Appeal Decision

by [redacted] MRICS

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

Valuation Office Agency - DVS
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Appeal Ref: 1790876

Planning Permission Reference: [redacted]

Location: [redacted]

Development: The demolition of existing buildings (save for the Grade II barn) and erection of four houses with ancillary coach house / garages and landscaping together with the repair and refurbishment of the Grade II barn.

Decision

I determine the Community Infrastructure Levy (CIL) payable in this case calculated at £[redacted] ([redacted]) to be correct, and the Appeal is therefore dismissed.

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. An Appeal Decision reference [redacted] and [redacted] issued by the Planning Inspectorate dated [redacted] in relation to two previously refused planning applications Ref [redacted] and [redacted] dated [redacted]. The Inspector's decision was to allow "*demolition of existing buildings (save for the Grade II barn) and erection of four houses (3 new dwellings) with ancillary coach house/garages and landscaping together with the repair and refurbishment of the Grade II barn and its incorporation as part of the dwelling house to be erected on Plot 2*."
    b. The CIL Liability Notice [redacted] issued by the CA dated [redacted] with CIL Liability calculated at £[redacted]
    c. The Appellant's request to the CA dated [redacted] for a Regulation 113 review of the chargeable amount.
    d. The CA's decision dated [redacted] on its Regulation 113 review.
    e. The CIL Liability Notice reference [redacted] issued by the CA dated [redacted] with CIL Liability calculated at £[redacted]

f. The CIL Appeal Form dated [redacted] submitted by the Appellant under Regulation 114, together with documents and correspondence attached thereto dated [redacted] and [redacted]. A claim for the award of costs is also made by the Appellant, but no detail for the latter has been submitted.
g. The CA's representations to the Regulation 114 Appeal dated [redacted] together with the Appellant's response dated [redacted].

Background

2. An Appeal Decision reference [redacted] and [redacted] was issued by the Planning Inspectorate dated [redacted] in relation to two refused planning applications Ref [redacted] and [redacted] dated [redacted]. The Inspector's decision was to allow "*demolition of existing buildings (save for the Grade II barn) and erection of four houses (3 new dwellings) with ancillary coach house/garages and landscaping together with the repair and refurbishment of the Grade II barn and its incorporation as part of the dwelling house to be erected on Plot 2*."

3. A CIL Liability Notice reference [redacted] was issued by the CA dated [redacted] with CIL Liability calculated at £[redacted] in accordance with [redacted] - [redacted] and [redacted] Local areas CIL Charging Schedule, which took effect on [redacted]. The Liability Notice states the development had been granted approval on [redacted] (the date of the CA's original decision regarding the planning application, which was later subject to the Planning Inspector's appeal decision).

4. The Appellant made a request to the CA on [redacted] for a Regulation 113 review of the chargeable amount. They state "*Based on these updated floor areas …. the existing GIA to be* [redacted] *m2 all of which will be demolished, save for building 4 which will be subject to a change of use as part of the new Plot 2 house. The GIA of the approved development is* [redacted] *m2. The net additional GIA will be* [redacted] *m2*".

5. The CA issued the outcome of its Regulation 113 review of the chargeable amount on [redacted] commenting "*I am content to agree the GIAs of the proposed buildings as listed in the "EXISTING BUILDINGS AND PROPOSED DEVELOPMENT GIA SCHEDULES" document you supplied. My measurements agree more with the original CIL Team member's measurements but as the discrepancies from your figures are reasonably small I am content to agree your figures with an overall proposed GIA of* [redacted] *m2*."

6. The CA further commented "*We would not usually accept a Statement of Truth, as you supplied, and we would normally expect an affidavit to be provided. However, we will accept this, along with the Council Tax bill as evidence of the continuous lawful use of the dwelling house (Building 1 on your existing buildings schedule). However, I have concluded that the evidence does not, and cannot, show the continuous lawful use of the other existing buildings. It is clear from the original Officer's Report and the Planning Inspector's Decision Notice (and indeed the statement of truth) that the use of the buildings for the three years prior to the determination (and since* [redacted]*) was 'commercial vehicle related activity including maintenance breaking and storage' and not agricultural use. The 6 months continuous lawful use of the building for agricultural purposes therefore has not, and cannot, be evidenced*."

7. The CA concluded "*I have concluded therefore that the demolishment credit will be for* [redacted] *m2. The chargeable area is therefore* [redacted] *m2 -* [redacted] *m2 =* [redacted] *m2*".

8. A CIL Liability Notice [redacted] was issued by the CA dated [redacted] with CIL Liability calculated at £[redacted]

9. An appeal under Regulation 114 against the chargeable amount dated [redacted] was submitted to the VOA on the same date, together with a claim for the award of costs, but no detail for the latter has been submitted.

Appeal Grounds

10. The appeal is made on the grounds that the chargeable amount has been calculated incorrectly. It is the Appellant's contention that the GIA of existing lawful in use buildings applied to the calculation of CIL liability is incorrect and should cover all the buildings on site rather than just building 1 (the dwelling house).

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

Consideration of Appeal Grounds

12. This appeal arises from disagreement surrounding the issue of identifying the lawful in-use buildings as a result of Schedule 1 of the CIL Regulations 2010 (as amended), which provides for the deduction or off-set of the GIA of retained parts of existing in-use buildings from the GIA of the total development in calculating the CIL charge (a KR (i) deduction).

13. Schedule 1 of the CIL Regulations 2010 (as amended) Part 1 – standard cases – 1 (10) 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 6 months within the period of three years ending on the day planning permission first permits the chargeable development.

14. It would appear there is no dispute between the parties as to the principle of off-setting the GIA of existing buildings against the total GIA of the proposed development, but the identification of the relevant in-use buildings, and thus their total GIA for off-set purposes, remains a matter of dispute between the parties.

15. The Appellant considers that the GIAs of all the buildings within the site including the Grade II listed timber-framed barn should be deducted as part of the calculation of the chargeable amount, and refers to Schedule 1 of the CIL Regulations 2010 (as amended) Part 1 – standard cases – 1 (10) which defines an "in-use building" as a building which:

    (i) is a relevant building (i.e. one which is situated on the relevant land on the day planning permission first permits chargeable development);
    And
    (ii) which contains a part that has been "in lawful use" for a continuous period for at least six months within the period of three years ending on the day planning permission first permits the chargeable development.

16. In accordance with the above, the relevant period of "at least six months" of continuous lawful use would fall within the three-year period [redacted] to [redacted].

17. The Appellant has submitted a "statement of truth" dated [redacted] signed by [redacted] which confirms that "*the buildings have been in mixed residential and commercial use continuously by the current tenant for the three years up to the date of the grant of planning permission on* [redacted]." This statement includes a Council Tax Bill dated [redacted] for [redacted] [redacted] for the sum £[redacted]

18. The Appellant argues that following the Planning Inspector's decision reference [redacted] and [redacted] dated [redacted] the site is "previously developed land" (PDL). They argue that

as it was not disputed that the site had been at one time a farmyard, to make a finding that the site was PDL it was necessary to find that there had been a subsequent material change of use to a non-agricultural use, and that the lawful use of the land was not agriculture or forestry or had been abandoned. The Appellant argues that use of the site for vehicle-related activities has taken place since at least [redacted] and the vehicle-related use was therefore lawful and the site, excluding the dwelling house, has not been used for agricultural purposes for over 40 years.

19. The Appellant reasons that in finding that the site was PDL, the Inspector must necessarily have accepted that:

    a. the change of use of the former agricultural buildings from agriculture to car repairs was now immune from enforcement by operation of section 171B(3) of the Town and Country Planning Act 1990 and, therefore, lawful.
    b. those "current" vehicle activities were "ongoing" as at the time of his site inspection [[redacted] and [redacted]].

20. A much earlier Planning Officer's report reference [redacted] dated [redacted] notes that "*the site and the building in question has not been used for agricultural purposes….on* [redacted] *or for a considerable time prior to that. It is also evident that the site and building has not then remained unused following the cessation of the agricultural use, but rather the site and building has been used for a vehicle repair business*."

21. The Appellant argues that a previous planning application in [redacted] for change of use is "*entirely consistent with the use having changed*". They refer to the above Planning Officer's [redacted] report in connection with an application seeking confirmation from the LPA as to whether or not the proposed change of use of the existing agricultural building and land to residential use requires further permission. The Officer's report states that the "*use* [non-agricultural] *was already taking place*" and "*had taken place for a considerable time prior to that*" and "*continued to operate from the site and building*", which they argue confirms that the non-agricultural use had taken place continuously for more than 10 years, is immune from enforcement, and is therefore lawful. They contend that this is echoed in the Planning Inspector's [redacted] decision.

22. The CA argue that the Inspector's finding that the site met the definition of PDL does not determine that the use was lawful, only that it was not agricultural. The definition of previously developed land in the Glossary at Annex 2 to the National Planning Policy Framework 2021 is as follows:

    "Land which is or was occupied by a permanent structure, including the curtilage of the developed land (although it should not be assumed that the whole of the curtilage should be developed) and any associated fixed surface infrastructure. This excludes: land that is or was last occupied by agricultural or forestry buildings; land that has been developed for minerals extraction or waste disposal by landfill, where provision for restoration has been made through development management procedures; land in built-up areas such as residential gardens, parks, recreation grounds and allotments; and land that was previously developed but where the remains of the permanent structure or fixed surface structure have blended into the landscape."

23. The CA argue that in order to qualify as PDL all that is required, and all that the Inspector in this case determined, is that the permanent structures were not last occupied by agricultural buildings, but the Inspector made no finding of the lawfulness of the alternative uses.

24. The CA also notes that there is no suggestion within the Inspector's finding of PDL that the use was continuous or had to have been continuous for a specific period of time sufficient to acquire immunity from enforcement action and, therefore, lawfulness. They

contend that the Appellant's statement erroneously claims in paragraph 16 that the Inspector must necessarily have accepted the Appellant's case that "*the change of use of the former agricultural buildings from agriculture to car repairs was now immune from enforcement by operation of section 171B(3) of the Town and Country Planning Act 1990 and, therefore, lawful.*" They argue that this is an incorrect interpretation of the Inspector's findings when at paragraph 11 the Inspector also states: "*The Council eventually failed to succeed in enforcement action against unlawful uses on the site between* [redacted] *and* [redacted] *because the activity had ceased.*"

25. The CA argue that the Inspector therefore demonstrably accepted the CA's position that an Enforcement investigation was concluded in [redacted] and resulted in the finding that the unlawful use (that of vehicle related activities) had ceased and hence no further enforcement action was taken because there was no unauthorised use against which to enforce. As the unauthorised vehicle related operations ceased for a period of time in [redacted], they would not be immune from enforcement under the 10 year rule by operation of section 171B(3) of the Town and Country Planning Act 1990.

26. The CA also contend that there was no finding of fact by the Inspector as to the lawful use, nor whether any "vehicle related activities" currently taking place on site had been part of any broader mixed use of the site (for example, encompassing residential use of the dwelling house) so that it formed one planning unit, or whether any other uses had also formed part of a mixed use but subsequently ceased, which would amount to a material change of use of the land. They further argue that the term "vehicle related uses" is in itself ambiguous and can cover uses within Class B1 (such as valeting), B2 (such as paint-spraying), B8 (storage of vehicle parts) and even *sui generis* mixed uses. Therefore, there is no clarity, nor Inspectorate determination, as to whether the same vehicle related use continued for any defined period, or whether there were further material changes of use.

27. The CA contends that due to the periods of time as accepted by the Inspector, when the vehicle uses were not merely dormant but had ceased so that enforcement action could not be taken, the lawful use of the land and buildings (excluding the dwelling) was agricultural. They argue that any vehicle related use which the Inspector found to be taking place at the time of their site visit was not a lawful use, as it had not continued uninterrupted for a ten year period, so as to render it immune from enforcement action. They argue that the material change of use only took place after the Council's site visit in [redacted]. They contend that the Appellant's claims that the CA's acceptance of [redacted]'s Statement of Truth that buildings on the site were in vehicle-related uses for three years prior to the determination of the planning appeal, or that there was a car repair workshop on site in [redacted] and/or [redacted], do not support the claimed lawfulness of such uses, due to their cessation in [redacted].

28. The CA's calculation of the chargeable GIA for CIL purposes is therefore:

    GIA of the proposed development [redacted] *m2*
    Less
    Existing Buildings GIA [redacted] *m2* (for building 1 – the dwelling house)
    = [redacted] *m2 chargeable area*

29. The Appellant's proposed chargeable GIA is:

    GIA of the proposed development [redacted] *m2*
    Less
    Existing Buildings GIA [redacted] *m2* (from the Appellant's schedule of existing buildings)

(This total excludes building 4 (to be retained), which has a Gross External Area of [redacted] m2 – the Gross Internal Area is estimated to be [redacted] m2 and should thus be added to the [redacted] m2 above)

Thus total Existing GIA [redacted] *m2*
= [redacted] *m2 chargeable area*

30. In their request for a Regulation 113 review on [redacted] the Appellant had quoted an existing building GIA of [redacted] m2 including, it is assumed, building 4. The Existing and Proposed Building Area Schedule they submitted as [redacted] with their Appeal papers on [redacted] states a total GIA excluding building 4 of [redacted] m2. This would indicate they believe building 4 to have a GIA of [redacted] m2 and I have thus applied a rounded GIA of [redacted] m2 to ascertain their view on the likely chargeable area above.

31. It is noted that in their Regulation 113 review request the Appellant stated the "*Net additional GIA will be* [redacted] *m2*", which would indicate a total existing GIA of [redacted] m2 – there is thus a discrepancy of [redacted] m2 between the two existing building GIA totals which is assumed to be due to the building 4 GIA. The Existing and Proposed Building Area Schedule submitted by the Appellant includes a specific GEA of [redacted] m2 for building 4 – this would represent an adjustment of some 8% to arrive at the GIA of [redacted] m2 I have estimated above, and this latter figure is therefore to be used for building 4 when establishing the total GIA for the existing buildings.

Decision on the Appeal

32. Although there is evidence of continuous use contained within [redacted]'s statement of truth dated [redacted] that states "*the buildings have been in mixed residential and commercial use continuously by the current tenant for the three years up to the date of the grant of planning permission on* [redacted]", this in itself does not prove that such use was lawful.

33. The Council Tax Bill dated [redacted] for [redacted] for the sum £[redacted] only proves that the dwelling house (known as building 1 on the Appellant's schedule of buildings) was in use as a dwelling, and it is indeed accepted by the CA that this should be treated as a lawful existing in-use building for CIL purposes.

34. Whilst the Appellant argues that use of the site for vehicle-related activities has taken place since at least [redacted], and that such use was lawful being in excess of 10 years duration and as supported by the Planning Inspector's [redacted] decision, Schedule 1 of the CIL Regulations 2010 (as amended) Part 1 – standard cases – 1 (10) requires that an "in-use building" contains a part that has been "in lawful use" for a continuous period for at least six months within the period of three years ending on the day planning permission first permits the chargeable development, which is [redacted].

35. The Town and Country Planning Act 1990 section 171B (Time limits) states: "*(3) In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach."*

36. The CA do not agree that the use of the buildings for vehicle related activities was lawful. Paragraph 10 of the Planning Inspector's decision states "*The current vehicle related activities have been ongoing since at least* [redacted]" but also at Paragraph 11 "*The Council eventually failed to succeed in enforcement action against unlawful uses on the site between* [redacted] *and* [redacted] *because the activity had ceased*".

37. Whilst the Planning Inspector acknowledges that "*The non-agricultural uses have clearly been ongoing for a very significant time*" he clearly states that by "[redacted] *… the activity*

had ceased" and there "*is no evidence of any further enforcement action being pursued since then*". He also notes "*The appellant asserts that agricultural use ceased prior to* [redacted] *but there is no firm evidence for this*."

38. The requirement of the TCPA 1990 section 171B is not therefore met, as whilst the buildings were used for vehicle related activities for some time, this would appear to have only been for a period of some six years between [redacted] and [redacted] when such use ceased, thus a period of ten years as per section 171B was not reached and any use for other than agricultural purposes remained open to enforcement action. Any use of the buildings for vehicle related activities was made without planning permission and was therefore unlawful.

39. It is my opinion that from all the information provided the buildings were not lawfully "in-use" for a continuous period within three years of the grant of planning permission on [redacted] and the "lawful use" requirement of Schedule 1 of the CIL Regulations 2010 (as amended) has not therefore been met, other than for building 1 (the dwelling house).

40. The GIA of the dwelling house (building 1) can therefore be off-set as a KR (i) deduction against the GIA of the proposed development for the purposes of calculating the CIL charge, but the GIA of the other existing buildings cannot be off-set against the GIA of the proposed development.

Calculation of CIL Liability

41. GIA of the proposed development [redacted] m2
    Less
    Existing Buildings GIA [redacted] m2 (for building 1 – dwelling house)
    = 1[redacted] m2 chargeable GIA
    X £[redacted] /m2 CIL Rate indexed to £[redacted] /m2
    = £[redacted] CIL Liability

Award of Costs

42. Under CIL Regulation 121 "*The appointed person may make orders as to the costs of the parties to the appeal and as to the parties by whom such costs are to be paid*."

43. Such costs are normally awarded where the following conditions have been met:-

    1) a party has made a timely application for an award of costs
    2) the party against whom the award is sought has acted unreasonably and
    3) the unreasonable behaviour has caused the party applying for costs to incur unnecessary or wasted expense in the appeal process – either the whole of the expense because it should not have been necessary for the matter to be determined by the Secretary of State or appointed Inspector, or
    4) part of the expense because of the manner in which a party has behaved in the process

44. As it would appear the CA did not act unreasonably, under all the above circumstances I do not believe that an award for costs is appropriate in this case.

Decision on CIL Liability

45. On the basis of the evidence before me and having considered all the information submitted in respect of this matter, I therefore determine a CIL charge of £[redacted] ([redacted]) to be correct, and the Appeal is therefore dismissed.

[redacted] DipSurv DipCon MRICS
RICS Registered Valuer
Valuation Office Agency
11 April 2022