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: 1759634

***Address**:* [redacted]

Proposed Development: Demolition of the pavilions, change of use of offices and ancillary buildings to 25no. apartments/dwellings, erection of 52no. dwellings, construction of new access and associated works without compliance with conditions 2 (Approved Drawings), 9 (Ecology), 21 (Drainage) and 25 (Arboricultural Method Statement) of planning permission [redacted]).

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 of the submissions made by [redacted] of [redacted] (the Appellant) and the Collecting Authority (CA), [redacted] in respect of this matter. In particular, I have considered the information and opinions presented in the following documents:-

    a) The Planning Decision ref: [redacted] dated [redacted].

    b) Approved planning consent drawings, as referenced in the Planning Decision notice.

    c) The CIL Liability Notice (ref: [redacted]) dated [redacted].

    d) CIL Appeal form dated [redacted], including 'Grounds of Appeal' statement and appendices.

    e) Representations from the CA dated [redacted], including appendices.

    f) Appellant's comments on the CA's representations, dated [redacted].

2. Planning permission was granted under application no [redacted] on [redacted], for *"Demolition of the pavilions, change of use of offices and ancillary buildings to 25no. apartments/dwellings, erection of 52no. dwellings, construction of new access and associated works."* Listed building consent for the same development was also granted under application no [redacted] on the same date.

3. Planning permission was varied by a s73 application (ref: [redacted]) on [redacted] for *"Demolition of the pavilions, change of use of offices and ancillary buildings to 25no. apartments/dwellings, erection of 52no. dwellings, construction of new access and associated works without compliance with Condition 2 (Approved drawings) of planning permission [redacted]".*

4. Planning permission was further amended by a second s73 application (ref: [redacted]) on [redacted] for *"Demolition of the pavilions, change of use of offices and ancillary buildings to 25no. apartments/dwellings, erection of 52no. dwellings, construction of new access and associated works without compliance with conditions 2 (Approved Drawings), 9 (Ecology), 21 (Drainage) and 25 (Arboricultural Method Statement) of planning permission [redacted]".*

5. The CA issued a CIL Liability Notice in respect of application [redacted] on [redacted] for the sum of £[redacted]. This was calculated on a chargeable area of [redacted] m² at the 'Residential Zone 2' rate of £[redacted] per m² plus indexation. The GIA calculation was based on a total proposed GIA of [redacted] m², with a total of [redacted] m² of existing retained floorspace deducted and a further [redacted] m² 'demolition deduction'.

6. The Appellant requested a review under Regulation 113 on [redacted]. The CA did not submit a response to the Regulation 113 review, but I have been provided with an e-mail dated [redacted], in which the CA have provided their reasoning for the CIL charge adopted.

7. On [redacted], the Valuation Office Agency received a CIL appeal made under Regulation 114 (chargeable amount) contending that the CIL liability should be issued in phases as follows:

   Phase 1: £[redacted]
   Phase 2: £[redacted]
   Phase 3: £[redacted]
   Phase 4: £[redacted]

8. The proposed chargeable amounts were calculated using the following gross internal area (GIA) figures, at a rate of £[redacted] per m² including indexation:

Phase	Permitted Development	In-use retained	In-use demolition apportionment	Chargeable Development
1	[redacted]	[redacted]	[redacted]	[redacted]
2	[redacted]	[redacted]	[redacted]	[redacted]
3	[redacted]	[redacted]	[redacted]	[redacted]
4	[redacted]	[redacted]	[redacted]	[redacted]
Total	[redacted]	[redacted]	[redacted]	[redacted]

9. The Appellant's grounds of appeal can be summarised to two key points of contention, as follows:-

a) The [redacted] and [redacted] should be treated as 'in-use' buildings and accordingly deducted from the chargeable amount; and

b) The application should be treated as a phased planning permission and CIL liability notices should be issued for each phase, rather than a single notice for the entire development;

10. The CA has submitted representations that can be summarised as follows:-

a) The Appellant should not be permitted to submit new evidence regarding the 'in-use' status of the [redacted] and [redacted], as a decision on this has already been made under a previous CIL decision; and

b) The application does not meet the definition of a phased development and should not be treated as such.

11. I shall address each of these disputed contentions in turn.

In-use Buildings

12. Regulation 9(1) defines the chargeable development as the development for which planning permission is granted. The Appellant and CA have both adopted a total GIA for the permitted development of [redacted] m².

13. The CIL Regulations Part 5 Chargeable Amount, Schedule 1 defines how to calculate the net chargeable area. This states that the "retained parts of in-use buildings" can be deducted from "the gross internal area of the chargeable development."

14. 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.

15. Under Part 2 of Schedule 1, an application granted under section 73 should be assumed to be granted on the date the original consent was granted. Therefore, in this case the relevant period will be the three years prior to [redacted] (the date that planning permission ref: [redacted] was granted).

16. The Appellant and CA have agreed on the "in-use" status of several buildings at the site but disagree on two buildings, known as the [redacted] and the [redacted]. In a previous CIL appeal decision dated [redacted] (ref: 1691610), it was decided that the Mansion and the [redacted] should not be classed as in use buildings. The Appellant has now provided additional evidence to support their contention that these buildings should be treated as in-use.

17. The CA contend that any new evidence should be disregarded, as the in-use status has already been considered in the CIL appeal for the earlier planning permission. I do not consider that there are any grounds to disregard the additional new evidence submitted to me and have allowed this new evidence.

18. The new evidence includes several utility bills from [redacted], [redacted], [redacted] and [redacted], across a range of dates from [redacted] to [redacted]. These bills show the site address as merely [redacted] or in some cases, the site is not specified at all; of note, none specifically mention the [redacted] or the [redacted]. Given that several of the buildings on site have been accepted as in-use, I do not consider that these energy bills provide evidence that the [redacted] or the [redacted] were occupied specifically.

19. In addition to the utility bills, a statement has been provided by [redacted], a handyperson for [redacted], dated [redacted]. The statement confirms that [redacted]'s office has been located within the [redacted] since [redacted] and was used on a full time basis. The statement further confirms that the office and other welfare facilities within the building are used by [redacted] staff, sub-contractors and consultants and that meetings and site inductions regularly take place in the [redacted]. In addition, the statement confirms that the [redacted] and [redacted] were used on four occasions by the Planning Department between [redacted] and [redacted], to hold public exhibitions in association with the planning applications. Although this is a new statement, the information contained within appears to be largely similar in content to that previously summarised within paragraph 27 of the previous CIL appeal decision dated [redacted].

20. Finally, a VOA Notice of Alteration to the Rating List in respect of "[redacted]," dated [redacted] has been provided. This alteration split the [redacted] between the first floor office and the rest of the building and provides a Rateable Value for the office of £[redacted] with effect from [redacted]. The reasoning for this split is not detailed in the notice and was carried out over two years post the effective date. A Rating assessment would typically only be split if the building were in occupation by two or more separate occupiers, or was partly occupied and partly vacant. The split of the assessment would therefore appear to contradict the information provided within the statement by [redacted], which suggests that both the office and other parts of the building were in use by [redacted] p. There has been no evidence provided to show whether business rates were being paid on either assessment or whether empty rates relief was claimed.

21. I do not consider that the new information provided is sufficient to determine that the Mansion was in use during the relevant period. There has been no new information regarding the [redacted], except for a mention that it was used to hold planning exhibitions, which I do not consider to be sufficient proof of use. I therefore determine that these buildings should not be classified as "in-use".

Phasing

22. The Appellant considers that the application should be treated as a phased development, whereas the CA contend that it should be considered as a single phase development.

23. The CA consider that in order to be a phased development, the phasing should be set out and established from the outset; the phasing should be controlled by a separate planning condition ensuring that the development is carried out in accordance with the approved phasing plan and the structure of the decision notice should clearly separate out the pre-commencement and other conditions to be discharged by phase. The CA consider that the consent does not meet these requirements.

24. The CA also consider that the approved implementation strategy binds different identified areas together and does not provide a schedule for separate phases, but for work required across the site. As the areas cannot be developed separately, the development cannot be treated as phased.

25. The Appellant states that the tests applied by the CA to determine if a development can be treated as phased are not substantiated by the regulations or supported by any government guidance. They refer to a section 73 planning application approved by [redacted], which was treated as a phased permission without a stand-alone phasing condition.

26. I accept that a section 73 application could have the ability to change a permitted development from a single phase to a multi-phase development. Regulation 9 (6) states *"Where a planning permission is granted under section 73 of the TCPA 1990, the chargeable development is the most recently commenced or re-commenced chargeable development."* I understand that no work was commenced under the original application and so I consider the chargeable development to be that permitted by the section 73 permission. I have therefore given consideration to whether application ref: [redacted] constitutes a phased permission.

27. Phased planning permission is defined within Regulation 2(1) of the CIL Regulations 2010 (as amended) as being "*a planning permission which expressly provides for development to be carried out in phases."*

28. Regulation 9(4) provides that in the case of a grant of phased planning permission, each phase of the development is a separate chargeable development.

29. Regulation 8(3)A(b) provides that in the case of a phased planning permission (which is not an outline planning permission), planning permission first permits a phase of the development:-

    "(i) on the day final approval is given under any pre-commencement condition associated with that phase; or

    (ii) where there are no pre-commencement conditions associated with that phase, on the day planning permission is granted."

30. As indicated above, the CA consider that the phasing should be set out and established from the outset; the phasing should be controlled by a separate planning condition ensuring that the development is carried out in accordance with the approved phasing plan and the structure of the decision notice should clearly separate out the pre-commencement and other conditions to be discharged by phase. I am not aware of any guidance that suggests these tests must be fulfilled. The Regulations give no further guidance on the definition of a phased planning permission other than that defined in paragraph 27 above. However, Regulation 8(3)A(b)(ii) suggests that a 'phased planning permission' may include a permission *"where there are no pre-commencement conditions associated with that phase".*

31. The planning decision notice for application [redacted] grants planning permission for the development, subject to 31 conditions. Condition 2 lists the approved drawings, which includes "[redacted] dated [redacted]." The phasing plan shows the site divided into four phases.

32. Phasing is mentioned within various additional conditions. Condition 4: Materials (New Build) states that "*Details and samples of all external materials within each phase of the development (in accordance with the approved Scheme of Implementation or any subsequent Scheme of Implementation approved in connection with Condition 26), including roof cladding, wall facing materials and cladding, glazing, door and window frames, decorative features, rainwater goods where appropriate, shall be submitted to and approved in writing by the Local Planning Authority before any above ground level work for the construction of the new buildings in that phase is commenced. The development shall be carried out in accordance with the approved details.*" Similar clauses are contained in reference to lighting (condition 5), fire hydrants (condition 6), slab levels (condition 22) and refuse storage (condition 30).

    Condition 21: [redacted] states "*The development hereby approved shall be implemented in accordance with the approved surface water drainage strategy (Plan ref. [redacted]). The scheme shall subsequently be implemented in accordance with the approved details on a phased basis (the approved Scheme of Implementation) before the development is completed for each area.*"

33. A "Proposed Scheme of Implementation Revision D" is also listed within Condition 2. Condition 26: Proposed Phasing Condition refers directly to this document stating *"The development shall be completed in accordance with the approved Scheme of Implementation, unless otherwise agreed in writing with the Local Planning Authority."* The reasoning for this condition is: *"To ensure the works for the restoration / repair / refurbishment of the Buildings to be retained are carried out prior to the completion of the new development to comply with the justification for the development and in order secure the heritage and public benefits of the development scheme."*

34. In summary, the Scheme of Implementation includes the following requirements:-

    - To carry out all works to the existing retained listed buildings (located within phases 1, 2, 3 and 4) are wind and water tight before commencing phase 1.
    - To complete the repair and restoration works of the [redacted] (located within phase 1) before occupation of any phase 1 dwelling.
    - To commence the repairs to the external envelope of the [redacted] (located in phase 3) before occupation of the final dwelling within phase 1.
    - To carry out all demolition works ([redacted] and the [redacted] buildings located within phase 2 and 4) prior to commencement of phase 2.
    - To complete the remaining works to the existing retained listed buildings and the [redacted] (located within phase 2, 3 and 4) prior to 20th occupation of any phase 2 dwelling.
    - To complete the relevant landscaping works in the areas covered by the buildings to be demolished, before completion of the final phase 2 dwelling.

35. The final paragraph of the proposed scheme of implementation sates that it *"does not preclude any works; the completion of works; or the residential occupation of the existing listed building(s) and curtilage listed building in advance of the proposed sequencing of the implementation scheme. The advancement of these works should be encouraged, in order that the heritage assets are put into a long-term optimum viable residential use as soon as practicably and viably possible and the heritage benefits of the scheme secured."*

36. The site has clearly been divided into four areas, named as phases. However, there is no requirement within the planning decision notice for the phases to be developed sequentially; in fact, the development could be carried out in any order desired by the developer. The purpose of the scheme of implementation appears to be to ensure that the listed buildings (which are located within all four phases) are returned to use as soon as possible, rather than being delayed until the end of the new build.

37. The pre-commencement requirements in the Schedule of Implementation in respect of Phases 1 and 2 may impact on the date taken as the commencement of development for Phases 3 and 4 (for example demolition of buildings within phases 2 and 4 will have to commence at some time before commencement of phase 2). The dates of commencement for each phase could all be different but this will depend on when material operations actually commence in each identified phase. Additionally, as detailed in paragraph 35 above, the planning permission effectively allows development of Phases 3 and 4 to commence before Phases 1 or 2. It therefore seems clear that although the planning permission in this case refers to phases of development, it does not require the development to be carried out in the sequence suggested by the numbering of those phases.

38. In my opinion, it is important that to be a 'phased planning permission' the planning permission must clearly specify the order in which the phases will be developed. I qualify my opinion as follows: If a permission is to be treated as a phased planning permission, the order in which the phases will be developed must be known in order to properly identify the deduction for demolished buildings when calculating the chargeable amount for each phase in accordance with the formula in Schedule 1, Part 1, paragraphs 1(6) and (7) of the CIL Regulations 2010 (as amended). If the order in which the phases must be developed is not specified in the planning permission, then it is not possible to calculate 'Ex' in the formula when planning permission has been granted (because if the order of the 'phases' is not stipulated within the planning permission, it is not possible to identify which will actually be the "second phase" and which will be "the previously commenced phase" until the development of each 'phase' has actually commenced).

39. Although the planning permission in this case is not in my opinion a 'phased planning permission', if it were to be treated as such, I consider the Appellant's calculation of the chargeable amounts for each phase to be incorrect. In their calculation of the chargeable amount for 'Phase 1' the Appellant has deducted the area of all the buildings to be demolished across all four phases from the GIA of the development included in Phase 1. For the first phase of a development, the formula in Schedule 1, Part 1, paragraphs 1(6) and (1(7) only allows for the deduction of in-use buildings that are to be demolished before completion of the chargeable development (and, as noted above, the chargeable development only comprises the development within Phase 1, because each phase of the development is treated as a separate chargeable development). For the second and subsequent phases, the formula allows for the deduction of in-use buildings that are to be demolished before completion of the chargeable development in each phase and also 'Ex'. 'Ex' in the formula effectively allows for an additional deduction to be made if the GIA of the demolished buildings in the previous phase exceeded the GIA of the chargeable development. Any excess area that was not deducted in the first phase can therefore in effect be carried forward and deducted from the GIA of the chargeable development comprising the second or subsequent phases.

Decision

40. I consider that the [redacted] and the [redacted] building should not be treated as in-use buildings and therefore the areas of these buildings should not be deducted from the chargeable area.

41. I consider that the consent is not a "phased planning permission" and it is therefore correct to calculate a single chargeable amount and issue a single CIL Liability Notice for the entire development.

42. I understand that the GIA of the site and the existing buildings has been agreed. I have not been notified of any dispute regarding the charge rate or indexation, and therefore I have adopted the CA's calculations with regards to the CIL charge.

43. In conclusion, having considered the facts of this case and all the evidence put forward to me, I confirm that the Community Infrastructure Levy (CIL) payable in this case should be the sum 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
29 July 2021