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]

Address: [redacted]

Development: Retention of existing building (with alterations [redacted]) comprising 6 flats [redacted] at 1st to 3rd floor levels, and mixed commercial use within use classes B1 [redacted] and D1 [redacted] at ground and basement levels.

Planning permission details: Granted by [redacted] on [redacted] under 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 Mr [redacted] (the agent) on behalf of the appellant Mr [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 letter dated [redacted].
(b) The CA's Liability Notice dated [redacted] reference [redacted].
(c) The CA's Decision Notice on review of CIL chargeable amount dated [redacted].
(d) The CA's revised Liability Notice following the CA's Decision Notice, dated [redacted].
(e) Completed CIL Appeal form dated [redacted] with covering letter containing the Grounds of Appeal.

(f) Additional supporting documents submitted with the CIL Appeal:-

(i) Copies of a location plan and a plan showing the proposed and existing floors areas with annotated measurements.

(ii) Email from appellant's architect [redacted] to [redacted] detailing the floor areas.

(iii) Copy of the request to [redacted] for a Review of the Liability Notice of [redacted], dated [redacted].

(g) The CA's representations in an email dated [redacted] together with a copy of a planning statement from [redacted] dated [redacted] which was submitted with the planning application.

(h) The comments of the appellant's agent on the CA's representations, in a letter dated [redacted].

(i) The appellant provided further comments in an email to me dated [redacted]. However, as these were received outside the statutory time limit for their receipt, Regulation 120(7) I have had no regard to them in coming to my decision.

2. Planning permission was granted by [redacted] on [redacted] for retention of existing building (with alterations [redacted] comprising 6 flats [redacted]) at 1st to 3rd floor levels, and mixed commercial use within use classes B1 [redacted] and D1 [redacted] at ground and basement levels, application reference [redacted]. Two earlier planning permissions were granted in respect of the same property as below.

Planning permission was granted on [redacted] for demolition of the existing [redacted] and erection of a single-storey-to-4-storey and excavation of basement, mixed-use development, comprising office and commercial use and storage on the basement level, commercial use on the ground floor and part of the first floor, with [redacted] flats ([redacted]) on the upper floors ("[redacted]" scheme) and subject to a Deed of Agreement dated [redacted] under Section 106 of the Town and Country Planning Act 1990, as amended, application reference [redacted]. It is understood that a Section 106 payment of £[redacted] was not paid.

Planning permission was granted on [redacted] for demolition of the existing [redacted] and erection of a single-storey-to-4-storey and excavation of basement, mixed-use development, comprising office and commercial use and storage on the basement level, commercial use on the ground floor and part of the first floor, with [redacted] flats ([redacted]) on the upper floors ("[redacted]" scheme) and subject to a Deed of Agreement dated [redacted] under Section 106 of the Town and Country Planning Act 1990, as amended, application reference [redacted]. A CIL Liability Notice dated [redacted] was issued at a figure of £[redacted]. It is understood that this CIL charge has not been paid.

3. On [redacted] the CA issued a Regulation 65 Liability Notice ([redacted]) in the sum of £[redacted] based on a Gross Internal Area (GIA) of [redacted] square metres (sqm) as follows:-

[redacted]

[redacted]

[redacted]

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[redacted]

[redacted]

[redacted]

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4. The agent on behalf of the appellant requested a Review of the calculation of the chargeable amount on [redacted].

5. The CA issued their decision notice on the review on [redacted] amending the GIA's and changing the description of the [redacted] accommodation to Non-residential institutions resulting in a revised CIL liability of £[redacted]. A revised Liability Notice was issued on [redacted] as follows:-

[redacted]

[redacted]

[redacted]

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[redacted]

[redacted]

[redacted]

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The CA determined that no allowance should be made for the existing floorspace relating to permission [redacted] as this permission was also CIL liable and no payment had been made.

6. On [redacted] the agent acting on behalf of the appellant submitted a CIL Appeal under Regulation 114 (chargeable amount) stating that the chargeable amount should be '£[redacted] less the proper amount of credit for 'in-use buildings' as referred to and defined in Regulation 40 of the CIL Regulations 2010'. This was accepted as a valid appeal because although development had commenced, the planning permission was considered to be a retrospective permission under Regulation 114(3A).

7. The grounds of the appeal were contained in a covering letter the contents of which can be summarised as follows:-

(a) The appellant does not agree with the CA's calculation of the GIA of the chargeable development. The difference relates to the dwelling house accommodation which the appellant considered to be [redacted] sqm rather than the CA's figure of [redacted] sqm.

(b) The original development took place pursuant to the permission [redacted], but the appellant sought to make certain amendments to the development resulting in the permission which is the subject of this appeal. Therefore, the liability in respect of the [redacted] planning permission should have been reduced by the extent of the gross internal area of the existing building and/or the development permitted under the [redacted] permission. In addition, the calculation of the amount payable does not take into account either that the relevant building had been in lawful use for a continuous period of at least 6 months within the period of 3 years ending with the day that the planning permission was granted or that the development permitted by the [redacted] permission had in fact been carried out largely under the [redacted] permission which predated the charging schedules.

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

(a) The development was not built in accordance with the [redacted] planning permission [redacted]. Therefore, it does not benefit from relief as it was not in lawful use for the qualifying period of 6 months in the previous 3 years prior to the new permission.

(b) [redacted] subsequently viewed the [redacted] application as superseded by the consent [redacted] granted on [redacted]. This was a full application covering the whole development and was not an application explicitly seeking to vary elements of the existing permission. This permission was subject to both [redacted] and [redacted] which has not been paid by the applicant.

(c) Whilst the relevant planning permission [redacted] refers to the retention of the existing building, the Planning Statement associated with the application states that 'the proposals essentially seek to alter the existing (unauthorised) building....'.The Planning Statement makes a number of references to the extant permission as being the permission [redacted]. Therefore, as the permission is a variant on the permission [redacted] the relief relating to the existing buildings should not apply.

9. The agent for the appellant submitted comments on the CA's representations, dated [redacted] which can be summarised as follows:-

(i) It is understood the development commenced in [redacted] following the grant of permission [redacted] in [redacted]. Although the building was not constructed fully in accordance with the planning permission that does not of itself render the development unlawful.

(ii) The failure to pay the S.106 contribution required for permission [redacted] does not affect the validity of the permission or the development carried out under that permission.

(iii) [redacted] has incorrectly interpreted the reference to the existing (unauthorised) building as the whole of the building being unauthorised. This is not correct as the reference to unauthorised is the planning consultant's shorthand referring only to those parts of the building that were not in accordance with the relevant planning permission

(iv) The planning consultant's reference to the extant permission being the [redacted] permission [redacted] was only because [redacted] had stated that they viewed the [redacted] application as being superseded by the [redacted] consent.

(v) At all material times there has been a building constructed or being constructed following the grant of planning permission. Although the building may not have been constructed wholly in accordance with the relevant planning permission it was lawful and therefore in lawful use. Credit should be given against the CIL levy in respect of both permissions [redacted] and [redacted].

10. Having fully considered the representations made by the agent for the appellant and the CA, I would make the following observations regarding the grounds of the appeal.

11. [redacted] have included an area within the dwelling house area on the ground floor being a residential bin store, the stairs to the first floor and approximately 50% of the floor area of the shared entrance hall. I am of the opinion that these areas should be included within the dwelling house area as they are ancillary to the residential accommodation on the upper floors. I have checked the measurements and can agree to the CA's area of [redacted] sqm on the ground floor and their apportionment of the entrance hall floorspace is reasonable having regard to the respective areas of the different uses in the chargeable development.

12. In respect of the upper floors [redacted] have a floor area that is [redacted] sqm greater than the area provided by the appellant. [redacted] were of the opinion that certain areas had possibly been omitted from the GIA by the appellant's agent including the zigzag windows. I have measured the floor areas from the plan [redacted] drawn by [redacted] and I am able to agree to the GIA's that have been put forward by the appellant's agent as follows:-

First floor – [redacted] sqm
Second floor – [redacted] sqm
Third floor – [redacted] sqm

Therefore the total GIA of the chargeable development liable for the CIL charge applicable to dwelling house accommodation including the ground floor is [redacted] sqm.

13. It is understood that the area of the general business use accommodation on the ground floor is agreed at [redacted] sqm.

14. There was also a disagreement over the floor area of the basement accommodation. However, as this area is not liable to a CIL levy, being for non-residential institutional use, I will not consider it further.

15. The appellant's agent has contended that the building in existence on the land at the date of the planning permission satisfied the meaning of an in use building for the purposes of Regulation 40(11) and the area should be netted off the GIA of the chargeable development before calculating the CIL charge. Although he accepted that the building may not have been constructed wholly in accordance with a planning permission previously granted he considered that it was lawful and in lawful use. The appellant's agent supported this approach by contending that parts of the building were built in accordance with a previous planning permission and were therefore authorised and lawful, only those parts built not in accordance with a previous planning permission being unlawful.

16. I do not accept the appellant's contention that parts can still be considered to be in lawful use if they have been built in accordance with a previous planning permission, even though the entire property has not been constructed wholly in accordance with the previous planning permission. In such circumstances, any use of the property would be unlawful in planning terms and as such I do not consider that it would satisfy the CIL in use definition. In addition, no evidence has been put forward that the property was actually in use at any time prior to the date planning permission was granted as there has been no indication that the property was occupied.

17. The appellant's agent has also put forward the argument that the planning permission [redacted] was granted prior to [redacted] charging schedules coming into force, and it was this planning permission that the appellant implemented in [redacted]. There is some dispute over whether it was this permission that was originally implemented, or whether it was superseded by the [redacted] planning permission. However, Regulation 128(1) confirms that a liability to CIL does not arise where the planning permission is granted for that development in an area in which no charging schedule is in effect. As the development has not been built in accordance with the original planning permission [redacted], this provision cannot apply in respect of the [redacted] consent.

18. Regulation 128A allows for the CIL liability to be reduced where an original planning permission was granted prior to a charging schedule coming into force and a new planning permission is granted after a charging schedule has come into effect. The liability is reduced by an amount that would have been paid if the original planning permission had been granted on the same day as the new permission. However, this regulation only applies when the new planning permission is granted in relation to the development under Section 73 of the Town and Country Planning Act 1990 (TCPA1990). Section 73 refers to the determination of applications to develop land without compliance with conditions previously attached. As the relevant planning permission [redacted] was not a Section 73 determination, this provision does not apply.

19. There is a further regulation, Regulation 74B that in certain circumstances allows for the CA to credit any previous CIL paid in relation to an earlier permission against a subsequent CIL charge. However, although permission [redacted] was CIL liable no CIL was paid by the appellant so this provision does not apply.

20. The CA have applied a rate of £[redacted] sqm for the [redacted] charge before indexation. However, this should £[redacted] sqm in accordance with the [redacted] Charging Schedule and I have adopted this in my decision. In addition, an index figure of 224 has been adopted as at 1 November 2011, whereas the figure from BCIS Online is 223 and I have adopted this in my decision.

21. On the evidence before me I conclude that the appropriate charge in this case should be based on a total GIA of [redacted] sqm as set out below:-

[redacted]

[redacted]

[redacted]

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[redacted]

[redacted]

[redacted]

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[redacted] BSc (Hons) MRICS
RICS Registered Valuer
Valuation Office Agency
[redacted]