Appeal Decision

by [redacted] MRICS

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

Valuation Office Agency (SVT)
[redacted]

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

Appeal Ref: [redacted]

Address: [redacted]

Proposed Development: *Application to allow relocation of bin store to external west elevation, omission of entrance to* [redacted]*, relocation of the* [redacted] *entrance, reconfiguration/reduction of 2 x openings to* [redacted]*, reduction of floor level to the plant room and remove requirement for a scheme of sound insulation works (Application under Section 73 to vary condition No. s 2. (Approved plans) 6. (flood) 10. (sound insulation works) & 11. (validation testing) as imposed by planning permission No.* [redacted]*).*

Planning Permission details: *Granted by* [redacted] *on* [redacted]*, under reference* [redacted]*.*

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 the appellant, [redacted], and the submissions made by the Collecting Authority (CA), [redacted].

2. Planning permission was granted for the development on [redacted], under reference [redacted] (the "[redacted] Permission"). Of note, this permission was a section 73 planning permission to amend conditions attached to planning permission reference [redacted] for *Use of existing buildings (Use Class B8) as 21x dwellings (Use Class C3) including associated refurbishment, provision of mezzanine, car parking and open space.* This permission was granted on [redacted] (the "[redacted] Permission").

3. The day following the grant of the [redacted] permission, the CA issued a revised Liability Notice ([redacted]) on [redacted]. Of note, this superseded (three) earlier liability notices and was for a sum of £[redacted], based on a net chargeable area of [redacted] m² @ £[redacted] per m², with indexation at [redacted]. This is the liability notice to which this appeal relates.

4. The appellant requested a review of this charge under Regulation 113 of the CIL Regulations 2010 (as amended). However, the CA is of the view that the provisions of Regulation 113(9) apply and the appellant is ineligible to request a Regulation 113 review as development had commenced.

5. On [redacted], the Valuation Office Agency received a CIL appeal made under Regulation 114 (chargeable amount) from the appellant, contending that the CA's calculation is incorrect. The appellant is of opinion that the CIL payable is £[redacted], based upon a net chargeable area of [redacted] m² @ £[redacted] per m², with indexation at [redacted]

   The appellant's contentions can be summarised to two core points:

   a) The contention of having a valid appeal.
   b) From the appellant's perspective, the CIL calculation should reflect 'in-use' floorspace of [redacted] m² (the existing area floor space, which the appellant considers is an eligible deduction, which can be offset).

6. The CA first requests that I reject this 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) (which allows appeals to be made after the relevant development has commenced in certain circumstances).

   Secondly, in addition to ineligibility of making an appeal, the CA is of the view that the requirements of continuous lawful use have not been met and on this basis, the existing floor space cannot be offset.

7. Based upon the submitted evidence, I confirm that I consider this appeal to be valid and dismiss the CA's request for me to reject the appeal. I clarify my decision and rationale as follows:

   Regulation 9(6) provides:

   "(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(7) provides:

   "(7) 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 under regulation 40 (as modified by paragraph (8)) would change, the chargeable development is the most recently commenced or re-commenced chargeable development."

   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."

8. 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 section 73 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 2017 Permission).

   It is quite clear that Liability Notice [redacted] issued on [redacted], adopts a different floor area from the previous notice. In my view, the different floor area is key to the validity of this appeal. Having checked the plans, there is no obvious change to the building footprint, yet the floor area is different. Accordingly, I have concluded that the change appears to be as a result of a correction by the CA to previous areas (which is confirmed by the CA with its submitted CIL calculations). 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; accordingly, Regulation 9(6) therefore applies and the 'chargeable development' and hence the 'relevant development' in my view, is the [redacted] Permission.

   Both parties disagree over the interpretation of Regulations 113(9A) which states:

   A review may be requested after the relevant development has been commenced if planning permission was granted in relation to that development after it was commenced.

   The appellant contends that the [redacted] permission has the effect of triggering the opportunity for a review, whilst the CA does not. In the particular circumstances of this case, I agree with the appellant on the validity of this appeal. In my opinion, although the 'relevant development' in this case is the development under the [redacted] Permission, the [redacted] Permission is a planning permission in its own right. As the [redacted] Permission was granted after the 'relevant development' had commenced the requirements of Regulation 113(9A) and Regulation 114(3A) are met and an appeal can therefore be made.

9. I shall now address the appellant's second area of disagreement, which is at the heart of the matter (the existing building floorspace, which the appellant considers is an eligible deduction, which can be offset).

10. I note that both the CA and the appellant agree that the gross internal area floorspace of the development is [redacted] m² and the total gross internal floorspace of the existing building is [redacted] m².

11. 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 of buildings that are to be retained includes;

    a. retained parts of 'in-use buildings', and

    b. 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.

    Under regulation 40(11), to qualify as an 'in-use building' the building must contain 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.

12. The appellant maintains that the property had been occupied for a lawful use (B8 storage use), for the requisite period up to [redacted]. The CA consider that the requisite period is up to [redacted], but accept that much of the information submitted by the appellant relates to what they consider to be the correct relevant period. The appellant's case essentially rests on three arguments:-

    a. The existing use of the buildings (B2 industrial use) had not been abandoned.
    b. As the existing industrial use had not been abandoned, the use of the buildings for storage purposes was lawful because up to [redacted] m² could be used for storage purposes under permitted development rights.
    c. The evidence they had submitted as part of their appeal demonstrated that up to [redacted] m² had been in continuous lawful use for the required period.

    The CA consider that the industrial use had been abandoned so the permitted use rights no longer existed, a larger area than the permitted [redacted] m² had been used for storage (which would mean that the storage use was unlawful) and although there was some evidence of actual use during the relevant period, this did not amount to a 'continuous use'.

13. I will consider the issue at paragraph 12(c) above first, i.e. did the actual use during the relevant period amount to a 'continuous use'. The following evidence in support of this view has been submitted by the appellant:

    - A licence to occupy the property between [redacted] ([redacted]) (the licensor) and [redacted] (the licensee).
    - Witness Statements of evidence from [redacted] and others.
    - Internal photographs of the building.
    - Statement of Use document prepared by [redacted], dated [redacted], which included storage plans and additional internal photographs of the building.

14. The CA is of the opinion that the information submitted by the appellant does not constitute sufficient evidence (or evidence of sufficient quality) to enable it to deem the relevant building to be in continuous use.

    The CA has provided its own photographic evidence, taken by Planning Officers in support of its position of the building not being an 'in-use building'.

15. Having carefully weighed up the submitted evidence in this case, I have concluded that there is insufficient evidence to prove that the building has been an 'in-use

building' which satisfies Regulation 40(11) as amended. I am of opinion that the evidence is not of sufficient quality to prove continuous use for the required period. The lack of utility bills such as electricity, water and business rates or an Energy Performance Certificate, are notable in their absence. In my opinion, the appellant's own photographic evidence suggests occasional, intermittent use, which is incidental to the works being executed to the wider Green Lane Works; this in my view, is not a continuous use, which satisfies Regulation 40(11). The CA's photographic evidence in my view supports this conclusion.

The presence of the license does not evidence actual use, it merely evidences permission to use the premises. There is no reason to doubt that the [redacted] staff did frequently attend the premises, but in my view, it does not pass the threshold test for continuous use of the premises. It is not contested by either party that [redacted] did at times use the premises for storage purposes. However, the mere *presence* of storage items at a particular time is insufficient evidence in my view. I am of opinion that the required continuous use has not been demonstrated in this instance, merely an occasional incidental use.

In conclusion, I do not consider that sufficient evidence has been provided to confirm the property was in continuous use for storage purposes for the requisite period. I therefore consider that it was reasonable for the CA to deem that the property was not an in-use building for CIL purposes.

16. In view of my decision on this issue it is not necessary for me to determine whether or not the original industrial use of the building had been abandoned or whether an area of greater than [redacted] m² had been used for storage purposes.

17. As part of its representations, the CA asked that I consider making an appropriate order for costs pursuant to Regulation 121. In their comments on the CA's representations the appellant requested that I consider making an award of costs in their favour. In terms of the issues in this appeal, I have decided in favour of the appellant on the validity issue and in favour of the CA on the 'in-use building' issue. Both parties have made very detailed, well-written and argued submissions on these issues. I do not consider that either party has acted unreasonably in pursuing this appeal, so I therefore determine that each party should bear their own costs.

18. On the evidence put forward, I calculate that the CIL payable is:

    [redacted] m² x £[redacted] per m² x [redacted] = £[redacted]

    This is the figure put forward in the CA's representations, adopting the indexation factor applicable as at the date of the [redacted] Permission.

19. In conclusion, having considered all the evidence put forward to me, I consider that based on the particular facts of this case the CIL payable should be the sum of £[redacted] ([redacted]).

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