Appeal Decision

by [redacted] MRICS

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

Valuation Office Agency - DVS

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

Appeal Ref: 1759300

Planning Permission Reference: [redacted]

Location: [redacted]

Development: Proposed two storey side extension and single storey extension with attic room above, glazed entrance to front and rear and two storey rear extension. Replacement of roof.

Decision

I determine that the Community Infrastructure Levy (CIL) payable in this case should be £ 0 (*zero pounds*).

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 Permission reference [redacted] issued by the CA on [redacted].
    b. Planning Permission reference [redacted] issued by the CA on [redacted].
    c. Plans and elevation drawings in connection with Planning Permission reference [redacted] dated [redacted].
    d. Planning Permission reference [redacted] issued by the CA on [redacted].
    e. CIL Liability Notice reference [redacted] issued by the CA on [redacted] but dated [redacted] at £[redacted] CIL liability.
    f. The Appellant's request dated [redacted] for a Regulation 113 review.
    g. The CA's response to the request for a Regulation 113 review, issued on [redacted]
    h. The CIL Appeal Form dated [redacted] submitted by the Appellant under Regulation 114, together with documents and correspondence attached thereto.
    i. The CA's representations (including Appendices 1-10) to the Regulation 114 Appeal dated [redacted].
    j. Further comments on the CA's representations prepared by the Appellant and dated [redacted].
    k. The Appellant's response dated [redacted] to specific questions raised by the Appointed Person by email on [redacted] and copied to the CA, who confirmed on [redacted] that they had no further comments to make.

2. On [redacted] planning permission was granted for "*Extensions and alterations to existing chalet bungalow including replacement of roof*" under reference [redacted]

3. Development began on site on [redacted].

4. On [redacted] planning application [redacted] was made to increase the height of the ridge line, eaves and atrium. This application was refused and appealed under reference [redacted].

5. In the meantime, on [redacted] a further planning application reference [redacted] for a variation to planning permission was made as a "fall back" to the previous application (which at that time was being appealed under reference [redacted]). This was to enable amendments to be carried out under previously granted planning permission [redacted] for work "*to be carried out in accordance with revised drawings* [redacted], [redacted], [redacted], [redacted], [redacted], [redacted] *and* [redacted]."

6. The CA, within their submission, have noted that at this time "*Extension relief was granted due to works being ongoing*". Whilst no papers have been provided to confirm this, I assume that under Regulation 42A "*Exemption for residential annexes or extensions*" the CA had previously deemed the Appellant exempt from liability to pay CIL in respect of planning permission reference [redacted].

7. Appeal Reference [redacted] was then refused on [redacted].

8. At this time, whilst the atrium height had been lowered, the ridgeline had remained at its original height.

9. On [redacted] planning permission reference [redacted] was granted for the retrospective construction of a "*two storey side extension and single storey extension with attic room above, glazed entrance to front and rear and two storey rear extension. Replacement of roof.*" This permission regularized the higher ridgeline and atrium as built.

10. CIL Liability Notice [redacted] was issued by the CA on [redacted] as follows:-

    Residential Zone 2
    X Chargeable Area [redacted] *m2 at £*[redacted] */m2*
    X Indexation [redacted]
    = £ [redacted] *(*[redacted]*) CIL Charge*

11. It is noted in the above calculation that no deduction or off-set is made for the Gross Internal Area (GIA)of the existing building.

12. The Liability Notice issued by the CA on [redacted] was addressed incorrectly to "[redacted]" rather than "[redacted]". This was subsequently corrected by the CA in a revised Liability Notice which was dated [redacted] but was actually sent to the Appellant on [redacted].

13. On [redacted] the Appellant requested a Regulation 113 Review be undertaken by the CA on the revised Liability Notice issued on [redacted]

14. The CA issued their response to the Regulation 113 Review request on [redacted] advising that they did "*not accept that the Liability Notice sent on the* [redacted] *is a revised Liability Notice, as described within the Community Infrastructure Levy Regulations 2010 (as amended)*" and that they remain "*satisfied that the Liability Notice was served correctly and on the correct person who assumed the liability. From the lengthy and on-going correspondence with* [redacted] *(including a face-to-face meeting) following the issuing of the Notices (both the Liability and Demand Notices), we are satisfied that* [redacted] *has not suffered any prejudice and was / is fully aware of the Notices and the information*

contained within (including any formal appeal routes). Therefore, the SDNPA will not be revising the Liability Notice dated [redacted] *and the request for a Regulation 113 review is declined as it is out of time.*"

15. A CIL Appeal form dated [redacted] was submitted by the Appellant to the VOA on [redacted].

Validity of the Appeal

16. With regards to the issue of the validity of this Regulation 114 Appeal; the CA had amended a typographical error on their Liability Notice (the Appellant's surname was misspelt as "Drummer"), but are otherwise of the view that the Liability Notice sent via email on [redacted] was identical, save the corrected surname, to the Liability Notice served on [redacted].

17. The CA argue that *CIL Regulation 65* does not define what constitutes a 'revised liability notice' other than to stipulate at *Regulation 65(4)* that a charging authority must issue a revised notice if the chargeable amount changes or the charging authority issues a new instalment policy which would change the instalment arrangements which relate to the chargeable development. Neither of these are relevant to this particular case. Therefore, it is the CA's position that the typographical correction does not result in a revised Liability Notice being issued.

18. The CA further comment that they had extensive engagement with the Appellant, and it is their position that this clearly demonstrates the Appellant was fully aware of the serving of the Liability Notice and the appeal options available at that time. They also dispute that any confusion was caused to the Appellant by correcting the typographical error. The email dated [redacted] states that the original Liability Notice had been corrected to address the typographical error, not that a revised Liability Notice had been issued.

19. The Appellant notes that Regulation 65(2) of the CIL Regulations 2010 (as amended) states that '(2) *a liability notice must* – (c) *state the date on which it was issued*'. They note there is no definition under the CIL Regulations on what constitutes a 'revised liability notice' or anything to indicate that, once issued, a Liability Notice can be revised without affecting the effective date of the Liability Notice. They further note that Regulation 65(5) states that '*A collecting authority may at any time issue a revised liability notice in respect of a chargeable development*' and that '*65(8) where a collecting authority issues a liability notice any earlier liability notice issued by it in respect of the same chargeable development ceases to have effect*'. The appellant therefore argues that any issuing of a revised Liability Notice has the effect in the Regulations of becoming a new Liability Notice, with the previous Notice ceasing to have effect.

20. The Appellant further argues that just because they were aware of such a notice, this does not negate the fact that the original Liability Notice was addressed to someone other than the person that assumed the liability, which they feel is acknowledge by the CA in the act of issuing a revision. The Appellant therefore argues that any change made to the Notice to amend who the notice is served upon represents a "revised" Liability Notice, and automatically replaces all previous liability notices. This revised notice also outlines who the liable party is, as the more recent one would supersede the previous version.

21. The Appellant therefore states that their appeal is made against the revised Liability Notice issued and distributed on [redacted] and submitted within 60 days of that date. They further state that given the retrospective nature of the application this appeal can be submitted in line with Regulations 114 (2) and (3A).

22. *Regulation 114 (2)* requires that an *"An appeal under this regulation must be made before the end of the period of 60 days beginning with day on which the liability notice stating the original chargeable amount was issued."*

23. *Regulation 114 (3A)* further states *"A person may appeal under this regulation after the relevant development has been commenced if planning permission was granted in relation to that development after it was commenced."*

24. With regards to Regulation 114 (2) above; whilst the CA's amendment to the original CIL Liability Notice dated [redacted] was only minor, involving a correction to the Appellant's name, in my view the notice sent on [redacted] has to be regarded as a new Notice. This new Liability Notice was therefore the Notice which the Regulation 113 review request related to and thus the "liability notice stating the original chargeable amount" for the purposes of Regulation 114(2). As it was issued by the CA on [redacted] this is taken to be the date from which the 60 day period for a valid appeal to be made should start.

25. With regards to Regulation 114 (3A) above; the planning permission granted in relation to the development (reference [redacted]) was retrospective, whilst development had already commenced this is not an issue that could prevent an appeal being submitted in line with Regulation 114 (3A) due to the intention of the planning application being to correct/regularize works already commenced under a previous permission.

26. The Regulation 114 Appeal dated [redacted] is therefore considered to be valid.

<u>The Chargeable Amount</u>

27. The dispute over the calculation of the chargeable amount relates to what, if any, GIA of existing buildings can be set off against the GIA of the chargeable development.

28. The appellant argues it is their understanding that the CA accepts that applications [redacted] and [redacted] were commenced and therefore remain extant and lawfully implementable for planning purposes, and that when issuing the revised liability for application [redacted] the existing floor area at the time of the planning application being determined should have been considered to represent 'in-use' floor area and off-set from the CIL liability.

29. The CA's view is that planning permission had been granted for an extension to the property under application reference [redacted] (and a subsequent variation of condition application approved under [redacted]). The development, however, was not undertaken in accordance with this permission. They state that the subsequent application submitted was for retrospective development, but this was refused and dismissed at appeal by the Planning Inspectorate (Appeal Reference [redacted] dated [redacted]).

30. The CA state that planning permission [redacted] granted on [redacted] followed the dismissed appeal and was for the retrospective construction of a two storey side extension and single storey extension with attic room above, glazed entrance to front and rear and two storey rear extension, and replacement of roof. It is for this permission that the CIL chargeable amount arises.

31. The Appellant refers to Schedule 1(6) (Formerly Regulation 40(7)(ii)) of the CIL Regulation 2010 (as amended) that states, "*the aggregate of the gross internal areas of… (ii)… retained parts [of other relevant buildings which are now in-use buildings] 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 date before planning permission first permits the chargeable development*", and argues this means that if a development is commenced and subsequently a developer applies for a new amended development through an application for the same use class, the floor space of the relevant development subject to

the original planning permission must be granted as relief as 'in-use' floor area from the latter application's floor space calculations.

32. The Appellant argues that applying this interpretation, as supported by the Court of Appeal decision in R (Giordano Ltd) v London Borough of Camden [2019] EWCA Civ 1544, the floor space from applications [redacted] and [redacted] which are accepted as having been commenced, and therefore remained extant at the time [redacted] was submitted and approved. The floor area approved under these extant planning permissions should therefore be deducted from the CIL liability arising from the amended development's floor space under planning permission [redacted], in accordance with Schedule 1(6) of the Regulations, and ratified in Giordano.

33. The Appellant further contends that as [redacted] did not approve any additional floor area over that already approved under [redacted], the CIL liability must therefore have equated to £Nil because the original application under reference [redacted] was granted prior to [redacted] a CIL Charging Schedule, and application reference [redacted] benefitted from a self-build exemption for the additional floor area, reducing the CIL liability from £[redacted] to £Nil.

34. I have not been given sight of any correspondence or documentation relating to any earlier calculation of CIL liability at £[redacted] referred to above.

35. The CA confirms there is no dispute between the parties that planning permission reference [redacted] was obtained to rectify a development on site which had already been carried out without the benefit of planning permission (i.e. it was a retrospective permission), nor does the appellant dispute the [redacted] sqm of proposed GIA used to calculate the chargeable amount.

36. It is the CA's position that the development on site was not made lawful until the day on which planning permission [redacted] was granted on [redacted], and therefore there was no floor space which could be used to off-set the potential CIL liability.

37. The CA advise that the Appellant has received correspondence from the CA as the Local Planning Authority (via Ch[redacted] an agent for the CA) which states '*the development as built on site is materially different from the proposal that was shown in planning permission* [redacted] *and therefore it is considered that the permission could not have been implemented*'. They state that whilst it is acknowledged that a residential extension exemption claim was submitted by the Appellant, it was the view of the CA at the time the Liability Notice was issued ([redacted]) that this claim was not valid as the development on site had commenced and the planning permission granted was to approve those retrospective works. It is the CA's view that exemptions can only be awarded prior to commencement, as per CIL Regulation 42B(2)(a). It is also the CA's position that 42B(3A) are not relevant in this case as the development on site was not built in accordance with any of the previous planning permissions and was not made lawful until the granting of permission [redacted] on [redacted].

38. The Appellant argues that it is clear from the images and plans provided under the CA's submission that the difference in development that lies between the approved [redacted] which varied the [redacted] original application ([redacted]) is the increase in ridge height only. They hold the view that evidence submitted previously establishes that the Local Planning Authority and the CA accepted that the chargeable development under [redacted] was commenced and can be reverted to as an extant chargeable development. They state that apart from the increase in ridge height (and therefore increase in roof pitch) no other differences in the elevations exist. They argue it must therefore be considered that application [redacted] was commenced.

39. The Appellant's view is that if the CA would allow the reversion to [redacted], then it follows that the floor space of this development remains extant. As such, this floor space must be

deducted from the permission that regularised the amendments ([redacted] - which only included the raising of the ridge and no increase or decrease to GIA). They point to the fact that the claim for residential extension exemption was granted by the CA under application [redacted] for the additional floor area that the variation introduced, and that this is the exemption the CA advise they will honour if the ridge height and pitch of the dwellings is amended to meet that approved by the extant chargeable development [redacted].

40. The CA, within their submission, have noted that "*Extension relief was granted due to works being ongoing*". The issue of whether or not relief is granted is not a matter for me as the Appointed Person to decide. In an appeal under Regulation 114 the Appointed Person's role is restricted to matters only relevant to the calculation of the 'chargeable amount' in accordance with Regulation 40 and Schedule 1 of the CIL Regulations 2010 (as amended), against which relief may, or may not, be granted by the CA.

41. The Appellant concludes that if the development is able to be reverted lawfully to permission [redacted] (which does not add or subtract any GIA, only the reduction in ridge height) then the Giordano case should be applied, and the existing floor area under [redacted] should be off-set from the chargeable development under [redacted].

42. It is the CA's position that, for the reasons they have already stated, the circumstances of this case are different from the Giordano case quoted by the Appellant. Therefore, the CA argue there are no retained parts of in-use buildings or other relevant buildings/retained parts which can be used to offset the potential CIL liability.

43. I have considered the respective arguments made by the CA and the Appellant, along with the information provided by both parties.

44. It is clear from both CIL Liability Notices issued by the CA that the development granted planning permission under reference [redacted] was the basis for the CA's CIL calculations, and indeed CIL Regulation 9 (4) is clear on this point, that the "*chargeable development is the development for which planning permission is granted*".

45. The Chargeable Development is therefore considered to be the development permitted under planning permission [redacted] dated [redacted].

46. Planning permission reference [redacted] is a s.73A permission (as it is retrospective) rather than a s.73 permission, so the chargeable amount must be calculated in accordance with standard cases in Schedule 1, Part 1 of the CIL Regulations.

47. Disagreement surrounding the correct CIL Liability calculation has arisen due to 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.

48. Within the formula, *KR* is:-

    (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;

49. There is no dispute that at the date planning permission [redacted] was granted (and first permitted the chargeable development) there was a building in existence, the GIA of which was the same as the GIA of the building with the extensions authorised by the

planning permission under consideration. However, in my view, (ii) in paragraph 48 above does not apply in this case, as the development as it then existed required further planning permission. Although it may still have been possible to implement the planning permission [redacted] (i.e. by lowering the ridge height of the roof), the building as it then existed was not built in accordance with that planning permission.

50. I have therefore considered whether (i) in paragraph 48 above applies: can a deduction be made for the aggregate of the GIAs of retained parts of in-use buildings?

51. An 'in use' building is defined in Schedule 1, Part 1, paragraph 1(10) of the CIL Regulations 2010 (as amended). There are two requirements. Firstly, a relevant building must be a building which is situated on the relevant land on the day planning permission first permits the chargeable development. Secondly, 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. Based on the facts of this case, the building that existed on the day planning permission [redacted] first permitted development can be considered to be a relevant building.

52. There is no dispute that the building, with extensions, was situated on the land on the day planning permission [redacted] first permitted the chargeable development, so the first requirement is met. As far as the second requirement is concerned the question is whether any part of the building has been in continuous lawful use for a 6 month period between [redacted] and [redacted] (when planning permission under [redacted] was granted).

53. Based on the evidence provided it would seem that the appellant remained in occupation of the original house throughout the relevant period whilst the extensions and new roof were being constructed, and then occupied the whole of the building after the extensions were completed in [redacted]. I consider that the building, or part of it, was therefore 'in use' throughout the period from [redacted] and [redacted]. However, the question then is whether that use was a lawful use having regard to the planning history.

54. In Hourhope Ltd v Shropshire CC (2015) the High Court held that for the purpose of the CIL Regulations (2010) (as amended) the words "lawful use" meant a use that was lawful for planning purposes. The Town and County Planning Act 1990, s.191(2) states that '*uses and operations are lawful if no planning enforcement action may be taken against them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason) and they are not in any contravention of any enforcement notice that is in force'*.

55. Although the use of the building as it existed on the day planning permission [redacted] was granted was unlawful, the appellant has confirmed that the work on the building's new roof did not commence until [redacted]. Based on the evidence submitted it would seem that up to this point in time there were no grounds for enforcement action. In light of this, I accept that the original part of the building was therefore "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. It is noted that construction commenced on [redacted] but it was lawful throughout the period up to [redacted], when the first part of the roof was delivered and shortly thereafter installed. At this point the apex height became higher than permitted, and the development went beyond the permissions so far granted, until it became lawful with the grant of planning permission under reference [redacted] on [redacted]. It is evident that at least part of the property was therefore in lawful occupation for a period in excess of 6 months, i.e. from [redacted] to [redacted]. As the work completed before [redacted] had been lawful, and at least part of the building was in lawful use for the period of 6 months during the relevant period [redacted] – [redacted], of the

extended building that existed on [redacted] qualifies as an 'in use building' and the GIA of the building should therefore be off-set against the GIA of the chargeable development.

56. As [redacted] is a s.73A permission, CIL should be calculated with reference to Schedule 1, Part 1, of Community Infrastructure Regulations 2010 (as amended).

57. On the basis of the evidence before me and having considered all of the information submitted in respect of this matter, I conclude that on the facts of this case the CIL charge should be £ 0 (zero pounds) calculated thus:-

    Residential Zone 2
    Proposed GIA [redacted] m2
    Less Existing GIA [redacted]
    = 0m2 Chargeable Development at £[redacted] /m2
    X Indexation [redacted]
    = £ 0 (zero) CIL Charge

[redacted] DipSurv DipCon MRICS
RICS Registered Valuer
Valuation Office Agency
14 June 2021