Appeal Decision

By [redacted] MRICS

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

Valuation Office Agency
[redacted]

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

Appeal Ref: [redacted]

Address of property: [redacted]

Development: Variation of condition 2 (approved plans), 3 (materials), 6 (external paint colour) attached to planning permission [redacted] (demolition of existing detached garage and flat roof side extension. Construction of new 2 bedroom dwelling)

Planning permission details: [redacted] granted by [redacted]

Decision

I determine that the Community Infrastructure Levy (CIL) payable in respect of the above development should be £[redacted] ([redacted])

Reasons

1. I have considered all the submissions made by the appellant and I have also considered the representations made by the Collecting Authority (CA), [redacted]. In particular, I have considered the information and opinions presented in the following documents:-

(a) Planning permission decision letter dated [redacted]
(b) The CA's Liability Notice dated [redacted]
(c) The appellant's regulation 113 review request dated [redacted]. The CA did not respond to this review request and they state they have no record of it being received. The appellant has attached a copy of the email requesting a regulation 113 review request to the appeal documentation and therefore the appeal has been deemed valid.
(d) Completed CIL Appeal form dated [redacted] (with attachments).
(e) Additional supporting documents submitted with the CIL Appeal:-

(i) CIL Liability Notice dated [redacted] which related to planning reference [redacted]
(ii) Self build relief claim decision dated [redacted]
(iii) CIL demand notice dated [redacted]
(iv) CIL acknowledgement notice dated [redacted]
(v) Extracts of government guidance relating to when CIL becomes payable and S73 guidance

(vi) Extracts from the CIL Regulations
(vii) Extracts from RICS Code of Measuring Practice 6th Edition
(viii) Emails from CA
(ix) Planning decision notice for [redacted]
(x) Maps and site plans

(f) The CA's emailed written representations and supporting documents including:-
(i) Site and layout plans
(ii) Liability Notice dated [redacted]
(iii) Liability Notice dated [redacted]

(g) The appellant's comments on the CA's representations received on [redacted] which included:-
(i) Email from the CA dated [redacted]
(ii) RICS Code of Measuring Practice 6th Edition 2015
(iii) Email from the CA dated [redacted]
(iv) Extract from 'Local Government Lawyer' relating to s73 permissions
(v) Emails from CA dated [redacted]

(h) The CA's further comments of [redacted] including:
(i) Copy of an email from [redacted] dated [redacted] advising that the property was to be sold
(ii) Planning application for variation of a condition dated [redacted] stating that the development was completed on [redacted]
(iii) Sales particulars dated [redacted]

(I) The appellant's further comments of [redacted]

2. Planning permission was granted on [redacted] by [redacted] for 'demolition of existing detached garage and flat roof side extension. Construction of new 2 bedroom dwelling'. A later application was granted on [redacted] for 'variation of condition 2 (approved plans, 3 (materials, 6 (external paint colour) attached to planning permission [redacted] (demolition of existing detached garage and flat roof side extension. Construction of new 2 bedroom dwelling)'.

3. On the [redacted] the CA issued a Regulation 65 Liability Notice ([redacted]) in the sum of £[redacted] based on net additional floorspace of [redacted] square metres (sq m) as follows:-

[redacted] m2 development with [redacted] sq m to be demolished and [redacted] sq m of buildings in existing use that were to be retained. The chargeable development amounted to [redacted] sq m at a rate of £[redacted] per m2 and indexation at [redacted].

4. On [redacted] the CA issued a Regulation 65 Liability Notice ([redacted]) in the sum of £[redacted] based on a net additional floor space of [redacted] sq m as follows:

[redacted] sq m at £[redacted] per sq m and indexation at [redacted]

5. On [redacted] the CA issued a Regulation 65 Liability Notice ([redacted]) in the sum of £[redacted] based on a net additional floor space of [redacted] sq m as follows:

[redacted] sq m at £[redacted] per sq m and indexation at [redacted]

6. On [redacted] the CA issued a Regulation 65 Liability Notice ([redacted]) in the sum of £[redacted] based on a net additional floor space of [redacted] sq m as follows:

[redacted] sq m at £[redacted] per sq m and indexation at [redacted] and having had regard to Schedule 1 Part 2 subparagraph 3 (1b)

7. The appellant requested a Review of the calculation of the chargeable amount under Regulation 113 on [redacted]

8. No decision was made by [redacted] on the request for a review. They informed the appointed person that they did not have a record of receipt of the review request. See 1(c) above.

9. On [redacted] the parties submitted a CIL Appeal under Regulation 114 (chargeable amount) stating that the chargeable amount should be £[redacted].

10. The grounds of the appeal can be summarised as follows:-

(a) That the original planning permission [redacted] resulted in a valid commencement notice, confirmation that full self-build relief would be available and a demand notice was issued to that effect in the sum of £[redacted] on [redacted]

(b) That a s73 planning permission is not a full planning application, rather it is a retrospective application and it should not be used in isolation to calculate the applicable CIL charge as per government guidance

(c) That areas with head height under 1.5 metres (m) should be excluded from the CIL calculation

(d) That, notwithstanding the query relating to the areas with head height under 1.5 m, if the appellant's interpretation of how s73 applications should be calculated is correct and that the previous 'set off' areas for existing use and demolition should be reused as per their Exhibit 6 (extract from regulations) the CIL charge should be £[redacted].

(e) That self-build relief applicable to planning reference [redacted] should be taken into consideration when considering the liability in accordance with Regulation 40/Schedule1

11. The CA submitted representations on [redacted] which can be summarised as follows:-

(a) That areas with head height under 1.5 m should be included in GIA calculation

(b) That s73 permissions under the Town and County Planning Act 1990 (TCPA) are included in the definition of planning permission within the CIL regulations

(c) That the appellant has misinterpreted the government guidance in relation to s73 permissions as it relates to payments already made. In this case no payments towards the CIL liability have been made and so there are no payments to offset.

(d)That there were no relevant buildings on the land on the day that the s73 application was granted and so there is no existing floorspace to be 'set off' when calculating the CIL charge

(e) That a revised Liability Notice dated [redacted] has been issued having had regard to the formula and method of calculation as per Schedule 1 of the Regulations.

12. The appellant submitted comments on the CA's representations dated [redacted] which can be summarised as follows:-

Reiterations of the points raised in section 7 above with additional supporting documentation provided. The appellant made reference to self-build relief apportionments and provided detailed workings of how they consider the correct CIL charge should be calculated, resulting in a further reduced CIL liability of £[redacted].

13. The C.A submitted further comments in response to the appointed person's letter of [redacted]. The comments can be summarised as follows:-

That the permission granted on [redacted] was a wholly retrospective and therefore the permission was granted under s.73A not s.73 of the Town and Country Planning Act 1990.

14. The appellant also submitted further comments in response to the appointed person's letter of [redacted]. The comments can be summarised as follows:-

(a) The facts in appeal referred to in the appointed person's letter of [redacted] were different from the facts of the subject appeal as pre-commencement conditions were never discharged in the case referred to by the appointed person

(b) That the 'Lawson builders' case can also be distinguished from the subject appeal as in that case the development had taken place in breach of a pre-condition. The subject appeal is not in breach of a pre-commencement condition.

(c) In this appeal, there was an earlier variation of conditions permission on [redacted] and the appellant therefore discharged the variations/ pre-commencement conditions attached to the original permission ([redacted]).

(d) That the development was built in accordance with approved plans and as such it was never in breach of planning conditions and so never required retrospective permission under s73a.

(e) That the CA did not issue any revised CIL charge following the grant of permission reference [redacted] on [redacted].

(f) The CA have not previously disputed that the permission dated [redacted] was a s.73 permission.

15. Having fully considered the representations made by the appellant and the CA, I would make the following observations regarding the grounds of the appeal:-

15.1 Areas with head height below 1.5 m

There is a dispute between the parties regarding the GIA of the second floor. The C.A are of the opinion that the GIA is [redacted] sq m whilst the appellant is of the view that it should be [redacted] sq m. Whilst the regulations state the basis of measurement is GIA, GIA is not further defined in the regulations. The RICS Code of Measuring Practice (6th Edition) definition should be adopted as per established practice. The appellant contends that there is no specific application guidance (APP) relating to CIL measurement. That is correct, however GIA 3 states that the calculations may be used for specialist purposes. Whilst APP 6 excludes areas below 1.5 m, it relates specifically to rating purposes and is not useful in this context. The appellant also refers to APP 8 which relates to the marketing of new dwellings and is also not useful in the context of calculating the GIA for CIL purposes. The general definition of GIA is the area of a building measured to the internal face of the perimeter walls at each floor and includes areas with a headroom of less than 1.5 m. The second floor areas under 1.5 m should therefore be included in the GIA. In the appellant's comments, they refer to a void area behind a 'structural wooden' wall and state that this area should be excluded

from GIA. Having reviewed the plans, I conclude that access to the storage areas is provided by gaps in the timber stud work walls and as such the areas should also be included in GIA calculations. I am therefore of the view that the chargeable area is [redacted] sq m.

15.2. s73 or s73a of the Town and Country Planning Act 1990

The subject permission sought to amend the following conditions:-

Condition 2 (approved plans) – The development was completed on [redacted] and was not in accordance with the original plans so this was clearly a retrospective application for a change to the originally approved plans.

Condition 3 (materials) – The original planning permission required the materials to be approved before development was commenced. This condition was a pre-commencement condition and was not complied with as there would then not have been a need to seek a variation of this condition.

Condition 6 (external paint colour) – The condition required the painting of the front and side elevations (to match [redacted]) to be carried out before the new dwelling was occupied. From the submissions it is not known whether the new dwelling was occupied before [redacted] but from the sales particulars provided by the CA dated [redacted], it would seem that the new dwelling had probably not been occupied before the relevant date.

The permission granted on [redacted] allowed certain variations to the conditions attached to the original permission but they did not give approval for the variations approved in the permission dated [redacted].

Whether or not the CA should have issued a revised CIL Liability Notice following the planning permission dated [redacted] is not relevant to the matter that now has to be determined. I can only determine the correct chargeable amount for the chargeable development approved by the planning permission granted on [redacted]. The facts at [redacted] were of course different in that the development had not been completed by this date.

The Lawson case is relevant because the development was completed on [redacted] and it was not completed in accordance with the original plans (as required by condition 2). The materials that the permission dated [redacted] approved were not approved before development commenced (as required by condition 3).

The circumstances here are similar to the Lawson case in that the development was not completed in accordance with the approved plans and the pre-condition requiring the approval of the materials used was not discharged because the materials actually used were different from those previously approved. This was why the permission dated [redacted] was required.

I therefore conclude that this is a permission under s73a of the TCPA (1990). The CIL charge should be calculated with reference to Schedule 1 Part 1 of the regulations.

15.3 Calculation of area

In order to calculate the amount of CIL chargeable, I have had regard to Schedule 1 Paragraph 1 and the required formula:

$$G_R - K_R - \left(\frac{G_R \times E}{G} \right)$$

G = the gross internal area of the chargeable development which in this case is [redacted] sq m
GR = the gross internal area of the part of the chargeable development chargeable at rate R, again [redacted] sq m in this case
KR = the aggregate of the gross internal areas of the following—
(i) retained parts of in-use buildings; and
(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.
E = the aggregate of the following—
(i) the gross internal areas of parts of in-use buildings that are to be demolished before completion of the chargeable development; and

I have considered if whether there should be any inclusions as per KR and E above.

The formula used to calculate the deemed net chargeable area requires a calculation of 'the gross internal areas of parts of in-use buildings that are to be demolished before completion of the chargeable development'. In this case, a garage and side extension were to be demolished and a new 2 bedroom dwelling constructed.

I must therefore consider if those parts of the now demolished areas comprising a garage and flat roof side extension should be accounted for in the calculation of deemed net chargeable area. The Regulations define an in-use building as being i) a relevant building and ii) containing 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. In this case that date is [redacted]. A "relevant building" is further defined in the regulation as a building which is situated on the relevant land on the day planning permission first permits the chargeable development. As the demolition had taken place prior to [redacted] they are not parts of relevant buildings and so cannot be accounted for within the formula.

The new dwelling is understood to have been complete / substantially completed by [redacted]. However, as permission [redacted] had not been implemented and at the time permission [redacted] was granted, the lawful use test is not passed and so the newly constructed part of the dwelling is also not a relevant building and as such cannot be accounted for within the formula.

16. **Calculation of the chargeable amount**

Based on the facts of this case and the evidence before me I conclude that that the appropriate charge in this case should be based on a net additional area of [redacted] sq.m at a rate of £[redacted] per sq.m in accordance with the charging schedule using indexation figure of [redacted].

17. **Conclusion**

Based on the facts of this case and the evidence before me I determine that the Community Infrastructure Levy (CIL) payable in respect of the above development should be £[redacted] ([redacted]).

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