters which are pertinent to CIL Regs 113 to 115, but these grounds are not before me and they were advised via e-mail on 5 June 2024.

2. On 7 February 2020, the CA confirmed that development approved by the 2015 permission had, in fact, commenced but that a claim for self-build exemption could not be granted because liability to pay CIL had been assumed after material operations had commenced. In addition, a CN was submitted late on 8 December 2019, which is a flagrant breach of CIL Regs 67(1). This explains that where planning permission is granted for a chargeable development, 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.

3. Following some debate between the parties a variation of condition application was made to the LPA pursuant to section 73 of the of the Town and Country Planning Act 1990 (as amended) ("the Act"). The appellants sought permission for a different internal layout and included an enlarged kitchen, due to the enclosure of an external balcony. The development, as built, closely mirrors the scheme approved on 22 January 2020 ('the 2020 permission'). The meaning of the 2020 permission is unambiguous. Knowingly or unwittingly, the appellants applied for development comprised in the creation of a two-bedroom flat that had, in essence, already commenced but was incomplete given the enlarged kitchen. The power to grant this permission is derived from s73A of the Act. Effectively, the 2020 permission is retrospective in nature and is for part-retrospective-and-part-prospective development.

4. CIL Regs (7) explains when chargeable development is treated as commenced. The relevant part clearly says that where development for which planning permission is granted under s73A of the Act, permission for development already carried out, then development is to be treated as commencing on the day planning permission for that development is granted. The CA has determined an incorrect deemed commencement date. The correct date of deemed commencement is 22 January 2020.

CIL Regs 117(a), (b) and (c)

5. The CA exercised its discretionary powers and imposed surcharges for failure to assume liability, submit a CN and late payment. The ground of appeal is that the claimed breach which led to the imposition of these surcharges did not occur. The CIL 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.

6. Having regard to CIL Regs 31, the service of a valid LN is not dependent on the submission of a form assuming liability. In a similar vein, assumption of liability is not conditional on service of a LN. The evidence presented clearly shows material operations for chargeable development had, in fact, initially commenced under the first 2015 permission. Subsequently, development granted under the 2020 permission had already commenced by January 2020 and the appellants did not apportion or assume liability in breach of CIL Regs. Regulation 80 explains that where nobody has assumed liability to pay CIL and the chargeable development has commenced, the CA may impose a surcharge of £50. In a situation where nobody assumed liability before works had already commenced and retrospective permission was obtained via s73A of the Act, liability to pay CIL must be apportioned between each material interest in the relevant land in accordance with CIL Regs 33(4). The surcharge was imposed and subdivided between the appellants and those with a material interest.

7. The appellants submitted an assumption of liability form on 23 February 2018, and this was acknowledged on 26 February. As CIL Regs 31(7) states, other than by way of a transfer of assumed liability, a person may not assume liability to pay CIL in respect of a chargeable development after that development has been commenced. The CA has not demonstrated why the appellants should have assumed liability for the chargeable development permitted by the 2020 permission when it had already commenced. It is therefore incorrect to impose this surcharge because the claimed breach has not occurred.

8. The issue of a LN is followed by the submission of a CN by the relevant person. However, by commencing the initial development and subsequently applying for a variation retrospectively, the appellants effectively prevented the normal sequence of events from taking place. In such circumstances it was simply not possible for a CN to be submitted pursuant to CIL Regs 67(1). As a result, the subsequent permission automatically became liable to CIL and the CIL Regs 83 surcharge. So, it was not possible for the appellants to prevent the subsequent surcharge for failure to submit a CN being imposed. This was effectively a situation of their own making. The breach which led to the imposition of this surcharge did occur.

9. An appeal under CIL Regs 117(b) is the CA failed to serve a LN in respect of the development to which the surcharge relates. CIL Regs 65(3)(a) is explicit that a LN must be served on the relevant person as defined in 65(12). A 'relevant person' is clearly defined as the person who applied for planning permission. In this case, whilst the content of LNs issued by the CA have varied, the appellants do not dispute they have not received any LN. The bundle of evidence clearly shows relevant LNs were submitted on relevant persons. In addition, default LNs were served on the appellants. This ground should fail.

10. 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 £2,500, whichever is the lower amount. At risk of repetition, no CN had in fact been submitted in compliance with CIL Regs 67(1) and so this surcharge is correctly calculated.

11. In this case, because the 2020 permission is retrospective in nature, CIL was due on the day when the 2020 permission was granted. The failure to pay the full CIL amount after the end of the period of 30 days, 6 months, and 12 months invokes a surcharge. Effectively, there are three periods where a surcharge for late payment can be imposed. The CA has decided to exercise discretion and imposed surcharges calculated on the full CIL liable. The appeal on ground 117(1)(c) fails.

Other matters and conclusions

12. On the particular facts and circumstances of this case, and for the reasons given above, my conclusions are as follows: the 117(a), (b) and (c) fails in relation to service of the relevant LNs, the surcharges for failure to submit a CN and for late payment. The imposition of surcharges relating to the failure to assume liability is incorrect and the appeal under 117(a) succeeds to this extent.

13. My conclusion on the 118 appeal is fundamental because the CA incorrectly determined the deemed commencement date – it is the day on which retrospective planning permission was granted (22 January 2020). Where an appeal is allowed under this ground, all DNs issued by the CA in respect of the relevant development before the appeal was allowed cease to have effect. Given my powers under CIL Regs 118 subs (6), I intend to quash the surcharges.

Formal Decision

14. The CIL Regs 117(1)(a), (b) and (c) fail in relation to service of the relevant LNs. The surcharge for a failure to submit a CN and for late payment were correctly applied.

15. The appeal is allowed on CIL Regs 117(1)(a) insofar as it relates to the failure to assume liability.

16. However, the appeal on CIL Regs 118 is allowed because the CA incorrectly determined the deemed commencement date. In accordance with CIL Regs 118(5), the revised deemed commencement for the relevant development is 22 January 2020. Further, in exercise of my powers under sub-section 118 subs (6), I direct that the surcharges be quashed.

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 applicants need to show unreasonable behaviour resulting in wasted or unnecessary expense. An award of costs does not follow the outcome of an appeal. Essentially, the main argument is that the CA has acted unreasonably in issuing the DN with an incorrectly determined deemed commencement date, but they commenced chargeable development and later submitted a CN. A failure to comply with the CIL Regs has serious consequences and strict compliance is necessary to avoid penalties.

3. The respondent gave muddled, inconsistent, and incorrect advice to the applicants. For example, erroneously issuing a CIL credit note, misunderstanding the interplay between commencement and retrospective planning permission. The effects of the pandemic may have also affected negotiations and timely communication. Be that as it may, the applicants were professionally represented when planning applications were submitted on their behalf in 2014 and 2019.

4. My decision above explains why I have found in the applicants' favour. Nonetheless, based on information the respondent had in its possession at the time of issuing the DN, it believed material operations had commenced by 1 August 2020. Following issue of the DN, the applicants secured their interest in the land by appealing. The correct deemed commencement date would have been stated in the DN had the CA correctly understood the meaning and effect of CIL Regs 7 subs (5). Nevertheless, it submitted sufficient evidence to substantiate its reasons for issuing the DN and imposing surcharges.

5. 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