Appeal Decision

by [redacted] BA Hons, PG Dip Surv, MRICS

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

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

Email: [redacted] @voa.gov.uk

Appeal Ref: 1784156

Address: [redacted]

Development: Variation of condition 2 and 18 (in accordance with approved drawings) pursuant to planning permission dated [redacted] ref [redacted] (demolition of existing buildings and erection of a part four / five storey residential building to provide 5 X 1 bedroom, 2 X 2 bedroom and 1 X 3 bedroom flats, and flexible commercial space (Class A1/A20 on ground floor with associated landscaping roof terraces / balconies, cycle and refuse storage.) to allow amendments to layout of [redacted], and alterations to lift overrun and smoke shaft.

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

a. The Decision Notice issued by [redacted] on [redacted].
b. The Decision Notice issued by [redacted] on [redacted].
c. The CIL Liability Notices (references [redacted] and [redacted]) issued by the CA on [redacted].
d. The appellant's request for a Regulation 113 review dated [redacted].
e. The CA's Regulation 113 review decision dated [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] together with documents and correspondence attached thereto.
h. The appellant's comments on the CA's representations dated [redacted].
i. CIL Liability Notice (reference [redacted]) dated [redacted] issued in respect of planning permission [redacted], provided by the appellant on the [redacted] at my request.

2. Planning permission (reference [redacted]) (the amended permission) was approved by [redacted] on [redacted]. The permission was for the variation of conditions [redacted] and [redacted] of an earlier planning permission (reference [redacted]) granted on [redacted] (the original permission).

3. CIL liability notice [redacted] had been issued in respect of the original permission on the [redacted] stating a CIL liability of £[redacted].

4. On [redacted], the CA contacted the appellant by email advising them that they would shortly be issuing a new CIL notice. The email explained that whilst the S73 application granted for the amended permission did not propose any additional floorspace, the CA during their comparison required under S73, had realised that an error had been made in the calculation of the CIL liability in respect of the original permission. That error being that the lift overrun had been mistakenly excluded from the Gross Internal Area (GIA).

5. On [redacted], the CA issued two Liability Notices ([redacted] the Default Liability Notice in respect of the original permission and [redacted] the No Assumption Liability Notice) in respect of the amended permission. Both stated a revised liability of £[redacted].

6. On [redacted], the appellant wrote to the CA requesting a review of the calculation of the chargeable amount pursuant to Regulation 113 of the CIL Regulations.

7. The CA issued their regulation 113 decision on the [redacted] confirming the liability to be £[redacted].

8. The appellant submitted an appeal to the Valuation Office Agency (VOA) on [redacted] under Regulation 114 (chargeable amount appeal) proposing a CIL charge of £[redacted] in line with the sum stated in Liability Notice [redacted].

Grounds of Appeal

9. The appellant is of the view that the chargeable amount detailed in the liability notices dated [redacted] has been calculated incorrectly. The appeal centres around the inclusion of 3 square metres (sqm) of space relating to a lift overrun housed on the roof of the development and shown on drawing [redacted].

10. The appellant is of the view that this 3 sqm of space should not be included within the GIA. The appellant contends that the roof space is not a floor therefore 2.12 of the RICS Code of Measuring Practice 6th edition (COMP) should not apply as the CA have asserted. 2.12 states, "voids over stairwells and lift shafts on upper floors" would be included in GIA. The appellant points out that rooms with vaulted ceilings (even if that area of the roof projects above roof level of other parts of the building) do not incur CIL charges and the appellant likens the lift overrun to a vaulted ceiling. The appellant goes on to explain that chimneys and smoke shafts do not incur CIL and a lift overrun is a similar functional structure. The appellant draws attention to the fact the lift overrun projects only 600-700 millimetres above roof level advising this is no more than any access hatches, skylights, smoke shafts and AOVS (Automatic Opening Vent Systems) none of which are chargeable.

11. The CA contend this 3 sqm should be included within the GIA of the chargeable development. They advise they interpret the COMP to include voids over lift shafts on each floor level including roof levels. They point to 2.9 in the COMP which states "Lift rooms, plant rooms, fuel stores, tank rooms which are housed in a covered structure of a permanent nature, whether or not above the main roof level" are to be included within the GIA.

12. The CA have also explained why they consider the roof to be classed as a floor level. They opine that it is a floor level because it is a level in which associated utilities (such as vents and lift overruns) are situated. They cite 2.9 of the COMP to support this view. They contend, "the proposed lift overrun is clearly situated on the main roof level and therefore the CA concluded this makes the roof a useable built out level of the proposed building."

13. The CA advise they see the lift overrun as a space which stores mechanical equipment linked with the use of the elevator and are of the opinion this makes it different to a vaulted ceiling.

14. Finally, the CA respond to the appellants point about the projection of the overrun only being 600-700mm. They advise they have had regard to 2.14 which states, "Areas with a headroom of less than 1.5m" fall to be included within the GIA.

Decision

15. It is noted that the only area of disagreement between the parties is the inclusion of this 3 sqm of space upon the roof level occupied by the lift overrun. Neither party has raised further issue pertaining to the calculation of the remaining GIA of the chargeable development, nor have any queries been raised over charging rates, indexation and other items that may give rise to discrepancies relating to the chargeable amount. It is therefore assumed the parties are in agreement on these points.

16. Therefore, the issue before me is to determine whether this 3 sqm lift overrun should be included within the GIA. Gross Internal Area is not defined within the CIL Regulations it is therefore accepted practice to use the RICS Code of Measuring Practice 6th edition (COMP) definition for CIL purposes. GIA is defined as "the area of a building measured to the internal face of the perimeter walls at each floor level."

17. I agree with the appellant here, the roof level cannot be considered to be a floor level to be included within the GIA. There are no perimeter walls that would allow the measurement of the roof space to be carried out. The only part of the roof with internal walls to measure to would be the lift overrun itself. Therefore, I do not agree with the CA that 2.12 means the inclusion of voids over stairwells and lift shafts on upper floors can be extended to the roof.

18. Whilst I can understand why the CA have interpreted 2.9 of the COMP to mean that lift overruns should be included as it states, "Lift rooms, plant rooms, fuel stores, tank rooms which are housed in a covered structure of a permanent nature, whether or not above the main roof level" will be included, I do not consider the intention here was for a lift overrun to be included.

19. The Cambridge Dictionary defines a room as, "a part of the inside of the building that is separated from the other parts by walls, floors and a ceiling." A lift overrun is not a room, it is a void that contains the lift car and its machinery when the floor of the car is level with the upper finished floor and also affords a maintenance engineer protection whilst working on top of the car. It cannot have a floor as this would prevent the lift

accessing the space in question. Therefore, I am of the opinion a lift room is something different to a lift overrun which cannot be said to constitute a room due to the absence of a floor.

20. Another pertinent point is that a lift overrun does not have any permanent means of access, with access being gained through the top of the lift car only. For that reason, I would determine this area should be excluded from the GIA in the same way as mezzanine floors without permanent access are excluded.

21. The Community Infrastructure Levy (CIL) (Amendment) (England) (No. 2) Regulations 2019 (the '2019 Regulations') came into force in England on 1 September 2019. The new Regulation 5 amends Regulation 40 to now require the CA to calculate the amount of CIL payable ("chargeable amount") in respect of a chargeable development in accordance with the provisions of Schedule 1. Schedule 1 Part 2 sets out the basis of the calculation of the chargeable amount for "amended" planning permissions, these are defined under Regulation 3(1) of Schedule 1 Part 2 as 'Where a planning permission (B) for a chargeable development, which is granted under section 73 of TCPA 1990, changes a condition subject to which a previous planning permission (A) for a chargeable development was granted'. Regulation 1 of the 2019 Regulations requires that the amendments in Regulation 5 (and Schedule 1) of the 2019 Regulations apply in relation to a planning permission granted on or after the commencement date of 1 September 2019, or a liability notice, whenever issued, in respect of such a planning permission.

22. It is clear that whilst decision notice [redacted] does not specifically mention s73, it does relate to a planning permission which changes a condition subject to which a previous planning permission was granted. As such it is an 'amended permission' and CIL will fall to be assessed under Schedule 1 Part 2 of the 2019 Regulations.

23. Part 2 paragraph 3(1) of the CIL regulations states *'Where a planning permission (B) for a chargeable development, which is granted under section 73 of TCPA 1990, changes a condition subject to which a previous planning permission (A) for a chargeable development was granted, then—*

(a) where the notional amount for B is the same as the notional amount for A, the chargeable amount for the development for which B was granted is the chargeable amount shown in the most recent liability notice or revised liability notice issued in relation to the development for which A was granted;

(b) where the notional amount for B is larger than the notional amount for A, paragraph 4 applies; and

(c) where the notional amount for B is smaller than the notional amount for A, paragraph 5 applies.'

24. Sub-paragraph 2 defines that '*the notional amount for A is the amount of CIL that would be payable in relation to the development for which A was granted, calculated in accordance with paragraph 1, minus any applicable relief for the development for which A was granted' and*

25. Sub-paragraph 3 defines that *'The notional amount for B is the amount of CIL that would be payable in relation to the development for which B was granted, calculated in accordance with paragraph 1 (as modified by sub-paragraph (4)), minus any applicable relief for the development for which B was granted (as modified by sub-paragraph (5)).*

26. Subparagraph (4) then states that *'For the purposes of calculating the notional amount for B, paragraph 1 applies as if—*
(a) B first permits development on the same day as A;
(b) IP for B were the index figure for the calendar year in which A was granted;
(c) a reference to a relevant charging schedule were a reference to the charging schedule of the charging authority which was in effect—
(i) at the time A first permits development; and
(ii) in the area in which the development will be situated.

27. Paragraph 1, referred to within the sections above, sets out the calculation of CIL for 'standard cases' where the amount of CIL chargeable at a given relevant rate (R) must be calculated by applying the following formula—

$$\frac{R \times A \times I_P}{I_C}$$

where—
A = the deemed net area chargeable at rate R, calculated in accordance with subparagraph (6);
IP = the index figure for the calendar year in which planning permission was granted; and
IC = the index figure for the calendar year in which the charging schedule containing rate R took effect,

and the value of A must be calculated by applying the following formula—

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

where—
G = the gross internal area of the chargeable development;
GR = the gross internal area of the part of the chargeable development chargeable at rate R;

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
(ii) for the second and subsequent phases of a phased planning permission, the value Ex (as determined under sub-paragraph (7)), unless Ex is negative, provided that no part of any building may be taken into account under both of paragraphs (i) and (ii) above.

28. As I have concluded that the 3 sqm of space associated with the lift overrun should not be included within the GIA of the chargeable development, I agree with the appellant

the original liability notice [redacted] served in respect of planning permission A was correct.

29. Following the calculation set out above means that the notional amount for B is the same as the notional amount for A. Therefore, sub-paragraph (a) of Part 2 paragraph 3(1) of the CIL Regulations applies and, "the *chargeable amount for the development for which B was granted is the chargeable amount shown in the most recent liability notice or revised liability notice issued in relation to the development for which A was granted;"* The correct CIL liability notice in relation to development A is [redacted].

30. On the basis of the facts in this case and the evidence before me, I therefore find in favour of the appellant and determine a CIL charge of £[redacted].

[redacted] [redacted] BA Hons, PG Dip Surv, MRICS
RICS Registered Valuer
Valuation Office Agency
01 February 2022