Appeal Decision

by [redacted] BSc(Hons) MRICS

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

Valuation Office Agency

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

Appeal Ref:

Address:

Proposed Development: Variation of condition no10. of planning permission dated [Minor amendment to p.p.) dated for construction of 5 houses and parking and refuse storage facilities. (The main alterations involve internal changes only of).

Planning permission details: Approved by on under reference

Decision

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

Reasons

1. I have considered all the submissions made by on behalf of (the Appellant) and , 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 Decision Notice issued by on .
   b. The Revised CIL Liability Notice (reference) issued by the CA on .
   c. The appellant's request for a Regulation 113 review dated .
   d. The CA e-mail dated in response to the appellant's request for a review.
   e. The CIL Appeal form dated submitted on behalf of the appellant under Regulation 114, together with documents and correspondence attached thereto.
   f. The CA's representations to the Regulation 114 Appeal dated together with Appendices labelled A-D.

2. Planning permission for "the construction of 5 houses with parking for 5 cars and refuse storage facilities" (the "Development") was granted under reference [redacted] (the "Original Planning Permission") on [redacted]. At this time a charging schedule had been adopted by the [redacted], but not by the [redacted]. The CA subsequently implemented its Charging Schedule with effect from [redacted]. Development commenced on [redacted].

3. A series of later applications were made and approved under Section 73 of the Town and Country Planning Act 1990 for minor material changes to the Development which were implemented during construction as follows:

i) On [redacted] planning permission [redacted] (the "First Section 73 Permission") was granted for "Minor material amendment to p.p. (ref [redacted]) granted on [redacted] for the construction of 5 houses with parking for five cars and refuse storage facilities. The main changes involve alterations to approved elevations, increase in basement sizes, installation of rooftop condensers, roof lights to terrace." The net increase in floorspace over what was authorised by the Original Permission was calculated by the CA as [redacted] square metres (sq m).

ii) On [redacted] planning permission [redacted] (the Second Section 73 Permission") was granted for "minor material amendment to p.p. (ref [redacted]) dated [redacted] for construction of 5 houses and parking and refuse facilities. (the main changes involve removal of windows on the east elevation, adding [redacted] [redacted] into the [redacted] and minor layout changes". The net increase in floorspace over what was authorised by the Original Permission was calculated by the CA as [redacted] sq m.

iii) On [redacted] planning permission [redacted] (the "Third Section 73 Permission") was granted for "variation of condition 10 of planning permission [redacted] dated [redacted] [Minor amendment to p.p. (ref [redacted]) dated [redacted] for construction of 5 houses and parking and refuse storage facilities. (The main alterations involve internal changes only of [redacted])". There is no dispute that this permission did not result in a net increase in floorspace from that authorised by the Second Section 73 Permission.

4. On [redacted] the CA issued Liability Notices in respect of each of these three section 73 Permissions. These were subsequently superceded by revised Liability Notices issued on [redacted] and include [redacted] in relation to the Third Section 73 Permission indicating a liability of £[redacted] for [redacted] CIL which is the subject of this appeal. The [redacted] CIL liability arising from the Second Section 73 permission was £[redacted] so [redacted] represented an additional liability of £[redacted], even though there was no increase in floorspace.

5. The CA has calculated the disputed charge in relation to [redacted] in accordance with Regulations 128A and 40 of the CIL Regulations 2010 (as amended). Regulation 128A provides:

"(1) Where all the criteria set out in paragraph (2) are satisfied by a development, paragraphs (3) to (6) shall apply.

(2) The criteria are—

a) on the day planning permission (A) is granted in relation to the development, the development is situated in an area in which a charging authority has no charging schedule in effect;
b) a new planning permission (B) is later granted in relation to the development under section 73 of TCPA 1990; and

c) *on the day B is granted, the development is situated in an area in which that charging authority has a charging schedule in effect.*

(3) Liability to CIL shall arise in respect of the development, and the amount of CIL payable ("chargeable amount") shall be—

$$X - Y$$

where—
X = the chargeable amount for the development for which B was granted, calculated in accordance with regulation 40; and
Y = the amount, calculated in accordance with regulation 40, that would have been the chargeable amount for the development for which A was granted, if A first permitted development on the same day as B.

..."

6. The Appellant considers the charge in relation to the Third Section 73 Permission should be calculated in accordance with Regulations 9 and 40. He accepts the basis and the charge for the other two Liability Notices which have been calculated in accordance with Regulations 128A and 40.

7. The Appellant's reasoning is that the Third Section 73 Permission was granted for a "variation of condition no10 of planning permission [redacted] dated [redacted]" i.e. it varied a condition subject to which the Second Section 73 Permission was granted (as opposed to changing a condition subject to which the original planning permission ([redacted]) was granted, as were the First and Second Section 73 Permissions). Accordingly, because the Second Section 73 Permission was granted at a time when both the [redacted] CIL and [redacted] CIL was in effect, the qualifying criteria for the application of Regulation 128A (2) are not met.

8. Regulation 9(6) dictates that:
"(6) Where the effect of a planning permission granted under section 73 of TCPA 1990 is to change a condition subject to which a previous planning permission was granted so that the amount of CIL payable calculated under regulation 40 (as modified by paragraph (8)) would not change, the chargeable development is the development for which planning permission was granted by the previous permission as if that development was commenced."

Regulation 9(8) provides:
"(8) For the purposes of paragraphs (6) and (7), the liability to CIL under regulation 40 should be calculated in relation to an application made under section 73 of TCPA 1990 as if the date on which the planning permission granted under that application first permits development was the same as that for the application for planning permission to which the application under section 73 of TCPA 1990 relates."

The Appellant considers that, since it is accepted that the Third Section 73 Permission did not result in an increase in floor area over the Second Section 73 Permission and both were granted after the charging schedule came into effect, in accordance with Regulations 9(6), 9(8) and 40, the later Section 73 Permission should not give rise to any additional liability to CIL.

11. The CA first requests that I reject the Appeal on the grounds that it is an Appeal submitted under Regulation 114 that has been made after the relevant development had commenced and that it is also not eligible for Appeal under Regulation 114 (3A).

12. Should the appeal be determined the CA requests that the liability for CIL is upheld. It has made representations referring to Department of Communities and Local Government (DCLG) guidance issued and updated on 12 June 2014 in relation to transitional cases. The CA quotes the following guidance offered by DCLG in response to the question: "What is the

impact of a section 73 application to amend a planning condition?"; the response being: "There may be transitional cases, where the original planning permission was granted before a levy charge came into force in the area, and a section 73 permission is granted after the charge comes into force. In these circumstances, Regulation 128A (as amended by the 2014 Regulations) provides for the section 73 consent to only trigger levy liability for any additional liability it introduces to the development. The government's intention is that the provisions set out in Regulation 128 A should apply to all subsequent section 73 permissions granted in respect of such a development where these transitional circumstances have arisen."

13. The CA considers that, since it is acknowledged that the original planning permission for this development was granted before the Charging Schedule came into effect and all subsequent section 73 permissions were granted at a time after the charging schedule was implemented, then the guidance provided for such transitional cases is that Regulations 128A should apply to all subsequent section 73 permissions including the Third Section 73 Permission.

14. With regard to the first contention of the CA, that the appeal should be rejected, Regulations 113(9A) and 114(3A) provide that a review request or an appeal may be made after the 'relevant development' has commenced if planning permission was granted after that development was commenced. 'Relevant development' is defined in Regulation 112(1) as the 'chargeable development' which is the subject of the review or appeal. 'Chargeable development' is defined in Regulation 9(1) as the development for which planning permission is granted. However, it is different where there is a planning permission granted under section73 to change a condition subject to which a previous planning permission was granted, as in this case. The 'chargeable development' in section 73 permission cases is determined by either Regulation 9(6) or (9(7). Under Regulation 9(6), where there is a section 73 permission and the amount of CIL payable calculated under Regulation 40 **would not change,** the 'chargeable development' is the development for which permission was granted by the **previous planning permission** (in this case the Second Section 73 permission). Under Regulation 9(7), where there is a s.73 permission and the amount of CIL payable calculated under Regulation 40 **would change**, the 'chargeable development' is the **most recently commenced chargeable development** (in this case the Third Section 73 permission). In this case it does not appear to be disputed by the CA that there would be no change in the CIL payable if calculated under Regulation 40, so Regulation 9(6) therefore applies and the 'chargeable development' and hence the 'relevant development' is the Second Section 73 Permission. As the 'relevant development' in this case is the development under the Second Section 73 Permission, and this commenced before the Third Section 73 Permission was granted, the requirements of Regulation 113(9A) and Regulation 114(3A) are met and an appeal can therefore be made.

15. With regard to the substantive issue of the appeal it appears that the crux of the difference between the CA and the Appellant is the interpretation and application of the criteria set out in Regulation 128A(2). There is no dispute that the Third Section 73 Permission (Permission B within the context of Regulation128A) was granted on a day when the charging schedule was in effect, but what is at issue is whether permission A should be the Second 73 Permission, as is the view of the Appellant, or the Original Permission, as is effectively the view of the CA. If the Second 73 Permission is permission A then the qualifying criteria are not satisfied since both permission A & B were granted after the charging schedule came into effect and the Transitional Provisions contained within Regulation 128A do not apply. If the Original Permission is adopted as permission A then the criteria are satisfied and the liability to CIL is calculated in accordance with paragraphs (3) to (6) and the X-Y formula.

16. The Appellant is of the opinion that permission A should be the Second Section 73 Permission since the Third Section 73 Permission is a change to a condition subject to which the Second Section 73 Permission was granted (as opposed to changing a condition subject to which the Original Permission was granted).

17. Regulation 128A refers to the transitional provisions for section 73 applications as being applicable when the qualifying criteria are satisfied by a development. Regulation 128A(2)(a) simply refers to "planning permission (A)", it does not specifically exclude the possibility that planning permission (A) could itself be a section 73 permission. The DCLG guidance referred to by the CA suggests that Regulation 128A should apply where "the original planning permission" was granted before a levy charge came into force in the area but it too does not specifically exclude the possibility that "the original permission" could itself be a section 73 permission (i.e. where, as here, planning permission (B) varies an earlier section 73 permission). The DCLG guidance does also say that the government's intention is that the provisions set out in Regulation 128A should apply to all subsequent section 73 permissions granted in respect of a development where these transitional circumstances have arisen but that of course does not answer the fundamental question of whether the transitional circumstances outlined in Regulation 128A exist in the unusual circumstances of this case. In my opinion as the Third Section 73 Permission technically permits a variation of a condition contained within the Second Section 73 Permission rather than a variation of any condition in the Original Permission, for the purposes of Regulation 128A planning permission A should be treated as being the Second Section 73 permission.

18. It therefore follows that in the unusual circumstances of this case Regulation 128A does not apply and the chargeable amount should therefore fall to be assessed in accordance with Regulations 9 and 40. The CA do not appear to dispute the Appellant's submission that, if it is assessed in accordance with Regulations 9 and 40, the CIL liability arising in respect of the Third Section 73 Permission, should be £[redacted].

19. On the basis of the facts of this case and the evidence before me I therefore determine a CIL charge of £[redacted].

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RICS Registered Valuer
Valuation Office Agency
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