Appeal Decision

by [redacted] MRICS VR

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

Valuation Office Agency
[redacted]
E-mail: [redacted] @voa.gov.uk

Appeal Ref: [redacted]

***Address**:* [redacted]
Proposed Development: Retrospective application for the erection of detached dwelling house with detached garage.

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

Background

1. I have considered all the submissions made by the appellant, [redacted] and the submissions made by the Collecting Authority (CA), [redacted].

2. This site has a long and complicated planning history, which began in [redacted], with an application for the replacement of the existing dwelling bungalow, known as '[redacted]. Since [redacted], the site has been subject to four planning applications. However, retrospective planning permission was granted for the development on [redacted], under reference [redacted] (the fourth and latest planning application). It is the calculation of CIL liability in relation to this notice that is the subject of this appeal.

3. The background of this appeal stems from a [redacted] planning application ([redacted]) granted planning permission on [redacted], for the demolition of the existing dwelling (the '[redacted] bungalow) and construction of a new detached dwelling house on the site. Condition number 5 of this permission required that "within 3 months of the approved dwelling being first occupied the existing dwelling shown on the proposed site plan shall be demolished and the existing vehicular access at the

south of the site shall be removed and all resulting materials cleared from the site''. The planning permission granted was to be carried out in accordance with the approved plans [redacted], [redacted], [redacted], [redacted] (as appended to the appellant's written representation – 'Revised Plans- [redacted]).

4. A second planning application ([redacted]) was received by the CA in [redacted] and was granted permission on [redacted]; this was to vary Condition 5 of [redacted] to retain the original dwelling as an ancillary building for domestic storage and recreation. Whilst not made explicit within the application itself, application ([redacted]) was clearly a variation made under the provisions of section 73 of the Town and Country Planning Act 1990.

5. A third planning application ([redacted]) was received by the CA in [redacted] for the proposed alterations and extension to existing garage to create additional double garage with storage room above. This application was subsequently withdrawn by the appellant, as the CA had advised the appellant's planning agent that the development had not been built in accordance with the approved plans and was therefore unauthorised.

6. The appellant subsequently submitted a fourth, retrospective planning application ([redacted]) to rectify the situation, which is the subject of this appeal.

7. The CA identified that the planning permission granted under reference [redacted] was CIL liable and the CA requested CIL Form 1 to the appellant's Planning Agent on [redacted]. An incomplete form was submitted by the appellant's Planning Agent and was received on [redacted] (the form failed to show the Gross Internal Area (GIA) measurements and declared that the development did not include new build development).

8. A recent audit of the CA's CIL records highlighted that this application had initially been actioned for CIL in [redacted] with the planning agent, but this had not been followed up. In light of the CA's audit, the CA contends that the development constructed under planning permission [redacted] had created a new dwelling and is therefore liable to CIL, with liability falling on [redacted].

9. The CA sent a letter on [redacted], to the appellant and to [redacted] (both of [redacted]) advising both parties of a CIL liability of £[redacted] and requesting the completion and return of CIL Form 2 (Assumption of Liability). On the [redacted], the CA issued a Liability Notice for a sum of £[redacted], which was based on a net chargeable area of [redacted] m² including the garage and a Charging Schedule rate of £[redacted] per m² plus indexation.

10. In an e-mail sent on [redacted] to the CA, the appellant requested a Regulation 113 review of this charge. The CA responded; having reviewed the GIA measurements declared on the approved plans of planning permission [redacted], the CA revised its calculation of the net chargeable area of the development to a lower sum of [redacted] m². Following this minor revision in GIA, the CA issued a revised Liability Notice on [redacted], for a sum of £[redacted], which was based upon a net chargeable area of [redacted] m² and a Charging Schedule rate of £[redacted] per m² plus indexation.

Grounds of Appeal

11. 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 the opinion that the retrospective application [redacted] was not required and therefore CIL liability does not arise. In addition, the appellant contends that the CA's calculation of the net chargeable area is incorrect, as they assert that the CA has not netted off the GIA of the former '[redacted] building (which formed the earlier planning applications). The appellant contends that the net chargeable area is [redacted] m², which is based upon a new build GIA of [redacted] m² less the global GIA of the former '[redacted] dwelling of [redacted] m².

12. The appellant contends that the retrospective application [redacted] was not required, states that they have been entrapped into a CIL payment and that the CA has acted abysmally in charging CIL.

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

    a) That the retrospective application [redacted] was not required and CIL liability does not arise.

    b) The appellant contends that the net chargeable area is [redacted] m² and from the appellant's perspective, all parts of the existing floor space of the '[redacted] building constituted lawful use, and accordingly, is an eligible deduction, which can be offset in calculating the CIL charge.

    These two core points are separate arguments and I shall consider each of them, in turn, later in this decision.

14. The CA contends that the original permission of [redacted] was implemented but subsequently found not to have been built in accordance with the approved plans; consequently, the CA considers that the replacement dwelling and detached garage as built was unauthorised. Furthermore, the CA is of the opinion that the Planning Application [redacted] was submitted retrospectively in order to regularise the construction of a detached dwelling and garage, which had not been built in accordance with the previously approved plans.

15. The CA contends that the net chargeable area is [redacted] m², which is based upon a new build GIA of [redacted] m² less the global GIA of the former '[redacted] dwelling of [redacted] m².

16. It appears that there is no dispute between the parties in respect of the applied Chargeable Rate per m² or to the indexation.

Decision

17. Having fully considered the representations made by both parties, I refer to the provisions of The Community Infrastructure Levy (CIL) (Amendment) (England) (No. 2) Regulations 2019 (the '2019 Regulations') which came into force in England on 1

September 2019. Whilst neither party has cited the 2019 Regulations, I believe it is necessary to explain why they are immaterial in arriving at my decision.

18. 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*".

    Furthermore, the new Regulation 5 also amends Regulation 40 to now require the CA to calculate the amount of CIL payable ("chargeable amount") in respect of a chargeable development 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'.

    Of note, Regulation 1 of the 2019 Regulations dictates that the amendments in Regulation 5 (and Schedule 1) of the 2019 Regulations do not apply in relation to a planning permission granted before the commencement date of 1 September 2019, or a liability notice, whenever issued, in respect of such a planning permission.

19. In considering this appeal, I must first determine if the 2019 Regulations are applicable. If applicable, I must then determine the pathway for the calculations - whether the permission in question is an 'amended permission' with the CIL calculations under Schedule 1 Part 2 of the 2019 Regulations or whether it is a 'standard case' with the CIL calculations under Part 1 of the 2019 Regulations.

20. In this regard, it is clear to me that planning permission under reference [redacted] was granted for the development on [redacted], well before the implementation of the 2019 Regulations on [redacted]. Given that the 2019 Regulations are not retrospective, I have concluded that they are immaterial in this instance.

21. I shall now return to the appellant's contention that the retrospective application [redacted] was not required and CIL liability does not arise. The appellant cites that:

    a) The house was completed in accordance with planning, as evidenced by the Completion Certificate issued on the [redacted].

    b) The garage and car port were built using permitted development rights for Suncrest, which was a legal building at the time of the build.

    c) The extension to the house was built using permitted development rights.

22. In respect of a) (the cited Completion Certificate) I would point out that planning permission and building regulations approval (building control) are different and they are two wholly separate pieces of legislation. Consequently, I agree with the CA's statement that the issue of the Completion Certificate does not in any way constitute that [redacted] was built in accordance with the approved plans of the planning permission as detailed in [redacted].

23. The appellant contends that the garage and car port were built in [redacted] using permitted development rights for '[redacted]. The CA disagrees, citing that the garage and car port were never intended to be used as being incidental to the enjoyment of '[redacted]

[redacted], which was to be demolished as shown in condition 5 of the decision notice for planning permission [redacted]; therefore the garage and car port could not be built under permitted development rights. Based upon the submitted evidence, it is clear to me that the CA is correct in its opinion and I agree that the garage and car port were unlawful buildings.

24. In respect of the appellant's contention that the extension to the house was built using permitted development rights, it is very plain to me that there are no permitted development rights; consequently, I agree with the CA that retrospective planning permission [redacted] is the only permission upon which this development may rely.

25. Having considered all the evidence put forward to me, I do not agree with the appellant that the retrospective application [redacted] was not required. Moreover, it is a factual matter that the appellant applied for and was granted retrospective planning consent; given this fact, one might readily observe that it was a requirement in the circumstances.

26. I would point out that the appellant's allegation they have been entrapped into a CIL payment and the alleged poor conduct of the CA is wholly outside my remit in determining this appeal. My decision is based upon the submitted facts of the case, determined under the Community Infrastructure Levy Regulations 2010 (as amended).

27. I shall now address the appellant's secondary contention that the net chargeable area is [redacted] m², as opposed to the CA's opinion of [redacted] m². In arriving at their respective net chargeable areas, I note that there is disagreement between the parties on both the GIA (gross internal area) floorspace of the existing building and on the floor space of the development.

28. The principles of 'lawful use' and 'in-use buildings' in regulation 40(11) of the CIL Regulations 2010 (as amended) give rise to a consideration if the existing area floor space is an eligible deduction, which can be offset:

    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.

29. The CIL Regulations do not define GIA, so it is necessary to adopt a definition. The definition of GIA provided in the Royal Institution of Chartered Surveyors (RICS) Code of Measuring Practice (6th Edition) is the generally accepted method of calculation.

    GIA is defined as the area of a building measured to the internal face of the perimeter walls at each floor level.

Including:-

- Areas occupied by internal walls and partitions
- Columns, piers, chimney breasts, stairwells, lift-wells, other internal projections, vertical ducts, and the like
- Atria and entrance halls, with clear height above, measured at base level only
- Internal open-sided balconies walkways and the like
- Structural, raked or stepped floors are to be treated as level floor measured horizontally
- Horizontal floors, with permanent access, below structural, raked or stepped floors
- Corridors of a permanent essential nature (e.g. fire corridors, smoke lobbies)
- Mezzanine floors areas with permanent access
- Lift rooms, plant rooms, fuel stores, tank rooms which are housed in a covered structure of a permanent nature, whether or not above the main roof level
- Service accommodation such as toilets, toilet lobbies, bathrooms, showers, changing rooms, cleaners' rooms and the like
- Projection rooms
- Voids over stairwells and lift shafts on upper floors
- Loading bays
- Areas with a headroom of less than 1.5m
- Pavement vaults
- Garages
- Conservatories

Excluding:-

- Perimeter wall thicknesses and external projections
- External open-sided balconies, covered ways and fires
- Canopies
- Voids over or under structural, raked or stepped floors
- Greenhouses, garden stores, fuel stores, and the like in residential property.

30. Having examined the appellant's supplied photographs, it is clear to me that the shed of [redacted] m² is a garden store, which does not fall under the definition of GIA. In respect of the garage, it is also clear to me that it was not in 'lawful use' under regulation 40(11), as it was not built under permitted development rights and was therefore unlawful. Consequently, I agree with the CA that the GIA of both the shed and garage buildings cannot be reflected in the offset calculation.

    In respect of the '[redacted] bungalow, it appears that both parties agree that the GIA of this building is [redacted] m²; in conclusion, I determine that the existing GIA floorspace is [redacted] m².

31. The appellant contends that the GIA of the new development is [redacted] m² (comprising [redacted] m² at ground floor level and [redacted] m² at first floor level), whilst the CA contends that the GIA of the new development is [redacted] m² ([redacted] m² at ground floor level, [redacted] m² at first floor and the garage of [redacted] m²). The parties' disagreement in including the GIA of the garage is readily answered by Regulation 9(1) of the CIL Regulations 2010, which states that Chargeable Development means "*the development for which planning permission is granted*".

The CIL liability herein under appeal, relates to the development allowed by the planning permission [redacted], which is for "*Retrospective application for the erection of detached dwelling house with detached garage*". In conclusion, the GIA of the garage is included and I agree with the CA's opinion that the floorspace of the proposed dwelling is [redacted] m².

Accordingly, based upon the information submitted by the parties, I have determined that the CA's calculation of the CIL charge is correct.

32. In conclusion, having considered all the evidence put forward to me, I therefore confirm the CIL charge of £[redacted] ([redacted]) as stated in the Liability Notice dated [redacted] and hereby dismiss this appeal.

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