Appeal Decision

by [redacted]

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

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

Appeal Ref: [redacted]

Address: [redacted]

Development: Retention of 2 x two-storey houses with [redacted]

Planning permission details: Planning permission [redacted] ***was granted on appeal by the Planning Inspectorate on behalf of the Secretary of State for Communities and Local Government, reference*** [redacted]

Decision

I determine that the Community Infrastructure Levy (CIL) payable in respect of the development is to be assessed in the sum of £[redacted]

Reasons

1. I have considered all the submissions made by the appellant, Mr [redacted] and I have also considered the representations made by the Collecting Authority (CA) [redacted].

2. Planning permission was granted on appeal on [redacted] by the Planning Inspectorate on behalf of the Secretary of State for Communities and Local Government (application reference [redacted], appeal reference [redacted]) for 'Retention of 2 x two-storey houses with [redacted]

3. From the evidence submitted, it is understood that the relevant planning history is essentially as follows:-

i. There were a number of planning applications between [redacted] and [redacted] both for the erection of a single dwelling house and for a building to be occupied as flats. Planning permission was granted for the erection of a single dwelling house, but not for any form of flat development.

ii. Planning permission was granted on [redacted] for the 'Erection of part two, part three-storey house ([redacted], application number [redacted] (the original planning permission). There was no liability to CIL as neither the [redacted] nor the [redacted] Charging Schedules had been adopted at this date.

iii. Planning permission was refused on [redacted] for 'Retention of 2 x two-storey houses with [redacted], [redacted]. (N.B. This application is to reflect the as-built development)' reference [redacted]. The applicant appealed the refusal and the Planning Inspectorate on behalf of the Secretary of State for Communities and Local Government allowed the appeal and granted planning permission on [redacted], appeal reference [redacted] (the relevant planning permission).

iv. The planning permission granted on appeal included an additional area of land to that included in the original planning permission. This land was purchased by the appellant on [redacted], from the Land Registry extract provided by the appellant.

4. On [redacted] the CA issued a Regulation 65 Liability Notice(LIA 1518) based on a chargeable area of [redacted] square metres (sqm) in the sum of £[redacted] as follows:-

The CA subsequently issued a Demand Notice on [redacted] for the total CIL charge of £[redacted] and an additional sum of £[redacted] as a late interest payment. The reason stated for issuing the Demand Notice was that 'Development is deemed to have commenced' and the commencement date stated was [redacted].

5. The CA received a request for a review of the calculation of the chargeable amount on [redacted]. It is understood that the reasons for the request for a review were broadly as follows:-

i. No allowance had been made in the calculation for floorspace that had been demolished.

ii. No consideration had been taken of the previous planning approval which had been implemented.

iii. There had been no allowance in the calculation for the area of the development which was the subject of the previous approval.

The CA issued a decision on the request for a review and confirmed a revised CIL charge based on a chargeable area of [redacted] of £[redacted] as follows:-

The reasons for the decision broadly included the following:-

i. The measurement of the ground floor was amended as the CA considered that it was probable that the [redacted], rather than being 'open to the elements'.
ii. The CIL regulations did not state that the CA should combine multiple permissions when either evaluating a development for CIL liability or when calculating the chargeable amount.
iii. No building was situated on the relevant land when the permission was granted that would be demolished before completion of the chargeable development. Therefore, there was no deduction to be made in the formula for calculating the deemed net chargeable area in Regulation 40(7) in respect of any demolished floorspace.
iv. Although the two houses had been built at the time planning permission was granted they were not in lawful use for the required period of time because they had not been built in accordance with the approved plans and they required the retrospective planning permission to be lawful.

6. The appellant submitted a CIL Appeal under Regulation 114 (chargeable amount) proposing the CIL charge should be reduced to £[redacted]. This was calculated as follows:-

'New Floorspace Area (Ref:[redacted] m2
Retained Floor Area (Ref:[redacted] m2
Demolished Floor Area = [redacted] m2
Chargeable Development Floor area = [redacted] m2
[redacted] less than [redacted] m2 - £[redacted]'

The grounds of the appeal are broadly as follows:-

i. The gross internal area of the new build on the relevant land is less than [redacted] sqm so the Regulation 42 minor development exemption applies.
ii. The original planning permission was implemented, built and occupied.
iii. In [redacted] an enforcement officer visited the site and reviewed the implemented project works for the original planning permission and was satisfied with the matters as built and the file was closed.
iv. An area of additional land was purchased allowing for some alterations to the existing development with some additional demolitions to provide amenity space. The Planning Inspector accepted that the appeal proposal was an extension to the approved and built development as indicated by the following extract from the appeal decision,

   '…….the appeal proposal occurred following the commencement of works on site to implement the approved scheme when further land was acquired which enabled changes to be made to the approved development'.

v. [redacted] has accepted the position at iv. above by changing the description of the proposal to 'retention of the build' and this amendment of the description of the proposal was accepted by the Planning Inspector.
vi. The CA's CIL calculations do not include the relevant demolitions.
vii. The CA have misrepresented the proposal as it is not retrospective, it is an extension and retention to the implemented original planning permission. The application is to vary the plans, in other words it is an enlargement of the existing building.
viii. The [redacted] area is not a material floor space which can be used by the occupants as it is an internal enclosed double height space from the living room

and it is not open to the elements. Therefore, it should not be part of the chargeable area.

ix. The original planning permission had been implemented, and the building built and occupied for more than 6 months.

x. There are currently two areas which are still to be demolished and these need to be reflected in the CIL calculation.

This appeal was accepted as being valid although the chargeable development had commenced at the date planning permission had been granted as I considered it fell within Regulation 114(3A) 'A person may appeal under this regulation after the relevant development has been commenced if planning permission was granted in relation to that development after it was commenced'.

7. The CA submitted representations on [redacted] contending that their calculation of the chargeable amount was correct and their response to the appellant's grounds of appeal can be summarised as follows:-

i. The chargeable development is the development for which planning permission is granted. The original permission had only been partially implemented and deviated significantly from the approved drawings necessitating enforcement action. The CA do not accept that the original permission was built and the second planning permission was only for extensions and alterations.

ii. Information regarding planning enforcement was provided as follows:-

[redacted] – planning enforcement required the appellant to submit a new planning application to the planning authority as the development was not built in accordance with the plans approved in respect of the original planning permission.

[redacted] – planning enforcement notice served requiring appellant to cease the development and rebuild in accordance with drawings approved in respect of the original planning permission (case ref [redacted]).

[redacted] – planning enforcement notice withdrawn

iii. The development comprises two dwelling houses and the new floor space figure exceeds [redacted] sqm so the minor development exemption within Regulation 42(1) does not apply.

iv. The area of the buildings stated by the appellant as demolished should not be deducted in calculating the net chargeable area as they were not in existence at the relevant date being the date the appeal was granted, [redacted]. This was because part would have needed to have been demolished to construct the building, and the Planning Inspector said the development had been completed in his decision.

v. The CA consider that no floor space is eligible to be designated as retained within the Regulations as the floor space required the planning appeal decision to make it lawful. In addition, the earliest date the properties were registered with the Valuation Office for paying Council Tax was [redacted] so with the appeal decision being [redacted] this results in a total lawful use time period of 5 months.

vi. The CA representations also included a copy of the planning application for the relevant planning permission, the CIL Review Report, the approved plans for the relevant planning permission and planning enforcement correspondence as part of their representations.

8. The appellant's comments on the CA's representations may be summarised as follows:-

i. The original planning permission was implemented on [redacted].

ii. [redacted] sent two enforcement officers to investigate the construction of the project and they confirmed that the built works complied with the original planning permission. The enforcement matter was closed on [redacted] and [redacted] as evidenced by a copy of the Planning Enforcement Database that was attached to the comments. Therefore, the development under the original planning permission 'was erected as demonstrated in accordance with the consent'.

iii. The original planning permission was implemented before the purchase of the additional land and no CIL was liable for the original planning approval.

iv. The planning permission was implemented and this was inspected by the Enforcement Officers. The Council have provided no evidence to substantiate their claim as made in their submissions.

v. The relevant planning permission was only for extensions and alterations to the original planning permission, the original approval being two new dwellings ([redacted]) which were built.

vi. Notwithstanding the Planning Inspector confirming that the construction and built form had been completed the demolitions were still to be completed in accordance with the plans.

vii. The building granted under the original planning permission was built, is considered retained floor space and had been in lawful use for a period of 6 continuous months in the period of 3 years ending on the day planning permission was granted.

[redacted] The CA are relying on dates assumed by their Council Tax Department which is not correct and they have not provided evidence to support the date of [redacted]

9. Having fully considered the representations made by the appellant and the CA, I would make the following observations on the grounds of the appeal:-

10. Regulation 9(1) defines chargeable development as the development for which planning permission is granted. The appellant is contending the planning permission was only for extensions and alterations to the building granted consent and built under the original planning permission. Therefore, the CIL charge should only be applied to the Gross Internal Area (GIA) of the extensions and not to the GIA of the building granted consent under the original planning permission.

11. I have noted that the planning application in respect of the relevant planning permission, dated [redacted] described the proposed development as 'Erection of 2 x 4 bedroom houses with private areas (retrospective)'. In addition, the Appeal Decision dated [redacted] clearly confirms that the development granted planning permission is for the retention of 2 x 2 storey houses with [redacted] etc.

12. I have looked at the various plans and have noted that the original planning permission was for 2 x 2 bed [redacted], whereas the relevant planning permission is for 2 x 4 bed houses, over 50% larger and with significant changes to both the floor layouts and elevations. Having regard to the substantial differences between the developments granted consent under the original and relevant planning permissions and on reading the description of the development both in the application and the subsequently granted planning permission I consider it to be reasonable to conclude that the development granted planning permission and so comprising the chargeable development in accordance with the Regulations is the whole of the development. I should stress that whether the development granted by the original planning permission had been completed and occupied, or not, is not relevant to determining the extent of the chargeable development.

13. The appellant has challenged the CA's revised GIA of [redacted] sqm to include the area of the [redacted] at ground floor level on the basis that it is an internal enclosed double height space from the living room that cannot be accessed, as shown on the plans. I have looked at plans [redacted] and [redacted] and have concluded from the appellant's statement and the plans that the area is a double height open space from the basement to first floor height.

14. 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 defined as the area of a building measured to the internal face of the perimeter walls at each floor. There are various inclusions and exclusions referred to in the definition, but no reference to [redacted]. However, reference is made to including atria and entrance halls, with clear height above, measured at base level only. In my opinion a double height [redacted] could be reasonably concluded as coming within this definition. Therefore, the floor area should only be included at basement level so I am in agreement with the appellant's contention.

15. The appellant is contending for the area of the building granted consent under the original planning permission to be deducted from the GIA of the chargeable development. For the Gross Internal Area (GIA) of an existing building to be deducted from the GIA of the chargeable development it must be an 'in-use building' which in accordance with Regulation 40(11) means a building which –

(i) is a relevant building, and

(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;

"relevant building" means a building which is situated on the relevant land on the day planning permission first permits the chargeable development;

16. The building situated on the relevant land on the [redacted] when the appeal was allowed and planning permission was granted comprised 2 semi-detached houses and is a relevant building for the purposes of Regulation 40(11). In my opinion, for it to be in lawful use it would need to have had planning permission and to have been occupied at least in part continuously for 6 months in the previous 3 years. It did not have planning permission as this was not granted until the appeal was allowed and planning permission granted so prima facie it is not an 'in use building'.

17. The appellant has stated that the building granted consent under the original planning permission being 2 maisonettes was completed and occupied for at least 6 continuous months within the relevant 3 year period and it is the GIA of this building which should be deducted. Therefore, the appellant would appear to be arguing that the building in existence at the relevant date contained a part that met the lawful use test given that part of the original building is included in the existing building, albeit that it has been significantly altered and extended. However, I do not consider that this is a correct interpretation of Regulation 40(11) as the part to be lawfully occupied must be part of the relevant building which is the building in existence at the date planning permission was granted, not a previously existing building. I consider that this is further supported by there being no provision within Regulation 40 to allow for the deduction of the area of only part of a relevant building, either the whole area is deducted if it meets the criteria in Regulation 40(11) or none of the area if it does not.
In addition, although it would appear from the evidence provided that the original planning permission was implemented (i.e. commenced in planning terms) I do not consider that the evidence put forward by the appellant to support his contention that the 2 [redacted] were built and lawfully occupied is conclusive. He has not provided any dates, or details of how or

by whom the [redacted] were occupied and although reference has been made to dealings with planning enforcement at [redacted] as evidenced by an extract from their website, the CA have provided correspondence with the appellant which appears to counter the appellant's contentions. The statement in the Appeal Decision as follows also appears to support the CA's contention that the original building was not completed and occupied, 'The appellant indicates that the opportunity to construct the appeal proposal occurred following the commencement of works on site to implement the approved scheme when further land was acquired which enabled changes to be made to the approved development'.

Therefore, having regard to my comments above I consider it is reasonable to conclude that there should be no deduction from the chargeable area for part or all of the area of the existing building as an 'in use building'.

18. There is a further allowance that can be made for buildings in existence at the date planning permission is granted under Regulation 40(7) as follows:-

(ii) for other relevant buildings, retained parts where the intended use following completion of the chargeable development is a use that is able to be carried on lawfully and permanently without further planning permission in that part on the day before planning permission first permits the chargeable development

In this case, as planning permission was not granted for the use of the building for residential purposes until the grant of the relevant planning permission, any residential use on the day prior to the grant of the planning permission would not have been lawful as it would have required a further planning permission. Therefore, no allowance is appropriate in this instance.

19. The appellant's grounds of appeal included the need to allow for a deduction of [redacted] sqm from the chargeable area to reflect an area of single storey buildings that had been demolished of [redacted] sqm and a further [redacted] sqm still to be demolished. Regulation 40(7) allows for the deduction of areas to be demolished if they meet the following criteria, 'the gross internal areas of parts of in-use buildings that are to be demolished before completion of the chargeable development'. As a building already demolished cannot be an 'in use building' as it did not exist on the day planning permission was granted no allowance can be made in this case for the [redacted] sqm previously demolished.

20. With regard to the buildings still to be demolished, an allowance would be appropriate if they are 'in use buildings'. Although I have no reason to necessarily question the existence of these buildings, as the appellant has provided no evidence as to their lawful use (e.g. previous planning permissions, dates of use and details of how or by whom the buildings were occupied) I am unable to determine whether they are 'in use buildings'. Therefore, I am unable to allow a deduction from the chargeable development for the area of these buildings, having regard to the information provided.

21. It is understood that the parties are in agreement with the total GIA at [redacted] sqm to exclude the area of the [redacted] at ground floor level and I have taken some check measurements and can conclude that this appears to be reasonable. Therefore, as I am of the opinion from the evidence provided by the appellant and CA that no further deductions from the chargeable area are appropriate, I conclude that the appropriate charge in this case should be based on a net additional area of [redacted] sqm as set out below:-

RICS Registered Valuer
Valuation Office Agency