Appeal Decision

by [redacted] MRICS

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

Valuation Office Agency - DVS
[redacted]

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

Appeal Ref: [redacted]

Planning Permission Reference: [redacted]

Location: [redacted]

Development: Erection of two new dwellings, detached double garage and new entrance gates and piers following demolition of existing dwelling

---

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] as the Collecting Authority (CA), in respect of this matter. In particular, I have considered the information and opinions presented in the following documents:-

   a. Planning Application Decision Notice ref [redacted] issued by the CA on [redacted].
   b. Planning Application Decision Notice ref [redacted] issued by the CA on [redacted].
   c. CIL Relief Decision Notice [redacted] "Phase 2" issued on [redacted] by the CA.
   d. CIL Liability Notice [redacted] "Phase 2" issued on [redacted] by the CA at £[redacted] ([redacted]) CIL Liability.
   e. CIL Liability Notice [redacted] "Phase 1" issued on [redacted] by the CA at £[redacted] CIL Liability.
   f. The CAs email of [redacted] in response to the Appellants request for a Regulation 113 Review.
   g. The CIL Appeal Form dated [redacted] submitted by the Appellant under Regulation 114, together with documents and correspondence attached thereto.
   h. The CA's representations to the Regulation 114 Appeal received on [redacted].

i. Further comments on the CA's representations prepared by the appellant and dated [redacted].

2. A planning application reference [redacted] for the "Erection of two new dwellings, detached double garage and new entrance gates and piers following demolition of existing dwelling" was made by the Appellant on [redacted] and approved by the CA on [redacted].

3. On [redacted] the Appellant submitted a further planning application under Section 73 of the Town and Country Planning Act 1990 reference [redacted] to the CA - an *"Application for removal or variation of a condition following grant of planning permission"*, where Section 4 of the application refers to the proposed "*phasing*" of the development, along with "CIL Form 1: Additional Information to the CA", which confirms at "Section 1: Description of the development *"…changes to the CIL liability by altering the phasing of development*". This document also confirms at Section 6 that the existing building GIA is [redacted] m2, and at Section 5: Conditions – removal/variation item iv) states one of the conditions to be changed is "*To introduce a Phasing Plan to the construction of the development"*.

4. On [redacted] the CA issued Planning Decision Notice reference [redacted] "for the erection of two new dwellings, detached double garage and new entrance gates and piers following demolition of existing dwelling with amended plans".

5. On [redacted] the CA issued CIL Relief Decision Notice reference [redacted] "Phase 2" confirming that they had decided to grant self-build relief for the chargeable development in question, and also issued CIL Liability Notice reference [redacted] "Phase 2" advising that the CIL charge on the development in question would be £[redacted] ([redacted]). These documents relate to what the Appellant refers to as "Phase 2 (Plot 2)" – the construction of the second property measuring [redacted] m2 GIA.

6. A CIL Liability Notice reference [redacted] "Phase 1" was issued by the CA on [redacted] at £[redacted] CIL liability ([redacted]) based on a chargeable area of [redacted] m2 Gross Internal Area (GIA) with no deduction for existing in use buildings.

7. This CIL liability was calculated by the CA as follows:-

   Residential Zone 3
   Chargeable Area [redacted] *m2 at £*[redacted] */m2*
   Index [redacted]
   = £[redacted] *CIL Charge*

8. On [redacted] the Appellant requested a Regulation 113 Review of the CIL calculation, with the CA's response received in an email dated [redacted] in which the CA state their "*view is that the regulations do not intend that the introduction of phasing to a development to change the overall CIL liability of the development but to allow phasing of payment where there are clear and distinct phases. Therefore, the demolition should be apportioned across both phases."*

9. On [redacted] the Valuation Office Agency received a CIL appeal dated [redacted] made under Regulation 114 (chargeable amount).

10. The Appellant believes that the demolition figure of [redacted] m2 used by the CA as displayed on their Relief Claim Decision Notice for Plot 2 had not been applied correctly and points to the submitted CIL Form 1, which states that the demolition floor area equates to [redacted] m2, which can be confirmed by measuring the approved plans submitted with application [redacted]. They further state that this GIA should not have been applied to the second phase of the development.

11. The Appellant further notes that the Liability Notice served for [redacted] Phase 1 carries no GIA deduction of the existing building, and therefore the CIL liability as calculated by the CA exists for the full proposed [redacted] sqm of floor area. The CA appear to have deducted the existing building GIA from Phase 2 of the development, and also applied the Self-Build Exemption to Phase 2, thus omitting the deduction of the demolition floor area. The allocation of the demolished area in full should, in the Appellant's view, have been applied to the first Phase (building Plot 1) instead.

12. The appeal therefore requires two specific matters to be addressed:-

    1) Identification of the Chargeable Development.
    2) The correct calculation of the CIL Charge.

13. With regards to appeal matter 1): Identification of the Chargeable Development: the Appellant is of the view that their scheme constituted a phased development, and the CIL regulations state that no part of the floor area of an in-use building that is proposed to be demolished can be apportioned to multiple phases of development, and should thus apply to the first Phase of the development only, which in this instance is the construction of Plot 1.

14. With regards to appeal matter 2): The correct calculation of the CIL Charge: the Appellant contends that CIL should be calculated using a Chargeable Area of [redacted] m2 GIA with a deduction of [redacted] m2 for the existing in-use building, with a resultant CIL liability of £[redacted] ([redacted]).

15. Identification of the Chargeable Development: The position which the CA maintain is that the demolished floor area should be apportioned between Phases 1 and 2, but the Appellant points to Regulation 9(4) of the CIL Regulations (as amended) which states that "*in the case of a grant of phased planning permission, each phase of the development is a separate chargeable development*."

16. The Appellant also notes that within Schedule 1, Part 1, (6), of the CIL Regulations, it is stated that "*no part of any building may be taken into account under both of paragraphs (i) and (ii)*" which read as:
    "(i) *The gross internal areas of parts of in-use buildings that are to be demolished before completion of the chargeable development; and*
    (ii) For the second and subsequent phases of a phased planning permission, the value Ex (as determined under sub-paragraph (7)), unless Ex is negative"

17. The Appellant is of the view that, given the above, the regulations state that no part of the floor area of an in-use building that is proposed to be demolished can be apportioned to multiple phases of development, and should thus apply to the first Phase of the development only, which in this instance is the construction of Plot 1.

18. The Appellant contends that using the equation outlined upon the Liability Notices as well as the rate and index provided, the CIL Total Area Charge should be £[redacted], and not £[redacted] as quoted upon the Liability notice for Plot 1.

19. The CA is of the view that the planning permission originally granted under [redacted] does not include “CIL Phasing”, which whilst it is mentioned in the covering letter to the application is not contained within the description of the development or any of the approved plans of the decision notice. The CA also advise that planning permission [redacted] does not grant permission for a phased development, as it is not expressly granted in the decision notice through the conditions, approved plans or section 106.

20. The CA also state that they disagree with the principle of the approach to calculating the CIL charge applied by the Appellant, and confirm they have spoken to officers at [redacted] as suggested by the Appellant in forming this view. The CA believe the Appellant is attempting to use the combination of phasing and self-build exemption to reduce the overall liability of CIL, and their view is that this specific circumstance has been designed so that the formulae in the regulations can be applied in a way that the regulations had not intended.

21. The CA note that the proposed phasing includes the demolition of the existing building within the same phase as the first construction (referred to by the Appellant as Plot 1), despite the fact that this plot, which adjoins the demolished plot, could be built without the demolition. The self-build property is then included as a separate phase (referred to by the Appellant as Plot 2), with its [redacted] CIL liability. The CA’s view is that the demolished building credit (i.e. GIA off-set) should be apportioned in proportion to the area of each new house.

22. The Appellant comments that the description of the proposal within section 4 of the submitted application form reads “*Section 73 application for the variation of Conditions 2 (materials) and 13 (approved plans) of planning permission* [redacted]*, and changes to the CIL liability by altering the phasing of development at* [redacted]”, and that the form continues to state in section 5 *“(iv) to introduce a phasing plan to the construction of the development”.*

23. The Appellant feels that, contrary to what the CA state, given the above, the intention of the application was very clear with regards to proposed phasing of the development.

24. The Appellant states that every CIL form submitted by them outlined the intention to phase the development. The submitted covering letter for application [redacted] included a section entitled “CIL” which discusses the proposed phasing of the development, highlighting what would be undertaken throughout each phase, and the drawings that demonstrate the phasing visually. They confirm that whilst the description under the variation application [redacted] does not explicitly state that CIL phasing was proposed, it is instead covered by stating that the application approved under [redacted] involves the variation of the approved plans, which included the submission of CIL phasing plans.

25. The Appellant contends that as the CIL Regulations state that the demolished floor space should be applied to the first phase of the development, the CA cannot have the “view that the demolished building credit should be apportioned in proportion to the area of each new house” as this is not what the regulations state.

26. The Appellant feels that the regulations are not open for interpretation nor allow for any leeway in the way they are applied, and note the regulations state within Schedule 1, Part 1, (6) that “*no part of any building may be taken into account under both paragraphs (i) and (ii)*”, which they take to mean that no part of a single building used to offset floor area, such as demolition, can be apportioned to both the GIA of the first phase of development and second stages of a phased planning permission.

27. The correct calculation of the CIL Charge: The CIL Liability Notice reference [redacted] "Phase 1" issued by the CA on [redacted] advised that the CIL charge would be calculated as follows:-

    Residential Zone 3
    Chargeable Area [redacted] *m2 at £*[redacted] */m2*
    Index [redacted]
    = £[redacted] *CIL Charge*

28. This appears to be incorrect, however, and actually calculates to £[redacted] CIL Charge.

29. The Appellant objects to this calculation on the grounds that it does not off-set the GIA of the existing building, and the Appellant has proposed that CIL should be calculated as follows:-

    GIA Plot 1 [redacted] *m2*
    Less
    GIA Existing Building [redacted] *m2*
    = Chargeable Area [redacted] *m2 at £*[redacted] */m2*
    Index [redacted]
    = £[redacted] *CIL Charge*

30. The first matter to be established by the Appointed Person is whether the Chargeable Development consists of both Phases 1 and 2, as argued by the CA, or whether the phased approach to development, as argued by the Appellant, means that CIL Regulation 9 (4) would apply:-

    "Meaning of "chargeable development"
    9.—(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.

    (4) In the case of a grant of phased planning permission, each phase of the development is a separate chargeable development."

31. It is clear from both CIL Liability Notices issued by the CA on [redacted] that planning permission [redacted] was the basis for the CA's CIL calculations, and from the documentation submitted by the Appellant in relation to this variation of the former planning permission [redacted] the Appellant had been quite clear that a phased approach to the development was proposed. Whilst the CA did not refer to phasing within their planning decision reference [redacted], the information provided by the Appellant should have made it clear that phasing was one of the variations being proposed, and the planning decision's silence on the phasing issue could, in view of the other variations being approved, indicate an approval of the introduction of phasing as being included within that decision.

32. The chargeable development would therefore appear to represent each separate phase of development as per CIL Regulation 9 (4) above, with Phase 1 being demolition of the existing building along with construction of Plot 1, whilst Phase 2 represents construction of Plot 2.

33. The CA have remarked that Plot 1 is to be constructed alongside the demolished building, and comment that Plot 2 could therefore have been constructed on the cleared site first. This does not alter the fact that this is clearly a phased development.

34. The CA have already issued on [redacted] a CIL Relief Decision Notice reference [redacted] "Phase 2" confirming that they have granted self-build relief for the chargeable development in question (which would be the construction of Plot 2), and also issued CIL Liability Notice [redacted] "Phase 2" advising that the CIL charge on the development in question would be £[redacted] ([redacted]).

35. The remaining matter to be addressed by the Appointed Person is therefore the level of CIL Liability attributable to Phase 1.

36. Disagreement surrounding the correct GIA to apply within the CIL Liability calculation has arisen due to the effect of Regulation 40(7) of the CIL Regulations 2010 (as amended), which provides for the deduction or "off-set" of the GIA of existing in use buildings from the GIA of the total development in calculating the CIL charge.

37. Regulation 40(11) provides that an "in use building" means a building which 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 planning permission first permits the chargeable development.

38. Regulation 40(11) also provides that "relevant building" means a building which is situated on the relevant land on the day planning permission first permits the chargeable development.

39. Phase 1 includes the demolition of an existing in use building of [redacted] m2 GIA, and therefore Regulation 40 requires off-set of this GIA against the GIA of the proposed construction under Phase 1, which is [redacted] m2 for Plot 1.

40. CIL is therefore correctly calculated as follows:-

GIA Plot 1 [redacted] *m2*
Less
GIA Existing Building [redacted] *m2*
= Chargeable Area [redacted] *m2 at £*[redacted] */m2*
X Index [redacted]

= £[redacted] *(*[redacted] CIL Liability.

41. On the basis of the evidence before me and having considered all the information submitted in respect of this matter, I therefore determine a CIL charge of £[redacted] (forty five thousand five hundred and seventeen pounds and ninety two pence) to be appropriate.

42. With reference to the Appellant's claim for an Award of Costs: Appendix 8 of the CIL Manual states "*Costs will normally be awarded where the following conditions have been met:-*
1) a party has made a timely application for an award of costs
2) the party against whom the award is sought has acted unreasonably and
3) the unreasonable behaviour has caused the party applying for costs to incur unnecessary or wasted expense in the appeal process – either the whole of the

expense because it should not have been necessary for the matter to be determined by the Secretary of State or appointed Inspector, or

4) *part of the expense because of the manner in which a party has behaved in the process"*

43. The focus is whether points 2 and 4 are satisfied.

44. The Appellant states that contractors were ready to start work at the beginning of [redacted] and could not start construction due to the CA's administrative error in issuing the Liability Notices. The CA, however, issued its Planning Decision Notice reference [redacted] on [redacted] and the CIL Liability Notices on [redacted], and the CA have commented that at this time their staff were working from home due to the outbreak of Covid19, which caused some administrative difficulties and delays under highly unusual operational circumstances. The Appellant requested a Regulation 113 Review on [redacted], and again has pointed to the CA's failure to issue a formal response. The CA had, instead, provided comments on the outcome of their review in an email dated [redacted], again under the unusual circumstances of CA staff working away from the office due to the Covid19 pandemic.

45. As a result of the review, the CA had amended the allocation of the entire demolition GIA from Phase 2 to a distribution of it between both Phases 1 and 2 as advised within the emails dated [redacted], but did not provide updated Liability Notices. It is clear however from these emails that the CA believed they were applying the CIL Regulations correctly, although it is noted that this was not followed up by issuing any amended CIL Liability Notices. By this time, however, it would have been clear to the Appellant that the CA was not in agreement with the Appellant's view on how CIL Liability should be calculated, which is evidenced by their submission of a CIL Appeal to the VOA on [redacted].

46. Whilst the Appellant has made a claim for an award of costs from the CA, they did not submit details of costs being applied before the VOA's CIL Appeal submission deadline, and the Appointed Person cannot therefore ascertain which matters the Appellant is claiming costs for.

47. As it would also appear the CA did not in fact act unreasonably, under all the above circumstances an award for costs will not be made.

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