

Appeal Decision

by [REDACTED] MRICS

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

Valuation Office Agency



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

Appeal Ref: [REDACTED]

Planning Permission Ref. [REDACTED] from [REDACTED]

Location: [REDACTED]
[REDACTED]

Development: Erection of single storey dwelling, detached garage and vehicular access

Decision

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

Reasons

1. I have considered all the submissions made by [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. Prior Approval Consent [REDACTED] dated [REDACTED]
- b. Pre Planning Application Advice from planning authority dated [REDACTED]
- c. Planning application for the development dated [REDACTED]
- d. Planning decision (ref: [REDACTED]) dated [REDACTED]
- e. CIL Liability Notice dated [REDACTED]
- f. CIL Demand Notice dated [REDACTED]
- g. E-mail from appellant to CA regarding f.
- h. E-mail string between appellant and CA relating to CIL Liability Notice
- i. Letter dated [REDACTED] from Appellant to CA
- j. CIL form, 'determining whether a development is CIL liable', completed by appellant
- k. Further e-mail string between CA and Appellant discussing further the question of CIL liability
- l. E-mail from Building Control at CA relating to site inspection dated [REDACTED]
- m. CIL Appeal form dated [REDACTED]
- n. Grounds of Appeal from Appellant dated [REDACTED]
- o. CA response to above with various supporting attachments

p. Response to above by appellant with various supporting attachments.

2. Planning permission for the above development was granted by [REDACTED] on [REDACTED] ([REDACTED]). The Council implemented its CIL Charging Schedule for this location on [REDACTED].

3. Prior to the grant of the planning permission two Prior Approval applications were made

- [REDACTED] Notification for Prior Approval for a Proposed Change of Use of an existing agricultural building and land within its curtilage to residential use to form 1 no. dwelling (Use Class C3) and associated operational development.
- [REDACTED] Notification for Prior Approval for a Proposed Change of Use of an existing agricultural building and land within its curtilage to residential use to form 1 no. dwelling (Use Class C3) and associated operational development.(granted [REDACTED])

It is understood that works of demolition of the barn had commenced during the spring and summer of [REDACTED]. The site was inspected by the planning authority in [REDACTED] when it was accepted by the appellant that the works undertaken were contrary to above Prior Approval consents and a full planning application was to be made. Subsequently pre application advice was requested by the appellant and issued by the planning authority in [REDACTED].

4. Following the grant planning permission the CA issued a CIL Liability Notice on [REDACTED] in the sum of £[REDACTED]. This is based on a net chargeable area of [REDACTED] square meters @ £[REDACTED] per square metre plus indexation.

5. On [REDACTED] the appellant contacted the CA by e-mail to request a review of the CIL Charge.

6. On [REDACTED] the CA completed a review of the CIL Charge and did not revise its calculation. The decision was contained in an e-mail of the above date, without reference to the review of the Liability Notice, I understand this followed a meeting between the CA and the appellant. The CA stated in that decision in respect of the Review of the Liability Notice that the previously existing building on the site had been demolished prior to the granting of the planning consent ([REDACTED]) and the building that stood there, as at [REDACTED], was rebuilt after the demolition. This building was therefore not an 'in use building' as defined in Regulation 40 of the CIL Regulations 2010 as amended, and could not therefore be in use lawfully for 6 months of the proceeding 3 years, as the consent related to a development already constructed at the date consent was granted.

7. The Valuation Office Agency received a CIL appeal dated [REDACTED], made under Regulation 114 (chargeable amount) contending that CIL should not have been charged. The appeal form indicated that the Appellant wished to appeal under Regulation 114 (Chargeable Amount Appeal).

8. The appellant's grounds of appeal for a nil charge are:-

- i. That the CIL charge relating to the Prior Approval ([REDACTED]) was nil as the barn to be converted was deemed an 'existing use credit' and could be netted off the converted development. The building on the site at the date of the granting of planning consent should be netted off the new development as it was lawfully in use and complied with Regulation 40 of the CIL Regulations 2010. A statement is provided by the previous owners that the barn was used for agricultural purposes for 6 months of the last 3

- years, and that the original building was the same size and shape as that now standing on the site.
- ii. That the barn required 'substantial replacement due to its poor structural condition' and the appellant then proceeded to build a structure capable of being converted under the Prior Approval consent (██████████)
 - iii. Following agreement with the planning authority to rectify the failure to comply with the Prior Approval Consent, it was agreed to apply for full planning consent for the development, there were no formal procedures issued by ██████████ against the actions taken regarding the barn.
 - iv. That the appellant had informed the enforcement officer that he would restore the former barn as per the plans associated with the Prior Approval.
 - v. That the plans for conversion of the barn under the Prior Approval consents are identical to those of planning consent ██████████, apart from the addition of a garage and alterations to the drive.
 - vi. Reference to a photograph taken in ██████████ of the building on the site confirming its presence.
 - vii. That the legal status of the barn at the date of the planning consent was granted was agricultural and that there are no onerous restrictions on farmers upgrading and repairing existing barns to maintain their pre-repaired, size, shape and location.

9. The Council implemented its CIL Charging Schedule on ██████████ and all planning permissions granted on or after that date are potentially liable to a CIL charge.

10. The CA made their submission in response to the grounds of appeal, the main points are detailed below

- That the planning consent ██████████, is the chargeable development under Regulation 9 of the CIL Regulations 2010 and is not a consent for a barn conversion, but as stated, is for the erection of a single storey dwelling, detached garage and vehicular access, and quotes case law in support of that contention (Hibbitt v SSCLG 2016 EWHC 2853).
- That officers of the Council confirmed that the above development had been commenced at the date of the planning consent and therefore the consent constituted a retrospective consent.
- That the case notes regarding the Prior Approval stated that in ██████████ it was noted, during an inspection by a council officer, that the barn had been demolished.
- That the CA reject the contention that the demolished barn was a relevant building under Regulation 40 of the CIL Regulations 2010 as the demolished building was not situated on the relevant land on the day the planning permission first permits the chargeable development. Therefore the existing use credit does not apply.

11. The appellant responded to the CA submission with the following points

- Reiterated that the plans and drawings relating to the planning consent ██████████, are the same in size, shape and volume and in the same location as the barn under the Prior Approval ██████████.
 - That the CA assertion that the planning consent issued on ██████████ was not for a barn conversion is contradictory to the advice given in the pre application advice request issued by the planning authority on ██████████.
 - That the Hibbitt case is irrelevant to the subject matter of the appeal
 - That the contention of the CA that the planning consent ██████████ was retrospective is incorrect, no mention of this was made in any of the documentation relating to the matter was ever made and to gain retrospective consent would have to be made under Section 73a of the T & CPA 1990
- ██████████ That the barns on the holding were well established as agricultural use until the grant of consent under ██████████

- The withdrawal of the Prior Approval consent did not alter the use of the barn in question, and at no stage was any stop on restoration, upgrading or building operations relating to the barn that was permitted under the previous use.
- Photographic evidence clearly shows the existence of the building on the site at the date of the planning consent.
- The appellant contends that the CA have asserted that he has submitted a demolished barn as the relevant building. He contends that the building in the photograph is the relevant building under Reg 40 CIL Regulations 2010 and should be used as an existing use credit to net off the chargeable development for CIL purposes.

12. Regulation 40(7) of the CIL Regulations 2010 (as amended) allows for the deduction of floorspace of relevant 'in-use' buildings from the gross internal area of the chargeable development to arrive at a net chargeable area upon which the CIL liability is based. Regulation 40(11) of the CIL Regulations defines an 'in use' building as '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 the planning permission first permits the chargeable development'. Regulation 40(11) further states that a 'relevant building' means a building which is situated on the relevant land on the day planning permission first permits the chargeable development.

13. Regulation 9 of the CIL Regulations 2010 (as amended) states that chargeable development means the development for which planning permission is granted. The CIL liability under appeal therefore relates to the development allowed by the planning permission [REDACTED] which is for the 'erection of single storey dwelling detached garage and vehicle access'. The fact that earlier prior approvals for conversion of the original barn exist is not relevant since the planning permission is for the erection of a new building and this is therefore the chargeable development and the subject of this appeal.

14. Grounds (i) & (ii) of the appeal (paragraph 8 above) relate to the contention that the barn was a relevant building under Regulation 40 of the CIL Regulations 2010 and in use, lawfully at the date the planning consent was granted. The CA are not satisfied that the building on the site at the date qualified as a relevant building on and have therefore not deducted that area from the proposed floor space area of [REDACTED] sq m. It is not under dispute that the previous barn was demolished prior to the day the planning permission first permitted the chargeable development. The fundamental issue before me is whether the building on the site at the date of the relevant planning permission ([REDACTED]) on [REDACTED] was a relevant building that had been in lawful use for the relevant period. On the evidence before me I am of the opinion that the building that existed at this time was not a relevant building in lawful use based on the following:-

- The planning consent was not for a conversion of an existing barn, it is clearly stated in that decision that consent was granted for 'erection of single storey dwelling, detached garage and vehicular access'
- That the barn was demolished is clearly stated in the application for planning consent dated [REDACTED], submitted by the appellant's agent.
- That the case notes of the planning enforcement officer who visited the site in [REDACTED] state that the barn had been demolished at that time.
- The statement by the appellant that 'substantial replacement due to its poor structural condition' was required and the appellant then proceeded to build a structure 'capable of being converted under the Prior Approval consent ([REDACTED])' indicates that the original barn had been demolished at this time.

- The building in place at the date of the planning permission cannot have been in lawful use for the requisite period since the permission itself was required to regularise its existence from a planning point of view.

15. With regard to grounds (iii) through to (xi) of the appeal, all relate to the activities between the site inspection by the enforcement officer and the planning consent granted on [REDACTED]. It is accepted that the building on the site at the granting of planning consent for the chargeable development was the same size, volume and location as the original barn and that such a building stood on the subject site at the date of consent. It is my view that this building was a rebuild of the original and therefore clearly not the original barn. It clearly follows that the development under planning consent [REDACTED], (the chargeable development) had already begun and therefore that building was the chargeable development for CIL purposes and not an existing building in lawful use as defined in Reg 40 CIL Regulations 2010. The GIA of the original barn could not therefore be netted off the proposed development for CIL purposes.

16. With regard to ground (vii) of the appeal at paragraph 8 above, as the barn was demolished and the Prior Approval was no longer in place, the rebuild of the structure was undertaken prior to the granted of the consent so to do. The contention that there were no onerous restrictions on farmers upgrading or repairing the original agricultural barn are not relevant as that barn was not in existence at the date consent was granted on the chargeable development.

17. In respect of the response by the appellant to the CA submission I would comment in the same order as paragraph 11.

- It is accepted that the rebuilt barn has been constructed on the same footprint and to the same volume as the original barn.
- The pre planning advice report dated [REDACTED] does not contradict the CA assertion that the planning consent was not for a barn conversion, it merely describes a proposal, it does not detail the future consent.
- All I can draw from the Hibbitt cases is that are the comments in paras. 26 and 27 on the difference between a 'conversion' and a 'rebuild'. In paragraph 27, the judge says "the test is one of substance, and not form based upon a supposed but ultimately artificial clear bright line drawn at the point of demolition" and "there will be numerous instances where the starting point (the "*agricultural building*") might be so skeletal and minimalist that the works needed to alter the use to a dwelling would be of such magnitude that in practical reality what is being undertaken is a rebuild." I presume the CA have referred to this case because the appellant says in the grounds of appeal that the existing building could 'legally' be regarded as 'an agricultural barn, appropriately repaired and restored', implying possibly that the existing building was not a new building but a 'conversion' of the original building (so the original building was still in existence). However, it is my view that the barn was demolished, I can see nothing in the submissions to indicate this wasn't the case, therefore I believe the development to be a rebuild and the original building was therefore no longer in existence at the date the consent was granted and the subject planning permission was therefore required to give consent to the building as re-built.
- The planning permission granted on [REDACTED] is not explicitly stated to be retrospective but for CIL purposes it is clear that the chargeable development had commenced at this date
- The original building could not have an established agricultural use at the date consent was granted as it had been demolished by [REDACTED].
- The withdrawal of the Prior Approval did not change the use of the barn it is agreed, however it is clear that the barn had been demolished by that time.
- The photograph provided by the appellant does show a building on the site at the date of the planning consent, however, that building is not the original barn, it is a rebuild permitted by that very consent.

- I do not agree that the building on the site at the date of the planning consent is the original barn subject to the Prior Approval in [REDACTED]. From the evidence before me that barn was demolished and subsequently rebuilt prior to the granting of the planning consent to do so. Regulation 9 (1) CIL Regulations 2010 state that the chargeable development is that for which planning consent is granted, namely in this instance, the building now standing on the subject site at the date consent was granted, [REDACTED].

18. The CIL charge has been calculated at £[REDACTED]/sq m and neither this rate nor the floor area of the chargeable development ([REDACTED] sq m) appears to be in dispute. Based on the information submitted by both parties I am therefore of the opinion that the CA's calculation of the charge is correct. No netting off is required as the building on the site at the relevant date ([REDACTED]) was a rebuild (albeit identical to the original building) but the rebuild was not in use lawfully because planning permission for a rebuild had not be granted prior to the relevant date.

19. On the basis of the evidence before me and having considered all of the information submitted in respect of this matter, I therefore confirm a CIL charge of £[REDACTED] as stated in the Liability Notice dated [REDACTED].

[REDACTED] MRICS
RICS Registered Valuer
Valuation Office Agency
[REDACTED]