Appeal Decision

by [redacted] BSc(Hons) MRICS

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

Valuation Office Agency (SVT)
[redacted]

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

Appeal Ref: [redacted]

Address: [redacted]

Proposed Development: Variation of Condition 1 of planning permission dated [redacted] ***(*** [redacted] ***) for, 'Alterations to the existing building including*** [redacted] ***& repair of the*** [redacted]***, part demolition & replacement of the*** [redacted]***, rear extension of the*** [redacted]***, removal of existing & introduction of a new*** [redacted]***, introduction of new*** [redacted]***, extension of the existing basement levels to include*** [redacted] ***(including one mezzanine level), installation of*** [redacted] ***and*** [redacted]***, public*** [redacted] ***including hard and soft landscaping, removal of*** [redacted]***, fencing, bollards & gates/barriers to*** [redacted] ***and*** [redacted]***, removal & replacement of*** [redacted] ***in front of*** [redacted] ***elevation &*** [redacted] ***of the*** [redacted] ***in front of the*** [redacted] ***elevation &*** [redacted] ***of the*** [redacted] ***on the*** [redacted] ***of the*** [redacted]***, all in connection with the use of the building as a*** [redacted] ***(Class C1) comprising up to*** [redacted] ***with*** [redacted] ***retail/restaurant use at*** [redacted]***,*** [redacted] ***and*** [redacted] ***(Class A1/ClasA3/ClassC1),*** [redacted] ***facilities within the*** [redacted] ***(Class D2/Class C1) & an*** [redacted]***,*** [redacted]***,*** [redacted] ***facilities & associated car, cycle parking &*** [redacted] ***accessed from*** [redacted]***, & other associated works...'; NAMELY, to make a number of amendments to the approved development including: the introduction of*** [redacted]***; complete omission of*** [redacted]***; internal*** [redacted]***; amendments to approved floor areas, changes to rear (*** [redacted]***), sides and front*** [redacted]***,*** [redacted]***, and*** [redacted]***; minor amendments to the entrance to the*** [redacted] ***and*** [redacted]***.***

Planning permission: Approved by [redacted] ***on*** [redacted] ***under reference*** [redacted] ***pursuant to section 73 of the TCPA 1990***

Decision

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

Reasons

Background

1. I have considered all the submissions made by [redacted] on behalf of [redacted] ([redacted]) [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 Decision Notice issued by [redacted] on [redacted].
b. The CIL Liability Notice (reference [redacted]) issued by the CA on [redacted].
c. The appellant's request for a review dated [redacted].
d. The CA's e-mail dated [redacted] in response to the appellant's request for a review.
e. The CIL Appeal form dated [redacted] 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 [redacted].
g. The appellant's comments on the CA's representations received by the Valuation Office Agency on [redacted] together with the documentation attached thereto.
h. Further comments received from both the appellant and the CA further to my request in a letter dated [redacted]

2. Planning permission was granted under Section 73 of the Town and Country Planning Act 1990 (TCPA 1990) by [redacted] on [redacted] **(the s.73 permission)**. The permission was for a Variation of Condition 1 of a planning permission dated [redacted] **(the original permission),** namely to make a number of amendments to the approved development including: the introduction of [redacted]: complete [redacted] of [redacted]; internal reconfiguration, amendments to approved floor areas; changes to [redacted], [redacted] and [redacted], [redacted], [redacted]; and minor amendments to the entrances to the [redacted] and [redacted] entrances.

3. There had been earlier CIL liability notices issued in respect of the original and the s.73 permissions and informal correspondence between the appellant and the CA in this regard but the liability notice issued on [redacted] superseded previous notices in respect of the development and it is the calculation of CIL liability in relation to this notice that is the subject of this appeal. The notice stated that the CIL liability in relation to the s.73 permission was £[redacted] and in arriving at that sum the CA applied the following indexation factors:

a. [redacted] CIL: [redacted]
b. [redacted] CIL: [redacted]

4. On [redacted] the agent acting for the appellant at the time wrote to the CA requesting a review of the calculation of the changeable amount pursuant to regulation 113 of the CIL Regulations. The letter sets out the appellant's view that the indexation had been incorrectly applied in the notice and the CIL liability should be £[redacted]. In arriving at that sum the appellant applied the following indexation factors:

a. [redacted] CIL: [redacted]

b. [redacted] CIL: [redacted]

5. The CA issued their decision that the CIL charge should remain unchanged on [redacted]

6. The appellant's agent submitted a CIL appeal dated [redacted] under regulation 114 (chargeable amount appeal) proposing a CIL charge of £[redacted].

Validity of Appeal

7. As a preliminary point the CA contends that the appeal is out of time and should therefore be dismissed. The disputed liability notice was dated [redacted] and therefore a valid appeal should have been made within 60 days of this date, i.e. by [redacted]. The appeal form submitted by the appellant was dated [redacted] but in the VOA's response confirming that the appeal was valid the VOA stated that the appeal was dated [redacted]. Unfortunately this was a typographical error and the appellant has evidenced by the inclusion of a copy of the VOA's emailed acknowledgement of receipt that the appeal was in fact received by the VOA on [redacted]. I therefore confirm this to be a valid appeal.

Grounds of Appeal

8. The grounds of the appeal are that the chargeable amount set out in the liability notice dated [redacted] has been calculated incorrectly. The appellant is of the view that the indexation factor applied when calculating both [redacted] and [redacted] CIL is incorrect as it is based upon the date when planning permission was granted pursuant to section 73 of the Town and Country Planning Act 1990, and not upon the date of the 'parent' or original planning permission.

9. In its calculation of the chargeable amount pursuant to the s.73 permission the CA has used an indexation figure based on the date on which the s.73 permission was granted: [redacted]. The appellant contends that the indexation to be applied should be based on the date on which the original planning permission was granted: [redacted].

10. There is no dispute as to the chargeable area or the relevant rates applied per square metre. Furthermore there is no dispute that the s.73 permission resulted in a higher chargeable area than the original permission.

11. The main issue in this appeal relates to the calculation of the CIL charge having regard to regulation 9 and the application of regulation 40, in particular the indexation adjustment reflected in the formula in regulation 40(5).

12. The relevant regulations are set out below:-

Regulation 9 – Meaning of Chargeable Development

(1) The chargeable development is the development for which planning permission is granted.

(2) Paragraph (1) is subject to the following provisions of this regulation.

(3) – (5)

(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.

(7) Where the effect of the 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.

(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.

Regulation 40 – Calculation of chargeable amount

(1) The collecting authority must calculation the amount of CIL payable ("chargeable amount") in respect of a chargeable development in accordance with this regulation.

(2) – (4)

(5) The amount of CIL chargeable at a given relevant rate (R) must be calculated by applying the following formula—

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

where—

A = the deemed net area chargeable at rate R, calculated in accordance with paragraph (7);

I_p = the index figure for the year in which planning permission was granted; and

I_c = the index figure for the year in which the charging schedule containing rate R took effect.

(6) In this regulation the index figure for a given year is—

a) the figure for 1st November for the preceding year in the national All-in Tender Price Index published from time to time by the Building Cost Information Service of the Royal Institution of Chartered Surveyors(a); or

b) if the All-in Tender Price Index ceases to be published, the figure for 1st November for the preceding year in the retail prices index.

13. The CA is of the view that in calculating the CIL charge in accordance with regulation 40(5), Ip should be the index figure for the year in which the s.73 permission was granted whereas the appellant considers this date should be the date of the original permission.

14. For the purposes of considering the chargeable development under a s.73 permission both parties agree that it must be decided if regulation 9(6) or regulation 9(7) applies; i.e. consideration must be given to the 'effect' of the s.73 permission and if the variation of the condition that has been allowed by the s.73 permission would result in a change to the CIL payable under regulation 40, after taking into account the modification allowed by regulation 9(8). Both parties are in agreement that regulation 9(7) is applicable in this instance. The effect of the s.73 permission in this case is that there would be an increase to the chargeable amount and hence the chargeable development becomes 'the most recently commenced or re-commenced chargeable development'. It appears that there is no dispute that the most recently commenced or re-commenced chargeable development is that in respect of the s.73 permission and I have sought further views from the parties as to whether the chargeable development then relates to the changes permitted by the variation only or if the s.73 permission in effect permits the entire development with the variations. I am satisfied that the latter is the correct interpretation. If there had been no change to the chargeable amount under the 'test' calculation then regulation 9(6) would have applied and the chargeable development would then have been the development for which planning permission was granted by the previous permission.

15. The crux of the disagreement is whether the provisions of regulation 9(8) then also apply when carrying out the actual regulation 40 calculation (in which case the date of the planning permission for the purposes of Ip should be taken as the date of the original permission) or are purely to be applied for the purposes of the consideration of whether regulation 9(6) or 9(7) are applicable, i.e. in consideration of the effect of the s.73 permission in order to decide what comprises the chargeable development.

16. The appellant contends that they do as:

    a. *The function of regulation 40 is to enable the chargeable amount to be calculated "in respect of a chargeable development".*
    b. *Chargeable development has the meaning given in regulation 9.*
    c. *It follows that, when calculating the chargeable amount in respect of chargeable development, the relevant chargeable development is to be ascertained by applying regulation 9.*
    d. *To restrict the application of regulation 9(8) to the determination of whether a section 73 permission fell within regulation 9(6) or (7), would:*
        i. *Create inconsistency between the approach taken in regulation 9(6) (no change), and regulation 9(7) (change) cases. Regulation 9(6) cases would be charged on the basis of an index figure for the year in which the 'parent' permission was granted, whereas regulation 9(7) cases would not.*
        ii. *Result in cases which fell within regulation 9(7) as a result of a reduced floor area (and consequent change in the amount of CIL payable) being subject to an increased CIL charge when compared to the parent permission with a greater floor area.*

17. In support of the appellant's view a redacted version of a decision by an appointed person in relation to a previous appeal has been submitted and referenced. In this decision the argument that the provisions of regulation 9(8) was restricted to the calculation necessary to ascertain whether a s.73 permission fell within regulation 9(6) (no change to CIL liability) or regulation 9(7) (change to the amount of CIL payable) was rejected by the appointed person.

18. The CA maintain that CIL must be calculated in respect of the chargeable development in line with the approach set out in regulation 40, but first it must be decided what the chargeable development comprises. To do this the CA has calculated, in accordance with regulation 9(8), the amount of CIL due under the parent permission, compared to that due under the s.73 permission, assuming *for those purposes* (and those purposes only) that both were granted on the date of the parent permission. In the subject case, since there is a still a change in CIL liability under the assumption that both were permitted on the same date, the CA consider that the chargeable development is therefore the most recently commenced development, namely the s.73 development. Having carried out this comparison, the CA has then applied the formula in regulation 40 to the relevant chargeable development, i.e. that permitted by the s.73 permission. It is the CA view that under regulation 40(5) the indexation figure Ip is then the figure for the year planning permission was granted, which is the same planning permission that the chargeable development relates to (namely the s. 73 date).

Decision

19. Having fully considered the representations made by the appellant and the CA it is my decision that the modification required by regulation 9(8) relates to the calculation undertaken 'for the purposes of paragraphs (6) and (7)' only, i.e. in consideration of the composition of the chargeable development in the case of s.73 permissions. This is a therefore a two-step process and once the chargeable development has been decided through the interpretation of regulation 9 there is nothing to suggest that this modification should be carried through to the CIL calculation required for that chargeable development as set out in regulation 40 (step two). Regulation 40(5), clearly states that Ip is to be the index figure *for the year in which planning permission was granted*, which in respect of this chargeable development will be the s.73 date. It is my opinion that there is no provision for the modification set out under regulation 9(8) to be carried through to the actual calculation and the date of the original permission to be substituted.

20. I note the previous decision in relation to a previous CIL appeal whereby the argument that the provisions of regulation 9(8) was restricted to the calculation necessary to ascertain whether a s.73 permission fell within regulation 9(6) (no change to CIL liability) or regulation 9(7) (change to the amount of CIL payable) was rejected by the appointed person. In that case the chargeable area was reduced by the s.73 permission but notwithstanding this, if the date of the s.73 permission had been adopted for indexation purposes within the calculation under regulation 40, the CIL liability would have increased. The appointed person appears to have been heavily influenced by the inequity of this scenario in favouring the appellant's arguments in that particular case. In the first section of paragraph 19 the appointed person outlines the CA's argument as to the modification provided in regulation 9(8) being restricted to the application of regulations 9(6) and 9(7) but in the second section the appointed person comments that "I do not believe that the purpose of regulation 9(6)-(8) (which were inserted into the 2010 Regulations by the CIL (Amendment) Regulations 2012) was to require an extra indexation charge in cases where a s.73 permission resulted in a reduction in the floor area of the chargeable development. Therefore, in the calculation of the chargeable amount in accordance with regulation 40 the index figure for the year in which planning permission was granted should be the figure for the year when the original permission was granted being…"

21. The appellant in this case notes that the CIL regulations draw no distinction between cases of reduction, or cases of increase, and it follows that while some of the specific reasoning in paragraph 19 of the appeal decision may not apply to situations where there is an increase in chargeable development, the construction should be no different

in the case where there has been an increase as a result of a s.73 permission, given the fact that it is the same provision under appeal and that the express deeming applies to cases within regulation 9(7). The appellant also considers that it would seem unconscionable that if the government intended additional indexation to apply to s.73 permissions where the floorspace was increased, why the same approach would not be adopted in respect of all s.73 permissions.

22. However it appears to me that by distinguishing between cases within regulations 9(6) and 9(7) the CIL regulations are intentional of treating cases where there is no change in floor space on a different basis from where there is a change in floor space. There would be no need to distinguish between these two scenarios if the chargeable development for all s.73 permissions was always to be considered to be the original permission and if the date for indexation was always the date of the original permission. Therefore, whilst I agree that there appears to be no provision in the Regulations to treat cases where there is an increase in the chargeable area different to those where there is a decrease, there clearly is a distinction between cases where there is no change in area (regulation 9(6)) where it is clear that the chargeable development then becomes the original permitted development (and hence the date for indexation is the date of the original permission) and those where there is a change in floor area (regulation 9(7)) where the chargeable development becomes that permitted under the s.73 permission and hence the indexation date for the calculation under regulation 40 becomes the date of the s.73 permission. The appointed person in the previous decision appears to have been swayed towards a purposive approach by the absurdity of potentially deciding an increased CIL charge in a scenario where the floor space was lower. This scenario is not applicable in this instance and I consider my decision to be a plain and certain literal interpretation of the regulations as they stand.

23. On the evidence before me, having regard to the particular facts of this case, I conclude that the regulation 40 calculation should be carried out at the date of the s.73 permission being [redacted] and the indexation factors to be applied should be as follows:-

    a. [redacted] CIL: [redacted]

    b. [redacted] CIL: [redacted]

24. I therefore determine a CIL charge of £[redacted] and dismiss this appeal.

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