Appeal Decision

by [redacted] MRICS VR

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

Valuation Office Agency (DVS)
Wycliffe House
Green Lane
Durham
DH1 3UW

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

Appeal Ref: 1769274

***Address**:* [redacted]

Proposed Development: Redevelopment of land at [redacted] for an extra care facility, ancillary medical and rehabilitation facilities, landscaping, car and cycle parking, and the redevelopment of [redacted] for a care home and residential units along with landscaping, car and cycle parking.

Planning Permission details: Granted by an appointee of the Secretary of State on [redacted] under planning appeal reference [redacted], in connection with the earlier planning application ref: [redacted] to [redacted], dated [redacted].

[redacted] Phase 2 ([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's agent, [redacted] (acting on behalf of the Appellant, [redacted], and the submissions made by the Collecting Authority (CA), [redacted].

   In particular, I have considered the information and opinions presented in the following documents:-

   a) Planning Inspectorate appeal reference [redacted] dated [redacted], in connection with the earlier planning application ref: [redacted], dated [redacted].

   b) Approved planning consent drawings, as referenced in the Planning appeal reference [redacted].

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].

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

Of note, this appeal decision is one of two appeals, in relation to the planning permission, which have been made by the appellant. The permission is a phased planning permission for the purposes of Regulation 9(4) of the Community Infrastructure Levy (CIL) Regulations 2010; as such, each phase approved pursuant to the approved phasing plan is a separate chargeable development.

The planning permission is in two phases:

Phase 1 comprises the basement area of [redacted] building and includes a car stacker for 28 car spaces for the 89 extra care units, cycle spaces and plant for the extra care.

Phase 2 comprises the above ground area of [redacted] building, comprising of medical and rehabilitation facilities on the ground and first floor and 89 extra care units on the upper floors to Level 12.

This appeal decision comprises Phase 2 (Appeal Ref: 1769274) whilst Phase 1 is considered under a separate appeal decision (Appeal Ref: 1768442), which has been decided upon simultaneously.

2. Planning permission was granted for the development on [redacted], allowed on appeal, under a planning appeal reference [redacted].

3. On [redacted] the CA issued a Liability Notice (Reference: [redacted]) following the grant decision under planning appeal reference [redacted], for a sum of £[redacted]. This was based on a net chargeable area of [redacted] m², comprising of:

Mayoral CIL (MCIL2)
[redacted] m² @ £[redacted] per m² (index [redacted]) = £[redacted]

[redacted] CIL ([redacted] CIL)
[redacted] m² @ £[redacted] per m² (index [redacted]) = £[redacted]
£[redacted]

4. The Appellant requested a review under Regulation 113 to the CA on [redacted]. The CA responded on [redacted] with a Regulation 113 upholding the CIL charge.

5. On [redacted], the Valuation Office Agency received a CIL appeal made under Regulation 114 (1) from the Appellant. The Appellant contends that the CA has applied the incorrect CIL rates when calculating the CIL liability to [redacted] building of the development. Specifically, the Appellant contends that the residential CIL rates of £[redacted] and £[redacted] (respectively, [redacted] and [redacted]) should not apply to:-

a) Any of the medical/care area elements – the 'all other uses' rate of £0 should instead apply.
b) Any of the commercial facilities that are open to the public – the commercial rate of £[redacted]/£[redacted] should instead apply.
c) Any plant associated with the health/medical use.

The make-up of the Phase A2 ([redacted], above ground) net chargeable area of [redacted] m² in the Liability Notice comprises of:

Residential Prime = [redacted] m²
Total Chargeable Area GIA = [redacted] m²

The Appellant contends that the medical and commercial areas in [redacted] do not have a residential use and should not be treated the same as the residential individual units for CIL purposes. Furthermore, the appellant contends that the plant areas should be equitably apportioned between the 3 uses categories in [redacted] building – residential, commercial and all other uses - such that CIL is not charged on all of the plant GIA at the Residential Rate (but at the Commercial or "all other uses" nil CIL Rate for the relevant and proportionate allocation).

The Appellant contends that chargeable area of [redacted] m² should be calculated based on the following rates, including the proportionate share of the plant areas in the allocation below:

(i) [redacted] m² of commercial plus [redacted] m² of plant - £[redacted] and £[redacted]
(ii) [redacted] m² of care plus [redacted] m² of plant - £0 [redacted] and £0 [redacted]
(iii) [redacted] m² of residential plus [redacted] m² of plant - £[redacted] and £[redacted]

As a secondary contention, the Appellant contends that in the alternative, the plant areas should be exempt from CIL. This is because the reference to "building" in CIL Regulation 6(2) must be construed as meaning "a building or any part of a building" into which people go only intermittently for the purpose of inspecting or maintaining fixed plant or machinery. There is no definition of "building" in the CIL Regulations and the Appellant further contends that reference needs to be made to the definition of "building" in s336 of the Town and Country Planning Act 1990 (TCPA) when interpreting Regulation 6(2) of the CIL Regulations. The TCPA defines a "building" as follows:

"includes any structure or erection, and any part of a building, as so defined, but does not include plant or machines comprised in a building

6. The CA contends that the CIL charge has been correctly calculated and points to the conclusions made in the Planning Inspectorate's decision letter, dated [redacted]. Citing the Planning Inspectorate's decision, the CA contends that:-

    - The Planning Inspector in his appeal decision letter was specific in describing the use class development at [redacted] as C3.

    - The appeal decision letter does not grant permission for a mixed use development.

    - The description in the CIL regulations of what constitutes a building is clear and cannot be interpreted to mean a part of a building, reference to section 336 of the TCPA 1990.

Primary Dispute

7. At the heart of the matter, the basic dispute between the parties is the treatment in the rates of the GIA Chargeable Area. Of note, there would not appear to be any dispute between the parties on the *calculation* of the GIA.

The Appellant contends that the care element should be based on a £0 rate instead of £[redacted] and £[redacted] (respectively [redacted] and [redacted]). In support of this contention, the Appellant cites that Extra Care development (otherwise known as housing with care) is a specialist form of accommodation for older people that is different from general needs housing. It has additional development costs and larger communal and non-saleable areas, such as medical suites, that mainstream housing developments do not have.

Furthermore, the Appellant points to the planning statement, phasing plans and the operating plan for [redacted] Extra Care building, that not all areas within the building have a residential use or are uses that could, in the normal course, be considered ancillary to residential accommodation. Furthermore, the care that is provided to the residents of [redacted] building is not minimal (it is at least 2.5 hours per week) or optional. It is only those residents that are assessed as having a medical need requiring care that qualify to live in [redacted]. The Appellant contends that it is specialist accommodation for older persons, that is different from general needs housing that is age restricted.

8. In this instance, the key document in arriving at my CIL appeal decision, is the Planning Inspectorate's decision, dated [redacted]. It is the document which has triggered the planning permission under Regulation 5 of the CIL Regulations 2010; as such, I must have regard to its content and conclusions. I elaborate on the inspector's conclusions as follows:-

   The Planning Inspectorate's decision addresses the use class of '[redacted]' in the approved appeal decision. In addition, C2 and the C3 use class within the Use Class Order (UCO) are also defined within the planning inspector's decision.

   The UCO defines the C3 use class 'dwellinghouses', as follows:

   "Use as a dwellinghouse (whether or not a sole or main residence) by –

   (a) a single person or by people to be regarded as forming a single household;
   (b) not more than six residents living together as a single household where care is provided for residents; or
   (c) not more than six residents living together as a single household where no care is provided to residents (other than a use within class C4)."

   Within paragraphs 38 to 47 of the appeal decision, the planning inspector explores and addresses the use class of '[redacted]' in detail. I see no merit in repeating the content and exploration of the use class aspect in my decision, save for the inspector's final conclusion on the matter. Of note, the inspector concludes in paragraph 47 that the subject Extra Care facility comprises a block of Class C3 dwelling houses with ancillary or incidental communal facilities. I find this conclusion compelling and is my primary reason in arriving at my conclusion that the CA's application of the residential rates of £[redacted] and £[redacted] on all the three GIA categories is correct.

Secondary Dispute

9. I shall now turn to the Appellant's secondary contention that in the alternative, the plant areas should be exempt from CIL.

10. The Planning Act 2008, Part 11 Section 209 defines development for CIL purposes as "*anything done by way of or for the purpose of the creation of a new building, or anything done to or in respect of an existing building*."

11. There is no definition given to the word "building" within the CIL Regulations, other than it expressly excludes in Regulation 6(2) :-

    i. a building into which people do not normally go,
    ii. a building into which people go only intermittently for the purpose of maintaining or inspecting machinery, or
    iii. a building for which planning permission was granted for a limited period.

12. The CIL Regulations do not provide a definition of building and so the only apparent option available is to refer to the dictionary for a clear definition as to what constitutes a building.

13. The Shorter Oxford English Dictionary, 6th Edition provides the 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*." An alternative dictionary definition is "*a structure with a roof and walls, such as a house or factory*."

    Having regard to this dictionary definition and in consulting the plans, I have concluded that the proposed plant area (which clearly forms part of a basement area of the development) readily falls within the definition of a "building" and comprises part of a building. Furthermore, I agree with the CA, that for CIL purposes, the interpretation of a reference to section 336 of the TCPA 1990 in respect of part of a building is incorrect and inappropriate. What is required here is an assessment of CIL under the provisions of the CIL Regulations. In conclusion, I have determined that the plant area is not exempt and the CA has ascribed the correct rate to the chargeable area.

Decision

14. In considering the facts of the case, based upon the information submitted by the parties, I have determined that the CA's calculation of the CIL charge is correct.

15. 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
Principal Surveyor
RICS Registered Valuer
Valuation Office Agency
14th October 2021