Appeal Decision

by [redacted] BSc(Hons) MRICS

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

Valuation Office Agency

[redacted]

Email: [redacted]@voa.gsi.gov.uk

Appeal Ref: [redacted]

Planning Permission Ref. [redacted] ***granted by*** [redacted]

Location: [redacted]

Development: Retrospective application for the erection of 1 No. dwelling.

Decision

I determine that the Community Infrastructure Levy (CIL) payable in this case should be £[redacted] ([redacted], [redacted] and [redacted] and [redacted]).

Reasons

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

a. The planning application ref [redacted] dated [redacted] together with approved plans, drawings and associated documents.
b. The Decision Notice issued by [redacted] on [redacted].
c. The CIL Liability Notice issued by the CA on [redacted].
d. The letter from the CA dated [redacted] in response to the appellant's request for a review.
e. The revised CIL Liability Notice issued by the CA on [redacted]
f. The CIL Appeal form dated [redacted] submitted on behalf of the appellant, under Regulation 114, together with documents and correspondence attached thereto.
g. The CA's representations to the Regulation 114 Appeal.
h. Further comments on the CA's representations prepared on behalf of the appellant dated [redacted].

2. Planning permission for the above development was granted by [redacted] retrospectively on [redacted].

3. Prior to the grant of the retrospective planning permission previous applications at the site included:-

- [redacted] – Erection of 1 No. dwelling with [redacted]. Approved on [redacted]
- [redacted] – Variation of Condition 2 of approved planning permission for the erection of 1 No. dwelling with [redacted] to allow changes to [redacted]; [redacted]; introduction of roof lights; external [redacted] to first floor bedrooms; changes to materials; change in design of [redacted]; and, alterations to footprint in accordance with Drg Nos. [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted]. Approved on [redacted].

It is understood that construction of the dwelling was complete as at the date of the retrospective application approval. The application was essentially required since the dwelling had not been built in accordance with approved plans under application [redacted] (as varied by a S73 application [redacted]). A single storey extension ([redacted]) had been built instead of a [redacted] as consented. The retrospective application was in respect of 'the erection of 1 no. dwelling'. Associated approved plans show the dwelling and extension.

4. Following the grant of the retrospective planning permission the CA issued a CIL Liability Notice on [redacted] in the sum of £[redacted]. This was based on a chargeable area of [redacted] square metres @ £[redacted] per square metre indexed by [redacted].

5. At the request of the appellant the CA undertook a review of the CIL charge and confirmed by letter dated [redacted] that the development remained liable for CIL but the rate had been incorrectly indexed. On [redacted] the CA issued an amended Liability Notice in the sum of £[redacted] using an indexation of [redacted].

6. On [redacted] the Valuation Office Agency received a CIL appeal contending that the chargeable amount had been incorrectly calculated. The appeal form indicates that the Appellant wishes to appeal under Regulation 114 (a Chargeable Amount Appeal) since the calculation should have been based on a chargeable area of [redacted] square metres (the area of the rear extension only) @ £[redacted] per square metre indexed by [redacted] equalling a charge of £[redacted].

7. The grounds of appeal made on behalf of the appellant can be summarised as:-

i. The appellant built a dwelling house that fundamentally accords with a planning consent granted pre-CIL that had been completed and occupied prior to the retrospective consent.

ii. The retrospective planning consent is for an identical dwelling house as previously accepted as valid and approved pre CIL under cover of a Section 73 consent with the unauthorised [redacted] sanctioned and included in lieu of an approved [redacted].

iii. The previously approved dwelling house as built and occupied before the retrospective planning consent should be classed as an 'existing' building and should not be included in the calculation for CIL.

iv. The formal review judgment refers to the original planning consent ([redacted]) and does not acknowledge the Section 73 consent which superseded this consent (ref: [redacted]). It also fails to recognise the fact the dwelling was an 'existing' building under cover of the Section 73 consent and illustrated/recorded as existing in the retrospective planning consent (ref: [redacted]) approved drawings.

v. The fact that the dwelling house was not occupied for at least six months prior to the retrospective planning consent is not relevant as Government CIL guidance clarifies buildings which exist at the time of commencement and do not require planning can be treated as 'existing' and be excluded from the CIL chargeable amount calculation.

vi. The dwelling house has been approved twice and is therefore considered to be existing and not liable for CIL as development of this element commenced legitimately well in advance of the CIL coming into force. The suggestion that the retrospective planning consent overrides previous consents and that the charge for the whole development is fair and reasonable is not accepted on the grounds there are mitigating circumstances and fundamental issues of fairness and reasonableness if this is not acknowledged and accepted.

vii. In the interest of fairness and reasonableness the appellant will appreciate acknowledgement of his circumstance and the facts outlined and the removal of the claim for CIL charge based on the dwelling floor area with the exception of the rear extension that required retrospective consent. This is considered a fair and reasonable interpretation of the facts and a reflection of the Governments CIL guidance and intent.

8. Within its representations the CA explain that the original planning permission ([redacted]) was granted prior to the local Charging Schedule implementation and hence no CIL was originally levied. Construction commenced but the Council's enforcement officers apparently intervened in [redacted] since works undertaken at the site were not in accordance with the planning permission. A Variation of Condition application ([redacted]) was submitted in [redacted] but it did not indicate a revision of plans to replace a [redacted] with a [redacted] addition. The subsequent retrospective full planning application ([redacted]) to regularise the unauthorised development was granted permission on [redacted] after the CIL Charging Schedule was brought into effect on [redacted]. The CA further explain that the retrospective permission was required since the [redacted] addition amounted to a material change to the original scheme, and therefore could not be considered as a variation of a condition; and because the dwelling, as it then stood, was still under construction and unauthorised and therefore did not benefit from permitted development rights for an extension. The CA have submitted plans and officer's reports for each of the three applications and a CIL Additional Information form relating to the retrospective application.

9. The CA further explain that a CIL liability notice and demand notice was issued in accordance with Regulation 7(5)a. Self-build relief was not granted in accordance with Regulation 54B(3) since the development had commenced. The floor space of the existing [redacted] was not deducted within the calculation since it had been demolished prior to the relevant planning permission.

10. The revised CIL calculation was based upon the following formula set out in Regulation 40 of the CIL Regulations 2010 as amended:

$$\frac{R \times A \times I_p}{I_c}$$

The figures used resulting in a liability of £[redacted] were:

Rate: £[redacted]
Area: [redacted] sq m
Index (Ip):
Index (Ic):

11. The appellant has made further comments on the CA's representations which he sees as overly reliant on the assumption that a retrospective planning consent being granted after the CIL came into force automatically justifies a full CIL charge based on the entire area of the development. His comments can be summarised as follows:

- The original planning permission was breached due to a number of unauthorised variations
- The S73 application was approved without any issue in [redacted] with the Planning Authority's full prior knowledge of the existence of the [redacted] extension. It was deemed accepted that that the unauthorised variations would be dealt with by [redacted] applications in order to allow the fundamental dwelling house to be considered as lawful.
- The S73 approval of the 'dwelling house' should be acknowledged as a legitimate stand-alone planning permission as opposed to a 'variation of condition'.
- The retrospective planning consent is also an entirely new consent which theoretically invalidated the S73 consent by sanctioning the rear single storey addition but it did not invalidate the fundamental dwelling house 'as built' therefore this element should be treated as existing under CIL guidance which the CA have failed to recognise in their representations.
- The fundamental dwelling house as varied and built prior to CIL coming into effect and the subsequent retrospective consent are no different other than the attachment of an ancillary [redacted] single storey building.
- The only element that was technically subject to enforcement and hence demolition was the [redacted]. The dwelling was not at risk since it reflected the S73 consent.
- The dwelling that existed at the time of the retrospective application was covered by the S73 consent and as such qualified as being an existing building having a lawful use for the purpose of CIL Regulations. The intended use (C3 residential) could have been rendered lawful if the [redacted] addition had been demolished without the need for a new planning consent and the existing dwelling should be excluded from the chargeable amount calculation.
- The only area that should be chargeable is the rear single storey addition that is classed as "ancillary to the enjoyment of the dwelling house" and not the fundamental house that was approved prior to CIL coming into force and implemented in accordance with that consent on the understanding the unauthorised [redacted] addition was subject to planning enforcement action or retrospective consent.

12. The Council implemented its CIL Charging Schedule on [redacted] and all planning permissions granted on or after that date are potentially liable to a CIL charge. It does not appear to be in dispute that the planning permission giving rise to the CIL charge is the result of a retrospective application (ref: [redacted]) made under S73A of the TCPA rather than a S73 application.

13. Regulation 9 of the CIL regulations 2010 states that chargeable development means "the development for which planning permission is granted". The CIL liability herein under appeal therefore relates to the proposed development allowed by the planning permission [redacted] which is for the erection of a dwelling. It was required since the dwelling was not built in accordance with the approved plans under planning application ref: [redacted], as varied by an approval under a S73 application [redacted] for minor variations. Whilst the material difference between the original consents and the retrospective

consent is the single storey [redacted], the development permitted by the retrospective consent is nevertheless the entire dwelling to include the [redacted].

14. Furthermore it is noted that the unauthorised [redacted] was not included in the approved plans sanctioned under the S73 consent which show the originally approved [redacted].

15. Regulation 40(7) of the CIL Regulations allows for the deduction of floorspace of certain existing buildings from the gross internal area of the chargeable development to arrive at a net chargeable area upon which the CIL liability is based. Deductible floorspace in relevant buildings includes "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"

16. Grounds (iii) to (vii) of the appeal and a number of the appellant's further comments relate to a fair and reasonable application of this Regulation and the appellant considers that the floor space of the dwelling house 'as built' should be deducted within the chargeable amount calculation. However on the day before the retrospective application, the dwelling, or any part of the dwelling, did not have a use that could be carried on lawfully since the dwelling had not been built in accordance with approved plans (for either application [redacted] or [redacted]); hence the requirement for the retrospective consent for its erection. Therefore, the dwelling as a whole or in part, does not qualify as deductible floor space.

17. The CA have based their calculations of the CIL liability on floor areas submitted on behalf of the appellant in the Planning Application Additional Requirement form dated [redacted]. The gross internal area of the proposed development is stated as being [redacted] sq m. There would appear to be no dispute in the calculation of this area.

18. The CIL charge has been calculated at a rate of £[redacted] /sq m and neither this rate nor the amended indexation rate appears to be in dispute. Nevertheless I note that within the calculation of the indexation rate the definitions of Ip and Ic as set out in Regulation 40 of the CIL Regulations 2010 (as amended) have not been adhered to by either the appellant or the CA. Ip is defined as the index figure for the year in which the planning permission is granted (i.e. [redacted]) and Ic is the index figure for the year in which the charging schedule containing the rate took effect (i.e. [redacted]). In this case both dates are therefore within [redacted] and there should be no allowance for indexation within the calculation.

19. I have therefore calculated the CIL charge as follows:

[redacted] sq m @ £[redacted] / sq m = £[redacted]

20. On the basis of the evidence before me and having considered all of the information submitted in respect of this matter, I therefore decide a CIL charge of £[redacted].

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