Appeal Decision

by [redacted] MRICS

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

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

Appeal Ref: 1773403

Planning Permission Reference: [redacted]

Location: [redacted]

Development: 20 residential dwellings comprising the re-erection of former farm buildings (units [redacted], [redacted] and [redacted]), in addition to the other new builds and conversions.

Decision

I determine that the Community Infrastructure Levy (CIL) payable in this case should be £[redacted] ([redacted] only).

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. CIL Liability Notice reference [redacted] issued by the CA dated [redacted] at £[redacted] CIL liability.
    c. The content of an email exchange between [redacted] and [redacted] between the Appellant and the CA.
    d. Various emails between the Appellant and CA between [redacted] and [redacted] along with the Appellant's request for a Regulation 113 review dated [redacted].
    e. The CA's confirmation of CIL Liability in their Regulation 113 review outcome issued [redacted].
    f. The CIL Appeal Form dated [redacted] submitted by the Appellant under Regulation 114, together with documents and correspondence attached thereto.
    g. The CA's representations to the Regulation 114 Appeal dated [redacted].
    h. Further comments on the CA's representations prepared by the Appellant and dated [redacted].

2. A planning application reference [redacted] was submitted on [redacted] for "*20 residential dwellings comprising the conversion of existing agricultural buildings and new build units; demolition of existing buildings; associated access, car parking and landscaping*", but works commenced before planning permission was granted and some of the existing

units were demolished. At the request of the Local Planning Authority the Appellant submitted an amended application reference [redacted].

3. Planning Permission reference [redacted] was granted on [redacted] for retrospective permission for "*20 residential dwellings comprising the re-erection of former farm buildings (units [redacted], [redacted] and [redacted]), in addition to the other new builds and conversions.*"

4. On [redacted] CIL Liability Notice reference [redacted] was issued by the CA at £[redacted] CIL liability calculated as:-

   £[redacted] x [redacted] m2 x [redacted] = £[redacted] CIL Liability

   Applying the formula:-

   $$\frac{R \times A \times Ip}{Ic}$$

   Where:
   - *R is the CIL rate in £/sqm*
   - *A is the net increase in gross internal floor area (sqm)*
   - *Ip is the All-in Price Index for the year in which planning permission was granted*
   - *Ic is the All-in Price Index for the year in which the charging schedule started operation*

5. On 14 May 2021 the Appellant requested a Regulation 113 Review of the CIL Liability calculation. The CA then issued an amended CIL Liability Notice on [redacted] reference [redacted] at £[redacted] CIL liability based on the following information:-

   Floorspace calculated as: [redacted] m2

   Less: self build [redacted] sqm
   = [redacted] m2

   Less: existing barn [redacted] sqm
   = [redacted] m2 Chargeable GIA

   The CA calculated CIL Liability thus:-

   £[redacted] x [redacted] m2 x [redacted] = £[redacted] CIL Liability

6. A Regulation 114 Appeal dated [redacted] was submitted to the Valuation Office Agency and received on [redacted].

7. The Appeal is made on the following main grounds:-

   a) The identification of "in-use" buildings.

   b) The definition of the term "building.

   c) Whether or not the buildings have been demolished.

8. **With regards to appeal ground a) The identification of "in-use" buildings**: the Appellant notes the CA comment that the remaining buildings have not had their floorspace off-set against the GIA of the development because they are 'uninhabitable' and had been demolished or partly demolished before the planning application was decided.

9. The Appellant is of the view that the matter of whether a building is 'habitable' is not a test contained within the CIL Regulations, and that an "in-use building" is a relevant building that 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.

10. The Appellant refers to CIL Regulation 40(11) that provides that "relevant building" means a building which is situated on the relevant land on the day planning permission first permits the chargeable development, and points to their "CIL additional information" form that confirms that the buildings were last in use in [redacted], and were in use for at least 6 months in the last three years.

11. The Appellant states that photographs provided show that the buildings were situated on the site on the day planning permission first permits the chargeable development, and therefore qualify as "in-use buildings".

12. The CA refer to CIL Regulation 40 and state it is their view that the remaining buildings on site had been demolished or partially demolished before the planning application was approved, and their interpretation of the CIL Regulations deem that they cannot therefore be considered as "in-use" floor space for offset against the floor space of the new development within the CIL calculation.

13. **Regarding appeal ground b) The definition of the term "building"**: the Appellant notes that The Planning Act 2008 defines a building in accordance with section 336(1) of the Town and Country Planning Act 1990, which itself defines a "building" as: "any structure or erection, and any part of a building, as so defined."

14. The Appellant contends that photographs supplied show that the structures on site are "buildings" in accordance with the definition contained in the Town and Country Planning Act 1990, and their existing floor space should therefore be taken into consideration in the CIL calculations.

15. The CA refer to CIL Regulation 40 (11) and quote: "building" does not include "*a building into which people do not normally go, a building into which people go only intermittently for the purpose of maintaining or inspecting machinery, or a building for which planning permission was granted for a limited period*".

16. The CA state their view that the remaining buildings on site had been completely / significantly demolished or partially demolished before the planning application was approved and their interpretation of the CIL Regulations deem that they cannot be considered for offset against the new development.

17. **Regarding appeal ground c) Whether or not the buildings have been demolished**: The Appellant notes the CA argue that the buildings have been demolished or partly demolished and therefore their GIA cannot be off-set against the total GIA of the development within the CIL calculation.

18. The Appellant argues that whilst some of the walls of the existing buildings at [redacted] have been removed, the RICS Code of Measuring Practice 6th Edition (May 2015) sets out the method of calculating GIA and includes an example of a loading bay (with walls to three sides only and an open-sided front) that illustrates how to calculate the GIA by

measuring the internal face of a supporting pillar rather than a wall. Therefore, despite some of the walls having been removed, the appellant believes it is possible to calculate the GIA of the partially demolished structures and thus off-set their GIA within the CIL calculations.

19. The Appellant therefore contends that the existing structures are “in-use buildings”, despite some elements such as walls being removed, and that their GIA should be offset from the total GIA of the chargeable development to arrive at a Chargeable Area of [redacted] m2.

20. The CA state that permission [redacted] is deemed as a new planning application and the Planning Officer’s report states that the buildings had been demolished under the previous planning permission reference [redacted], with the result that there is a significant element of new build required in the scheme. They note the previous permission [redacted] included “the demolition of some of the existing buildings”, and comment that this demolition has taken place and is considered to go beyond the level of demolition approved under the [redacted] permission. They confirm they made the decision that CIL will be liable on the new planning application [redacted], as they believe there were no existing buildings to off-set, as the previous application [redacted] had been implemented and the existing buildings had been demolished.

21. The Appellant contends that the buildings included in the floor space calculations were not demolished at the time planning permission was granted, as evidenced by:-

    I. Photographs of the buildings provided to the CA during the application process and at the time the application was granted demonstrating that there were buildings that had not been demolished (Appendix H of the Appellant’s Statement of Case)

    II. Photographs and explanations provided in both the Planning Statement and Heritage Statement submitted with the planning application showing the buildings in situ. (Appendix A)

    III. The Planning Officer Report and description of development clearly reference the “conversion” of buildings (Appendix 1 of CA’s Statement of Case).

    IV. The approved plans are clearly annotated with labels showing which buildings are to be re-built, demolished, or re-erected (Appendix F of the Appellant’s Statement of Case).

22. The Appellant contends that whilst the CA argues the remaining buildings on site had been “completely/significantly demolished” prior to the approval of the relevant planning application, no evidence has been submitted to support this and the CA have purely relied on one paragraph within the Planning Officer’s Report which outlines that demolition has taken place on the site.

23. The Appellant notes that regarding building 6 (which is to be converted to form unit 3) the Planning Officer wrote: “*Only the area marked on the front elevation of Unit 3 is proposed to be removed and rebuilt. The gable will be left as per the drawing*”. The Appellant argues that if there were no buildings on site the Planning Officer would not have assessed the proposal against policies that apply to the re-use of buildings, nor would the description of development be amended during the application process to regularise the works that had been taken place. Furthermore, they would not highlight that only a small section on the front elevation of Unit [redacted] would be removed and rebuilt.

24. The Appellant also points out that the approved plans show that some elements of the buildings are to be removed and/or replaced, but there are also buildings left standing,

and these buildings were present the day that planning permission was granted, as per the photographs and evidence provided in the submitted Statement of Case.

25. The Appellant also references Shimizu (UK) Ltd v. Westminster City Council [1997] where it was held that demolition of only part of a building not amounting to demolition of the whole, or substantially the whole, of the building is to be regarded as an "alteration" of the building rather than demolition.

26. The Appellant contends that the works undertaken to the buildings prior to the grant of planning permission did not amount to demolition of the whole or substantially the whole, and as such should be treated as an alteration and the floorspace included with the CIL calculation.

27. Whilst the three grounds of appeal are inter-linked, each will be addressed in turn:-

28. **Appeal Ground a) The identification of in-use buildings**:

    Disagreement surrounding the issue of identifying the "in-use buildings" has arisen due to the effect of 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.

29. 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.

30. Regulation 40(11) provides that an "in-use building" means a building which 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.

31. Regulation 40(11) also provides that "relevant building" means a building which is situated on the relevant land on the day planning permission first permits the chargeable development.

32. Before the matter of whether the structures in question can be considered as relevant in-use buildings, it must be established if indeed those structures were "buildings".

33. **Appeal Ground b) The definition of the term "building"**:

    Whilst CIL Regulation 40 (11) discusses the types of building not to be included for CIL purposes, it does not define what a "building" is.

34. The Appellant has made reference to The Planning Act 2008, which itself defines "building" as having the meaning given by section 336(1) of the Town and Country Planning Act 1990, which defines "building" as something that "*includes any structure or erection, and any part of a building, as so defined*". This definition remains too vague for the purpose of defining "building" required in the present instance however.

35. In the absence of any clear guidance from either CIL Regulation 40 or the Town and Country Planning Act 1990 as to what a "building" is, the only obvious option available is to refer to the dictionary for a clear definition as to what constitutes a "building".

36. The Shorter Oxford English Dictionary, 6th Edition (SOED), provides the following definition of "building" as "*A thing which is built; a structure; an edifice; a permanent fixed thing built for occupation, as a house, school, factory, stable, church, etc.*"

37. The SOED further defines "built" as "*Constructed or constituted, especially in a specified way; having a specified build; composed of separately prepared parts.*", "other" as "*That remains from a specified or implied group of two or (later) more.*" and "structure" as "*A thing which is built or constructed; a building, an edifice. More widely, any framework or fabric of assembled material parts.*" This would generally seem to accord and expand upon the definition of "building" as contained in the Town and Country Planning Act 1990.

38. The RICS Code of Measuring Practice 6th Edition (May 2015) sets out the method of calculating the GIA of a building but does not give guidance on what is to be measured for CIL purposes. The Code does not purport to define what a "building" is, but simply attempts to assist with measurement practice.

39. GIA is defined within The Code as the "*area of a building measured to the internal face of the perimeter walls at each floor level…*" The Code includes an example that illustrates how to calculate the GIA of a loading bay by measuring to the internal face of a supporting pillar. This loading bay has walls to three sides, however, and is only open sided to the front – a very similar structure to some of those remaining after demolition work at [redacted]. This example indicates that it is possible to measure the GIA of a structure that does not include walls all round, such as a partially demolished building.

40. It might also be implied that a building would define some form of boundary, but having an area within a boundary does not require walls but only a thing, things, or a structure of some kind, that can provide a recognisable form of "boundary". A boundary is not required to be a "wall". This would seem to be supported in the RICS Code of Measuring Practice example that illustrates how to calculate the GIA of a loading bay by measuring to the internal face of a supporting pillar.

41. Considering photographs submitted by the Appellant, it is evident that substantial demolition works had been undertaken, and that there was no adequate structure for the Appellant to occupy at the time these photographs were taken. This was the only structure in place at the time planning permission under reference [redacted] was granted on [redacted].

42. From the above however, the structure can be taken to be a "building" in accordance with the broad definition contained in section 336(1) of the Town and Country Planning Act 1990 as a "*structure or erection, and any part of a building, as so defined*", and more specifically defined in the Shorter Oxford English Dictionary, 6th Edition as "*A thing which is built; a structure; an edifice; a permanent fixed thing*" and "*More widely, any framework or fabric of assembled material parts.*"

43. The structures remaining as at the relevant date can therefore be taken to be a "relevant building" insofar as it "*is situated on the relevant land on the day planning permission first permits the chargeable development*", which was [redacted] as per grant of planning permission [redacted].

44. Having established that they are "relevant" and "a building", it remains to determine whether the remaining structures can be defined as "in-use buildings" in accordance with Regulation 40(11) insofar as they 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, which is [redacted].

45. The buildings, of which the remaining floor-space was a part, ceased occupation in [redacted]. They were therefore "in-use buildings" within three years of the grant of planning permission on [redacted] and had been continuously for a period of six months ending during [redacted] which would have to have been from [redacted] to accord with the requirement of Regulation 40(11) for "*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", which it was.

46. The areas of remaining floor-space in question had therefore been a "part" of an "in use building" which had been earlier partially demolished. The matter remaining is to consider whether such demolition works had resulted in there being no buildings or structures remaining, as argued by the CA.

47. **Appeal Ground c) Whether or not the buildings have been demolished**:

    As shown by the photographs supplied by the Appellant, the CA state their view that the remaining buildings on site had been completely / significantly demolished or partially demolished.

48. It has already been established, however, that having an area within a boundary does not require walls but only a thing, things, or a structure of some kind, that can provide a recognisable form of "boundary". A boundary is not required to be a "wall". This would seem to be supported in the RICS Code of Measuring Practice example that illustrates how to calculate the GIA of a loading bay by measuring to the internal face of a supporting pillar. It is therefore possible to establish the GIA of the remaining ground floor by reference to taking measurements from a combination of the internal face of the perimeter walls/supporting pillars or building boundary as defined in some other way as above, and therefore the GIA can be established.

49. The case of Shimizu (UK) Ltd v. Westminster City Council [1997] held that demolition of only part of a building not amounting to demolition of the whole, or substantially the whole, of the building is to be regarded as an "alteration" of the building rather than demolition. It has been established above that the works undertaken to the buildings prior to the grant of planning permission did not amount to demolition of the whole or substantially the whole, with sufficient structure remaining to be classified as a "building".

50. As there is sufficient structure in existence to enable GIA to be calculated, and it has also been established that this structure represents a relevant existing "in-use building", CIL Regulation 40 requires that the existing GIA should therefore be off-set from the GIA of the total development to arrive at the Chargeable Area as follows:-

    GIA of the development calculated as: 3669m2 GIA

    Less: self build [redacted] *m2*
    = [redacted] *m2*

    Less: existing barn [redacted] *m2*
    = [redacted] *m2*

    Less: other relevant existing in-use buildings:-
    - Building 1 – [redacted] *m2*
    - Building 3 – [redacted] *m2*
    - Building 4 – [redacted] *m2*
    - Building 5 – [redacted] *m2*
    - Building 6 – [redacted] *m2*
    Total – [redacted] *m2*

    = [redacted] *m2 Chargeable GIA*

    Thus the CIL Liability is calculated as:-

    £[redacted] *x* [redacted] *gm x* [redacted] *= £*[redacted] CIL Liability

[redacted]

51. The CIL Liability is £[redacted] ([redacted]).

[redacted] DipSurv DipCon MRICS
RICS Registered Valuer
Valuation Office Agency
18 August 2021