Appeal Decision

by [redacted]

an Appointed Person under the Community Infrastructure Regulations 2010 (as Amended)

[redacted]

e-mail: [redacted]@voa.gsi.gov.uk.

Appeal Ref: [redacted]

[redacted]

Development: Erection of [redacted] ***extensions*** [redacted] ***and above*** [redacted]

Planning permission details: Planning permission [redacted] ***granted by*** [redacted]

Decision

I determine that the Community Infrastructure Levy (CIL) has been calculated correctly in the sum of £[redacted]

Reasons

1. I have considered all the submissions made by [redacted] on behalf of the appellant [redacted] and I have also considered the representations made by the Collecting Authority (CA), [redacted]. In particular I have considered the information and opinions presented in the following submitted documents:-

(a) Planning permission decision letter dated [redacted].
(b) The CA's Liability Notice dated [redacted].
(c) The CA's Decision Notice on review of CIL chargeable amount dated [redacted], including an opinion from Counsel ([redacted]).
(d) Completed CIL Appeal form dated [redacted] with covering letter containing the Grounds of Appeal.
(e) Additional supporting documents submitted with the CIL Appeal:-

(i) Copies of all approved plans and elevations as listed at condition 6 of the planning permission dated [redacted].
(ii) Copies of two opinions from Counsel ([redacted]).

(f) The CA's representations dated [redacted] including copies of two opinions from Counsel ([redacted]).
(g) Comments on the CA's representations received on [redacted].

[redacted] space which is accessed via a loft ladder that retracts into the loft space when not in use, has no permanent flooring and is of limited height with a number of trusses affecting the use of the area. There were a small number of domestic items in the loft space.

2. Planning permission was granted by [redacted] on [redacted] for the 'Erection of [redacted]

3. On [redacted] the CA issued a Regulation 65 Liability Notice [redacted] (this Liability Notice superseded earlier Liability Notices understood to be dated [redacted] and [redacted]) in the sum of £[redacted] based on net additional floorspace of [redacted] square metres as follows:-

[redacted]

[redacted]

4. The appellant requested a review of the calculation of the chargeable amount on [redacted] and this included a copy of Counsel's opinion provided by [redacted], dated [redacted].

5. The CA issued their decision notice on the review on [redacted] and confirmed the CIL liability in the sum of £[redacted] based on net additional floorspace of [redacted] square metres. However, they amended the calculation to include the first floor area of the development in both G and K_R in the formula in Regulation 40(7) which resulted in the net additional floorspace remaining the same at [redacted] square metres. This decision included a Counsel's opinion provided by [redacted] dated [redacted].

6. On [redacted] the parties submitted a CIL Appeal under Regulation 114 (chargeable amount) that the CIL charge should be £[redacted] (there is no calculation for this figure, but from the submitted plans I have assumed it is based on a GIA of [redacted] square metres plus indexation). The grounds of appeal were contained in a covering letter and two Counsel's opinions. The contents of the covering letter can be summarised as follows:-

i) The appellant disputes the CA's application of the CIL Regulations to the 'chargeable development' because they consider the CA is rewriting the CIL Regulation defined meaning of 'chargeable development' in legal error.

ii) the appellant states that 'by definition of the planning permission granted by the Council the majority of the roof space in question is 'existing' and 'remains unchanged' by (and outside of) the alteration and improvement development'.

iii) The appellant maintains that development is in wholly existing roof space and the areas which they are contesting are all part of the existing and unchanged building structure. They state that the 'GIA includes the under eve (sic) space, the existing chimney breasts that purely serve the flats below, the area of the communal staircase which is in no way subject to planning and the dividing wall between flats.

iv) The appellant concludes with 'we regret that we are left with no option but to seek appeal under regulation 114 on the basis that we believe this is not a legally correct or accurate interpretation of the law to ascertain the Regulation 40 the chargeable amount on the particular 'chargeable development".

The Counsel's opinions submitted by the appellant can be summarised as follows:-

(a) That the CA is in breach of Regulations 40 (1) (5) (6) (7) and (11) its common errors being:-

i) Inclusion in 'G' of subsisting eaves storage, party walls and internal common stairs extensions.
ii) To exclude from 'E' the demolished parts of each building.
iii) To apply an All in Tender Price Index other than that for the 1st November 2014.

(b) Properly applying Regulation 40(1), (5) and (7) in respect of each chargeable development requires:-

i) Exclusion from G of the subsisting storage areas and areas of common stairs as these areas fall outside of the Planning Act 2008.
ii) Inclusion in E of the part of each mansion roof plan area that is to be demolished before completion of each proposal.
iii) Use of the Regulation 40(6)(a) 1st November 2014 All in Tender Price Index figure.

c) Counsel has referred to section 55 of the Town and Country Planning Act 1990 (Meaning of "development" and "new development") to support exclusion of the existing eaves storage area as it had the same use before and after the relevant planning permission was granted so there has been no change of use (paragraph 55(1)). In addition, the communal stairs, party walls and chimney breasts should also be excluded as they affect only the interior of the building (paragraphs 55(2)(a)(i) and 55(2)(a)(ii)).

d) The removal of part of the existing roof to allow for the formation of the [redacted] should be treated as demolition and the area affected included in E in the chargeable amount formula Regulation 40(7)E(i). The area is considered to be 'in use' in accordance with Regulation 40(11) as the relevant building is the whole of [redacted] and it contains a part (being flats) that appears from the submitted plans to have been in use for at least 6 months in the 3 years preceding the grant of planning permission.

e) The All Price Tender Index should be the figure for 1 November 2014 as published on 1 November 2014 and not that in any 'intervening publication' including any later update.

7. The CA submitted representations on [redacted] which can be summarised as follows:-

(a) The basis for what constitutes the chargeable development is determined by the planning permission and approved plans being the first and third floors and including all of the floorspace shown on the approved plans.

(b) The development of the loft space is considered to be creating new floorspace and as such would not have a Gross Internal Area. In addition, the conversion of loft spaces and how to apply CIL was considered at the [redacted] at the end of [redacted] and the consensus of opinion was that for it to be considered as either retained or demolished it should have a structural floor and permanent access.

(c) There is no demolished floorspace and the alterations to the roof are immaterial as this does not determine if there is existing floorspace to consider.

(d) The index figure for the 1 November in the preceding year should be the figure for Quarter 4 2014 as published on 1 August 2015, being the [redacted] in which planning permission was granted.

The representations included two Counsel's opinions and these can be summarised as follows:-

(a) The appellant's Counsel has adopted the wrong definition of development using that under section 55 of the Town and Country Planning Act 1990 (TCPA 1990) as opposed to section 209 of the Planning Act 2008 (PA 2008). The definition under section 209 is broader than that under section 55. The definition of chargeable development as 'the development for which planning permission is granted' in Regulation 9(1) of the CIL Regulations does not qualify or restrict the scope of 'development'. This identifies the development, whereas the identified development is then defined under the PA 2008.

(b) A 'holistic' approach to the meaning of development should be adopted. Therefore, notwithstanding the argument that these should be excluded for 'development' under section 55 of the T&CPA 1990, the additional areas all form part of the development as they constitute the totality of the operations contemplated.

(c) For the loft space to be 'habitable floorspace' and therefore whether it can be considered as retained or demolished, it needs to have a structural floor and a fixed staircase. This test is guided by the application of building regulations and was considered at the [redacted].

(d) The Regulations do not state that the figure for the All in Tender Price Index is as it appeared in publication on 1 November 2014. The figure is not static and is subject to change and at any given time the published figure is the figure 'for' the relevant year. The word 'for' makes clear that the figure used may be the figure published before or after the 1 November, otherwise the wording would have been 'published on'.

8. Having fully considered the representations made by the appellants and the CA, I would make the following observations regarding the grounds of the appeal:-

The chargeable development to exclude those areas for which planning permission was not required

9. The meaning of "development" is set out in Regulation 6 as follows:-

6.—(1) The following works are not to be treated as development for the purposes of section 208 of PA 2008 (liability)—

(a) anything done by way of, or for the purpose of, the creation of a building of a kind mentioned in paragraph (2); and

(b) the carrying out of any work to, or in respect of, an existing building if, after the carrying out of that work, it is still a building of a kind mentioned in paragraph (2).

(2) The kinds of buildings mentioned in paragraph (1)(a) and (b) are—

(a) a building into which people do not normally go;

(b) a building into which people go only intermittently for the purpose of inspecting or maintaining fixed plant or machinery.

10. The meaning of "chargeable development" as set out in Regulation 9 includes the following:-

9.—(1) The chargeable development is the development for which planning permission is granted.

11. There is a dispute over the extent of the chargeable development as a result of the parties adopting different definitions of development. The PA 2008 clearly defines development for the purposes of CIL as follows:-

(1) In section 208 "development" means—

(a) anything done by way of or for the purpose of the creation of a new building, or

(b) anything done to or in respect of an existing building.

12. In my opinion all the works that have been done to the [redacted] are 'development' as defined in paragraph 208(1) and this has resulted in the creation of an additional floor. In my view, it is irrelevant as to whether the proposed works, if carried out in isolation would, or would not have needed planning permission. The eaves storage areas may well have been there before the proposed works, but as a result of those works the access to those storage areas will be significantly changed, the consequence of which is that it is now appropriate to include them as part of the GIA of the building. I must therefore consider the GIA that has been added to the building as a result of the works done.

13. Gross Internal Area (GIA) is not defined in the Community Infrastructure Levy Regulations 2010. The generally accepted method of calculation of GIA is set out in the RICS Code of Measuring Practice (6th edition);

GIA is the area of a building measured to the internal face of the perimeter walls at each floor;

Including

- Areas occupied by internal walls and partitions
- Columns, piers, chimney breasts, stairwells, lift-wells, other internal projections, vertical ducts, and the like
- Atria and entrance halls, with clear height above, measured at base level only
- Internal open-sided balconies walkways and the like
- Structural, raked or stepped floors are to be treated as level floor measured horizontally
- Horizontal floors, with permanent access, below structural, raked or stepped floors
- Corridors of a permanent essential nature (e.g. fire corridors, smoke lobbies)
- Mezzanine floors areas with permanent access
- Lift rooms, plant rooms, fuel stores, tank rooms which are housed in a covered structure of a permanent nature, whether or not above the main roof level
- Service accommodation such as toilets, toilet lobbies, bathrooms, showers, changing rooms, cleaners' rooms and the like
- Projection rooms
- Voids over stairwells and lift shafts on upper floors
- Loading bays
- Areas with a headroom of less than 1.5m

- Pavement vaults
- Garages
- Conservatories

Excluding;

- Perimeter wall thicknesses and external projections
- External open-sided balconies, covered ways and fires
- Canopies
- Voids over or under structural, raked or stepped floors
- Greenhouses, garden stores, fuel stored, and the like in residential property

14. As the CIL Regulations do not define Gross Internal Area so it is necessary to adopt a definition of Gross Internal Area. The definition of Gross Internal Area provided in the RICS Code of Measuring Practice (6th edition) is the generally accepted method of calculation and I have applied this definition.

15. The CA have adopted a net additional floor area of [redacted] square metres, representing their estimate of the GIA of the 3rd floor measured in accordance with RICS Code of Measuring Practice (6th Edition). Although the appellant has not accepted that all of the [redacted] should be included in the GIA for the reasons stated above, they do not appear to dispute the CA's figure if all of the area is to be included. The RICS Code of Measuring Practice (6th Edition) clearly includes areas with a headroom of less than 1.5m, together with areas occupied by internal walls, partitions, chimney breasts and stairwells. Therefore, I can confirm that I consider the GIA of the [redacted] to be [redacted] square metres.

The GIA of the chargeable development to be reduced by the floor area of those parts of the existing roof to be demolished to allow for the formation of the mansard roof.

16. Regulation 40(7) broadly allows for the deduction from the GIA of the chargeable development of the GIA of parts of in-use buildings that are to be demolished before completion of the chargeable development. The appellant has not provided any evidence of the building being in–use (Regulation 40(11)(ii) 'contains a part that has been in lawful use for a continuous period of at least six months within the period of three years ending on the day planning permission first permits the chargeable development') other than a reference to the rest of the building being flats.

17. In my view the loft space which is accessed via a loft ladder which retracts into the loft space when not in use should clearly not be included within the GIA of the existing building in accordance with the definition of GIA in the RICS Code of Measuring Practice 6th Edition.

The All in Tender Price Index to be adopted to be that which was published on the 1st November of the preceding year.

18. I am of the opinion that the Regulations do not specifically prescribe that the Index should be the one that was actually published on the 1st November in the preceding year. It is well known that the Index for a particular date does change as more information becomes available after the date and I do not think that it was unreasonable for the CA to adopt the rate published on the 1 August 2015. I would point out that from the All in Tender Price Index available on BCIS Online which I have viewed, the Index for Quarter 4 2014 as published on 1 November 2014 would appear to have been 255, the same as the figure that was published on 1 August 2015 and adopted by the CA.

19. In conclusion, I do not consider that any of the grounds raised by the appellants have validity. Therefore, on the evidence before me, I am satisfied that the charge was correctly raised and I dismiss the appeal.

20. I conclude that the appropriate charge in this case should be based on a net additional area of [redacted] square metres at the rates applicable from the charging schedules adjusted for indexation;

[redacted]

[redacted]
RICS Registered Valuer
Valuation Office Agency
[redacted]