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]

Development: Variation of condition 2 (approved plans), 3 written scheme of investigation), 6 (contamination), 8 (materials), 11 landscaping), 13 (drainage scheme) and 14 refuse storage) attached to planning permission [redacted] – part demolition part convers

Planning permission details: Application for removal or variation of a condition following grant of planning permission, approved 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

Background

1. I have considered all the submissions made by [redacted] of [redacted] on behalf of [redacted] (the Appellant) and [redacted] of [redacted] on behalf of [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 letter dated [redacted] and the amended CIL Liability Notice (reference [redacted]) of the same date issued by the CA 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] together with documents and correspondence attached thereto.
g. The appellant's comments on the CA's representations dated [redacted] together with the documentation attached thereto.

2. Planning permission (reference [redacted]) (the amended permission) was approved by [redacted] on [redacted]. The permission was for variation of conditions 2, 3, 6, 8, 11, 13 and 14 of an earlier planning permission (reference [redacted]) granted on [redacted] (the original permission).

3. In the period between these two permissions there had been another full permission, [redacted], for a revised scheme on the site approved on [redacted].

4. Earlier CIL liability notices had been issued in respect of the original permission ([redacted]) confirming a CIL liability of £[redacted] and in respect of the revised scheme ([redacted]) in the sum of £[redacted].

5. On [redacted] the CA issued a Liability Notice ([redacted]) in respect of the amended permission stating a liability of £[redacted]. It is the calculation of CIL liability in relation to this notice that is the subject of this appeal.

6. On [redacted] the appellant's representative wrote to the CA requesting a review of the calculation of the chargeable amount pursuant to regulation 113 of the CIL Regulations. As a result of this review the CA issued an amended Liability Notice ([redacted]) on [redacted] stating a reduced CIL liability of £[redacted].

7. The appellant's agent submitted an appeal to the VOA on [redacted] under regulation 114 (chargeable amount appeal) proposing a CIL charge of £[redacted].

8. It is a point of agreement between the parties that demolition works at the site commenced on [redacted] and were substantially completed soon after. Similarly it appears that there is no dispute as to the relevant rate applied per square metre within the calculation, or to the indexation.

Grounds of Appeal

9. The appellant is of the view that the chargeable amount detailed in the liability notice dated [redacted] (and the amended notice dated [redacted]) has been calculated incorrectly. The grounds of the appeal are essentially that the CA has not taken account of demolished floorspace ([redacted] sq m) and retained floorspace ([redacted] sq m) as deductions within the calculation. The basis for the appellant's request for the CA review also included that the CA measurements were incorrect but the appellant is now satisfied that amended liability notice reflects relatively small differences and is not challenging this aspect as part of the appeal.

10. It is the appellant's view that the correct approach to the calculation, being in respect of a permission granted under s73 of the Town and Country Planning Act 1990, as

amended, is to treat the demolition as being carried out under the amended permission, notwithstanding that it had already been carried out by the date of the amended planning permission. The appellant is of the view that for CIL purposes the timing of the amended permission should be taken as if it first permitted development on the same day as the original permission. In support of this view the appellant refers to Regulations 9(6), 9(7) and 9(8) of the CIL Regulations 2010 (as amended). The appellant considers that the CA have already accepted that the demolition was carried out pursuant to the original planning permission and hence considers that the demolition and retained floorspace, that in his view, was properly taken into account in relation to the nil assessment under the original permission ([redacted]), must now be taken into account in assessing the slightly larger floorspace of the amended permission [redacted].

11. The appellant submits that the correct calculation is:

Total scheme floor space	[redacted] sq m
Demolition to be set off	[redacted] sq m
Retained floorspace to be set off	[redacted] sq m
Net Chargeable floorspace	[redacted] sq m

[redacted] x [redacted] x [redacted] = £[redacted]

12. The CA is of the opinion that since the development was substantially complete by the date of the application for permission [redacted] in [redacted], and since development had not been built in accordance with approved plans for either of the earlier permissions, then the permission granted on [redacted] was granted retrospectively under s73A TCPA 1990 for the development as built.

13. The CA argues that the chargeable development in this case (i.e. that for which planning permission is granted per Regulation 9(1)) is the development granted planning permission retrospectively on [redacted], pursuant to s73A of the Town and Country Planning Act 1990 (ref: [redacted]). The CA is of the opinion that by Regulation 8(2) of the CIL Regulations 2010, the chargeable development was "first permitted" on the date planning permission was granted (i.e. on [redacted]). At that date, the original buildings were not in existence on the site having already been demolished and so were not "relevant buildings" for the purposes of a deduction in the calculation of the chargeable amount. Furthermore the CA notes that the development was also commenced (pursuant to Regulation 7(5) of the 2010 Regulations) on [redacted]. The CA is of the view that planning permission [redacted] was not granted pursuant to s73 TCPA 1990 but rather pursuant to s73A TCPA 1990 and so Regulation 9(8) of the 2010 Regulations referred to by the appellant is of no application.

14. In accordance with Regulation 40 and paragraph 1 of Schedule 1 to the 2019 CIL Regulations, the CA considers that the development is not entitled to a reduction in the chargeable amount by reference to "the gross internal areas of parts of in-use buildings that are to be demolished before completion of the chargeable development" as claimed by the appellant. This is because the buildings, by reference to which the reduction is claimed by the appellant, were not situated on the relevant land on the day

planning permission first permitted the chargeable development ([redacted]) as they had already been demolished by that date. None of the buildings were therefore a "relevant building" as defined by paragraph 1(10) of Schedule 1 so as to qualify for the reduction in respect of in-use buildings that are to be demolished. Furthermore the CA is of the view that Regulation 7(5) of the 2010 Regulations makes it clear that development for which planning permission is granted under s73A TCPA 1990 is to be treated as commencing on the day planning permission for that development is granted or modified as the case may be. As such, it is the CA view that the development that is the subject of the appealed Liability Notice is to be treated as commencing on [redacted].

15. The CA notes that the appellant relies on Regulation 9(8) of the 2010 Regulations in support of the view that the chargeable development was in fact "first permitted" on 12 March 2018 when the original permission was granted since permission [redacted] was granted pursuant to s73 TCPA 1990 by way of a variation to that original permission. The CA considers reliance on this regulation to be incorrect since planning permission for the chargeable development in this case was not granted pursuant to s73 TCPA 1990 as the development that was the subject of the permission had already been carried out and the permission was therefore entirely retrospective in its effect. As planning permission was granted retrospectively, it must have been granted pursuant to s73A TCPA 1990 (and not s73 TCPA 1990) and Regulation 9(8) of the 2010 Regualtions (which applies solely to development approved under s.73 TCPA 1990) has no effect.

16. The CA has quoted the case of [redacted] v [redacted] [[redacted]] EWCA Civ 122 in support of its view that the original planning permission was not lawfully implemented since pre-commencement conditions in relation to the original planning permission were not discharged and the development was not built in accordance with the original permission. The CA considers that since the development was not lawfully undertaken pursuant to that permission it is therefore entirely retrospective, notwithstanding that the current permission refers to amendment of conditions only. The quotation from the Lawson judgement quoted by the CA is as follows:

25. […] [S]ection 73 enables an application to be made whether the development has not yet commenced, or is in progress, or has been completed. If the development has not yet commenced, a new grant of permission will take effect prospectively. If the development is partially completed the permission may take effect prospectively or, upon exercise of the section 73A power, both retrospectively and prospectively. However, if the development has been completed in breach of a pre-condition, (i) there remains no proposed development in respect of which any permission can be given and (ii) since there is no proposed development, any conditions, as varied, could only be imposed as a current obligation. The power to make a grant of permission in these circumstances is derived from section 73A and section 70 TCPA.

[…]

27. […] Section 73A(1) provides that on "an" application for planning permission, the permission granted may "include" permission in respect of development that has already been carried out. By subsection (2) retrospective permission may embrace development carried out (a) without planning permission, or (b) subject to time-limited permission, or (c) in breach of conditions imposed on a previous planning permission. Section 73A creates a general power to grant planning permission retrospectively. Here the development had taken place in breach of a pre-condition attached to a previous permission. I agree with the judge that there is no question of the inspector "re-classifying" the application made by the first appellant. It was implicit that if the appeal from the refusal to grant permission was to be successful the source of the

power to grant permission came from section 73A. It was unnecessary for the inspector to spell out the source of his power to grant the permission sought provided that the power existed.

17. There is disagreement between the parties as to whether the original permission was implemented and if demolition of the buildings was carried out pursuant to it or not, but it is the CA view that in any event, permission [redacted] was granted retrospectively under s73A TCPA 1990 in respect of works already carried out as none of the pre-commencement works conditions of the original permission were discharged.

18. In summary, it is therefore the CA view that the "chargeable development" in this case (i.e. that for which planning permission is granted) is the development granted retrospective planning permission on [redacted] pursuant to s.73A TCPA 1990 (ref: [redacted]). Contrary to the appellant's case, the CA is of the view that the chargeable development was not granted pursuant to s.73 TCPA 1990 and thus Regulation 9(8) of the 2010 Regulations is of no application. By Regulation 8(2) the chargeable development was first permitted on the date planning permission was granted (i.e. [redacted]). At that date, the original buildings were no longer on the site having already been demolished and so were not "relevant buildings" for the purpose of a reduction in the calculation of the chargeable amount.

19. In response to the CA representations the appellant has re-emphasised his opinion that planning permission [redacted] was a s73 permission, varying the conditions of an earlier permission. He has referenced numerous documents pertinent to the planning process that referred to it as such. Amongst other points, the appellant also clarifies his view that, whilst permission [redacted] was applied for, dealt with, and granted, under s73, it is part retrospective in the sense that it retrospectively approves all matters that were required to be approved prior to commencement of development under [redacted], it also part retrospectively regularises the 'as built' situation by approving a new set of plans that show in the main the then built situation, and it part prospectively approves further works which are yet to be undertaken.

Decision

20. Having fully considered the representations made by both parties I firstly note that both the CA and the appellant refer to the modification required by regulation 9(8) of the CIL Regulations 2010 (as amended) in consideration of the composition of the chargeable development in the case of s.73 permissions, albeit the CA does not consider this to be relevant to the subject development since it considers the amended planning permission to be a s73A permission.

21. The Community Infrastructure Levy (CIL) (Amendment) (England) (No. 2) Regulations 2019 (the '2019 Regulations') came into force in England on 1 September 2019. Regulation 5 of the 2019 Regulations requires the substitution of paragraph 9(8) (along with 9(6) and 9(7)) of the 2010 Regulations) with – "(6) Where a planning permission is granted under section 73 of TCPA 1990, the chargeable development is the most recently commenced or re-commenced chargeable development".

22. Furthermore the new Regulation 5 also amends Regulation 40 to now require the collecting authority to calculate the amount of CIL payable in accordance with the provisions of Schedule 1. Schedule 1 Part 2 sets out the basis of the calculation of the chargeable amount for "amended" planning permissions, these are defined under Regulation 3(1) of Schedule 1 Part 2 as 'Where a planning permission (B) for a chargeable development, which is granted under section 73 of TCPA 1990, changes a

condition subject to which a previous planning permission (A) for a chargeable development was granted'. These effectively replace Regulations 9(6) (7) and (8) as referred to by the appellant. The 2019 Regulations apply in relation to a planning permission granted on or after the commencement date of 1 September 2019, or a liability notice, whenever issued, in respect of such a planning permission.

23. The appellant does not mention the new regulations whilst the CA opines that Regulation 9(8) of the 2010 Regulations continued in force in respect of any variations to the original permission (Note 3 on page 7 of its representations), possibly on the basis that the original permission was granted before 1 September 2019. I do not consider this to be correct. The planning permission under consideration is [redacted] which was approved on [redacted]. It is not a planning permission granted before 1 September 2019 and the amendments contained within the 2019 Regulations are therefore applicable to the calculation of the chargeable amount in relation to it.

24. The crux of this appeal remains nevertheless; that is whether the permission in question is an 'amended permission' (granted under s73 of the TCPA) that would now fall to be assessed for CIL under Schedule 1 Part 2; or whether it is a retrospective permission granted under s73A of the TCPA, in which case it would be a 'standard case' that would fall to be assessed under Part 1; and the deductions that would apply within the CIL calculation in respect of 'relevant buildings' in either case.

25. Section 73 of the 1990 Act provides a power to determine an application for planning permission to develop land without compliance with conditions previously attached, and s73A provides for a grant of planning permission for development already carried out, to include that carried out without complying with some condition subject to which planning permission was granted. In this case the decision notice is clear that it relates to an 'application for removal or variation of a condition following grant of planning permission'. There is no mention of s73 or s73A on the notice itself but it is clear that it relates to a planning permission which changes a condition subject to which a previous planning permission was granted. Correspondence from the planning authority at the time was not clear, for example in a letter to the appellant dated [redacted], at times referring to it as a s73 permission and at other times a s73A.

26. In the Lawson Builders Limited case referred to by the CA, the presiding judge in the Court of Appeal, held that in an appropriate case, a decision-maker considering an application under s73 for planning permission without complying with conditions attached to an existing permission, could grant, under s73A instead, retrospective permission for a development already carried out without it usually being necessary to forewarn the applicant of this before the determination. The judgement makes it clear that in a case where a development has been *completed* in breach of a pre-condition, the power to make a permission for amendment is derived from s73A and s70. If the development was partially completed the permission may take effect prospectively under s73 or, upon exercise of the section 73A power, both retrospectively and prospectively.

27. In this case the appellant does not dispute that the development was carried out in breach of pre-conditions and the amendment permission retrospectively authorised variations to the conditions. However the appellant is not sure that it agrees with the CA that the development was substantially complete in [redacted] but it admits that it was well advanced at that time and was being marketed for sale. In his opinion the works required under [redacted] were additional works/changes that were required to help regularise the 'as built' situation, which the appellant admits was not in accordance with either of the earlier permissions. They were not necessarily required

to complete the development, which the appellant admits was well advanced and in the process of being marketing.

28. Based upon the facts of this case I am satisfied that the development had been completed in breach of a pre-condition and as such there was no proposed development remaining and the power to grant permission [redacted] was derived from s73A of the TCPA 1990.

29. As such the chargeable development is the entire development authorised by the planning permission and under regulation 8(2) the chargeable development was "first permitted" on the date planning permission was granted (i.e. on [redacted]).

30. "Relevant building" means a building which is situated on the relevant land on the day planning permission first permits the chargeable development. At that date the majority of the original buildings were not in existence on the site, having already been demolished and so they were not "relevant buildings" for the purposes of an 'E' deduction (gross internal areas of parts of in-use buildings that are to be demolished before completion of the chargeable development) in the calculation of the chargeable amount.

31. Counsel for the CA has not made reference to the deduction for 'retained parts', only to the demolished buildings which I agree should not be deducted. The CA stated in its consideration of the review request that there were no 'relevant buildings' in existence at the date of the permission and hence no deductions should apply. I do not agree. The development was essentially complete at the relevant date and there were 'relevant buildings' but to qualify as a 'retained part' ('K') deduction within the calculation the relevant buildings, or parts thereof, would have to be either (i) retained parts of in-use buildings; or (ii) 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." An "in-use building" means 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 planning permission first permits the chargeable development".

32. The new build elements would not therefore qualify in respect of the lawful use criteria for K(i) or K(ii) deductions as they had not been built in accordance with approved plans. The buildings that were retained and converted, however, might qualify as a K(i) deduction i.e. as retained parts of in-use buildings if they had been in lawful use for the qualifying historic period. I note that the CA deducted retained parts in existing use of [redacted] sq m in its calculation for the CIL charge in [redacted] in respect of the earlier revised scheme and I see no reason that a similar deduction should not be made here. The appellant has calculated that the retained parts in relation to the amended permission are [redacted] sq m and I have deducted this from the agreed gross development area of [redacted] sq m to derive a net chargeable area of [redacted] sq m.

33. Applying a net chargeable area of [redacted] sq m to the undisputed CIL rate of £[redacted] per sq m and indexation of [redacted] results in a CIL charge of £[redacted]

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

35. In respect of the costs claimed by the appellant, I do not consider that the CA has acted unreasonably. Each party should in my view bear their own costs in this matter and I do not therefore make any order as to costs.

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