Appeal Decision

by [redacted] MRICS

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

Valuation Office Agency - DVS
Wycliffe House
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Durham
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Appeal Ref: [redacted]

Planning Permission Reference: [redacted]

Location: [redacted]

Development: Demolition of existing residential unit within agricultural building and retention of dwelling and associated building operations. Including installation of foul drainage system, installation of roof water drainage system and construction of wall and installation of cladding to enclose N.E elevation of existing agricultural building (partly retrospective).

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. Planning permission [redacted] granted by the CA on [redacted] for "*Demolition of existing residential unit within agricultural building and retention of dwelling and associated building operations. Including installation of foul drainage system, installation of roof water drainage system and construction of wall and installation of cladding to enclose N.E elevation of existing agricultural building (partly retrospective).*"
    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 Delegated Officer report of [redacted].
    e. The [redacted] ([redacted]) [acting in a delegated capacity for Local Authority Building Control] letter dated [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]
g. The CA's representations to the Regulation 114 Appeal dated [redacted] together with the Appellant's response dated [redacted] and [redacted].

Background

2. A planning application was submitted by the Appellant on [redacted] for "*Demolition of existing residential unit; construction of replacement dwelling; and associated building operations including installation of foul drainage system, installation of roof water drainage system and construction of wall and installation of cladding to enclose N.E elevation of existing agricultural building (part retrospective).*"

3. Planning permission [redacted] was granted by the CA on [redacted] with amended wording (to that contained in the original application) for "*Demolition of existing residential unit within agricultural building and retention of dwelling and associated building operations. Including installation of foul drainage system, installation of roof water drainage system and construction of wall and installation of cladding to enclose N.E elevation of existing agricultural building (partly retrospective).*"

4. Condition 3 of the planning permission states "*Within either three months of this decision or three months of first occupation of the hereby permitted dwelling, whichever is the sooner, residential use within the existing agricultural building shall cease, the building structures shown for the demolition on the drawing [redacted] entitled "Existing residential unit to be demolished" received by the LPA on [redacted] shall be demolished in totality, and the building shall be returned to solely an agricultural use*".

5. CIL Liability Notice reference [redacted] was issued by the CA dated [redacted] for the amount £[redacted] calculated as follows:-

   [redacted]
   Chargeable area [redacted] m2
   @ £[redacted] /m2 indexed at [redacted]
   £[redacted] /m2
   = £[redacted] CIL Liability

6. The Appellant requested a Regulation 113 review of the chargeable amount on [redacted] stating that the Officer's site visit took place on [redacted] and not [redacted] as stated in the Delegated Officer report of [redacted]. The Appellant also contends in this request that the building to be retained (Building B) is not yet complete, referencing the [redacted] ([redacted]) letter dated [redacted]. The request also refers to the electrical fit-out not being complete and there being no connections to the foul drainage system, along with incomplete internal finishes.

7. The CA advised the Appellant they could not deal with the Regulation 113 review within the statutory 14-day period and the Appellant should therefore submit an Appeal to the Appointed Person.

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

Appeal Grounds

9. The Appellant contends that the chargeable amount has been calculated incorrectly and allowing for off-set of the GIA of the existing residential unit (which they state has been in lawful use for a continuous period of at least six months within the three years immediately preceding the grant of planning permission) the chargeable amount would be nil.

Consideration of Appeal Grounds

10. The Appellant claims that GIA off-set should be applied for existing in use buildings that comprise an existing residential unit (contained within an agricultural building) that was granted a Certificate of Lawful use by the CA dated [redacted].

11. The Appellant advises that the proposed replacement dwelling is partly built, but incomplete, and accordingly only part of the proposed development was retrospective.

12. The Appellant contends that the question of whether the retrospective element of the chargeable development is or is not "complete" is a key consideration in the correct application of the CIL Regulations, and a key consideration to this appeal.

13. The CA refer to the two buildings as Building A and Building B:-

    Building A is an agricultural barn within which the Appellant had been living in two mobile homes joined together to form a dwelling situated within part of this barn since [redacted]. A Certificate of Lawfulness for residential use was granted for this purpose on [redacted] reference [redacted].

    Building B is the building to be retained / replacement dwelling, for which construction had commenced around [redacted] without planning permission. Retention of this dwelling together with a proposed small extension and other works was approved on [redacted] under permission [redacted]. This permission also included demolition of Building A together with the part of the agricultural barn that housed it, so that there would only be one residential unit left on the site.

14. The Appellant notes that the CA have treated the retrospective part of the chargeable development (Building B) as already completed, stating in their email dated [redacted] "*The retained building will be liable for CIL. There can be no off-set for demolition of the existing residential unit as the building to be retained is already completed.*"

15. The Appellant states that the chargeable development includes "*associated building operations including installation of foul drainage system, installation of roof water drainage system*" and these works refer to the replacement dwelling (Building B) and apply equally to the constructed and not-yet constructed parts.

16. They refer to the planning officer's delegated report paragraph 3: site description proposal which notes: "*The proposed new dwelling house had been partially completed in* [redacted] *…but further works are proposed in this application to finish off the building….other associated works are also proposed such as the…foul drainage system…roof drainage system.*" The Appellant argues that these statements are inconsistent with the CA's view that the replacement dwelling is already complete.

17. The Appellant argues that the "chargeable development" is the development permitted by planning permission [redacted] and there are elements of the construction that have not been completed. The development is therefore not yet complete, and GIA off-set should therefore be available.

18. They refer to PPG1: "*completion for the purposes of self-build exemptions defined as the issuing of a compliance certificate for this development under either Regulation 17 of the Building Regulations 2010 or section 51 of The Building Act 1984*" and "*This evidence must comprise…proof of the date of completion – a copy of the building completion or compliance certificate for the home issued by Building Control*".

19. The Appellant states that on [redacted] they sent photographs to [redacted] (acting as agent to Local Authority Building Control), who responded by letter dated [redacted]: *"it would appear, from the information provided, that the dwelling, as it stands, is not yet fit for occupation*." The Appellant argues that Building B remains as per these photographs, and a further set of similar photographs dated [redacted] is also provided within the appeal papers.

20. The Appellant contends that from information they provided to the CA and to [redacted] the reason the latter concluded Building B is not yet fit for occupation is that installation of services for sanitation and drainage and waste disposal are either incomplete or do not exist. As no completion certificate has been issued on the building, it is not yet "complete" and they argue that CIL GIA off-set should therefore be available.

21. The Appellant further advises that Building B remains in the same incomplete condition as it was during the site visit of [redacted]. The have also submitted photographs taken [redacted] as follows:-

    - *Rear and front elevations – no rain water goods, no soakaway installed.*
    - *Internal – part of floor lifted and M&E still being installed (wiring etc).*
    - *Kitchen sink outlet pipe not connected to drainage pipe – missing elbow connector.*
    - *Utility room sink outlet pipe not connected to drainage pipe – missing elbow connector.*
    - *Exposed end of foul pipe adjacent to site allocated for septic tank (not installed).*
    - *Site for waste toilet and sink in bathroom – no w/c or sink installed.*
    - *Site for en-suite w/c and shower – neither installed.*
    - *Site for hand wash basin – pipework in place, but no basin.*
    - *Bath plumbing in place, but bath not installed.*

22. The Appellant proposes that the GIA of Building A currently in residential use but due for demolition is [redacted] m2. [redacted] solicitors' letter to the CA dated [redacted] this GIA is for two interlinked mobile home units situated within a barn, but they do not clarify whether the area is for the buildings only or includes the curtilage (garden). They also argue that the [redacted] Certificate of Lawfulness for this dwelling means it is "lawful" and will be demolished before the [redacted] m2 new dwelling is completed. They contend this is therefore an in-use building for CIL purposes.

23. The Appellant had also proposed that the GIA of Building B is [redacted] m2, and [redacted] confirmed at the time that a planning application would be made to retain/complete this area and demolish the [redacted] m2 Building A above.

24. The Appellant also comments in a later email to the CA dated [redacted] that Building B is to include an area as-built (ie retrospective permission sought) of [redacted] m2 plus the remainder (un-built at that time) – therefore they argue that as the chargeable development includes the proposed parts off-set should be permissible.

25. The CA response dated [redacted] was that "*There can be no off-set for demolition of the existing residential unit* [Building A] *as the building to be retained* [Building B] *is already completed.*" At that point the CA advised that the CIL charge would be [redacted] m2 @ £[redacted] subject to indexation = £[redacted]

26. Photographs taken on [redacted] and [redacted] by the Appellant and submitted as part of their response to the CA's case submission for this appeal appear to show a substantively completed building (B), but with some heating, plumbing and electrical work yet to be fully completed, as also shown in an earlier set of photographs taken on [redacted] referred to above.

27. The Appellant argues that the chargeable development is not restricted to just Building B but comprises the whole planning permission granted: "*Demolition of existing residential unit within agricultural building and retention of dwelling and associated building operations. Including installation of foul drainage system, installation of roof water drainage system and construction of wall and installation of cladding to enclose N.E elevation of existing agricultural building (partly retrospective)*."

28. They argue that the "development" includes not only the dwelling, but the foul drainage and roof drainage systems as well as associated works including a further bedroom and boot room to the building. They reason that as none of the associated works have been carried out the development has not yet been completed.

29. The Appellant notes that the CA submitted a photograph of Building B taken on [redacted] and assume the CA's intention was to demonstrate the building was completed. They also note that [redacted] inspected the building for Building Regulation purposes on [redacted]. A Planning Contravention Notice was issued on [redacted] under the Town and Country Planning Act, the content of which supports the content of the [redacted] photographs taken by [redacted].

30. The Appellant argues that even if the "development" consisted solely of Building B, the above information proves the building was not yet complete. They also note that despite undertaking two site visits in [redacted] and [redacted] the CA has not submitted any internal photographs of Building B.

31. The Appellant rebuts the CA suggestion that kitchen and sanitary goods may have been removed after installation, and pipes for drainage removed/disconnected, and points to the fact that the planned septic tank or treatment plant has not yet been installed.

32. The CA note that part of Building A was used for residential purposes without planning permission for some time before the certificate of lawfulness for residential use was granted on [redacted] and the CA advised the owner of its intention to issue an enforcement notice to remove Building B. Building B had been built and used without planning permission, and the CA state that it appears the family were living between both Building A and Building B.

33. The Appellant had asserted that Building B was immune from enforcement action as it had been completed more than 4 years previously, and a Planning Contravention Notice dated [redacted] signed by the Appellant states that Building B was substantially completed in [redacted] and that he and his family were currently living there. The CA state that from various site visits they consider the dwelling was not completed until [redacted] (when double glazed windows were fitted) or later, but the Appellant clearly states that he and his family were living in it in [redacted].

34. [redacted] Planning Committee resolved in [redacted] that if a planning application for retention of Building B was not submitted within 1 month of the Certificate of Lawfulness on Building A (subsequently issued on [redacted]) then an Enforcement Notice should be served on Building B to remove it from the land within 6 months. Although the Certificate of Lawfulness was approved on [redacted] and application [redacted] for retention of Building B was not submitted until [redacted] an enforcement notice was not served.

35. The CA comment that whilst an external photograph of Building B was taken by their officers on [redacted], they do not possess any photographs of the interior from either this site visit or the later visit in [redacted] They note it appears that when the external photograph is magnified flowers and other items can be seen on the windowsills.

36. The CA comment that Planning Application [redacted] was to retain the existing Building B and to add on a small extension and undertake various other works. They note that the wording of the proposal as submitted was amended in the planning permission granted because they considered that Building B was already complete and so the application was for "retention" of Building B and associated building operations.

37. The CA note that the Appellant had stated in the Planning Contravention Notice dated [redacted] that Building B was occupied and had been "*substantially completed in* [redacted]", and on [redacted] [redacted] (Planning Officer) and [redacted] (Enforcement Officer) carried out a site visit. The Appellant has submitted a letter from his agent to [redacted] in which he states that she and [redacted] agreed during the site visit that the proposed development had not been completed. The CA contend that it appears that the Appellant's recollection of that meeting differs from their staff member's recollection however, as there is an internal note from [redacted] dated [redacted] stating that "*dwelling (B) was completed when he recently carried out a site visit with* [redacted]".

38. The CA also note that at *point 25* of their statement the Appellant refers to the self-build exemption legislation to support their case, where it states the meaning of 'completed' is '*building completion certificate issued'* for that part of the legislation. In [redacted] the Appellant contacted Building Control / [redacted] and provided photographs (as submitted with their appeal) which show outlet/inlet pipes protruding from the dwelling and pipes coming up from the ground but not connected along with kitchen/sanitary ware not installed. On the basis of these photographs Building Control / [redacted] had advised that it would appear, from the information provided, that the dwelling as it stands is not yet fit for occupation. This was confirmed in a [redacted] letter from [redacted] / [redacted] stating that from the photographs submitted Building B "*is not currently capable of habitation*".

39. The CA continues to consider that Building B was completed however, and as such the demolition of Building A cannot be used as off-set against the CIL liability on Building B as the latter is already complete and the CIL Regulations require that demolition takes place before completion of the chargeable development: Schedule 1 Part 1 Reg 1 (6) E is *"…. (i) the gross internal areas of parts of in-use buildings that are to be demolished before completion of the chargeable development …"*

Decision on the Appeal

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

41. With regards to the planning application submitted and granted under permission [redacted], the CA's view is that the work under this permission mostly pertaining to Building B was complete when planning permission was retrospectively granted, and that the CIL chargeable amount must be calculated in accordance with standard cases in Schedule 1, Part 1 with no existing floor space used to off-set the CIL liability.

42. The Appellant contends that the works would need to have been fully completed to require retrospective s.73A planning permission, and as they were not complete the CA should not have treated this as a solely retrospective permission, and instead off-set the existing GIA against the chargeable area when calculating CIL.

43. The Delegated Officer report by [redacted] dated [redacted] in connection with planning application [redacted] followed a site visit in [redacted] and comments "*There can be no off-set for demolition of the existing residential unit as the building* [Building B] *to be retained is already completed*."

44. This report also states:-

"In the interest of clarity, at the time of the site visit undertaken by the former Case Officer and Enforcement Officer, the dwelling house had walls, windows and doors, a roof, a full internal layout and services including a kitchen, bathroom, lounge, bedrooms and additional amenity space. It is considered that the property has been built and at the time of the site visit could have been comfortably occupied. However, the application submission states that the dwelling is only partially completed."

45. This conflicts with the [redacted] (acting for Local Authority Building Control) letter dated [redacted] that states *"it would appear, from the information provided, that the dwelling, as it stands, is not yet fit for occupation*" which is supported by various photographs submitted by the Appellant.

46. The conflicting conclusions of the Delegated Officer report and [redacted] letter is further confused by the fact that a Planning Contravention Notice signed and dated [redacted] by the Appellant states that Building B was substantially completed in [redacted] and that he and his family were currently [redacted] living there.

47. Whilst any use of Building A for residential purposes that might occur would be lawful following the issue of the Certificate of Lawfulness on [redacted], this certificate does not in itself prove that such use actually took place during the relevant period for CIL purposes. It is noted that the Appellant has not provided any evidence to show that Building A was actually in continuous use for a period of at least 6 months within three years of the grant of planning permission on [redacted], and it is my opinion that the "lawful use" requirement of Schedule 1 of the CIL Regulations 2010 (as amended) which requires a period of at least 6 months continuous use is not therefore met.

48. It is clear from the CIL Liability Notice issued by the CA that the development granted permission under reference [redacted] was the basis for the CA's CIL calculation and is described as "*Demolition of existing residential unit within agricultural building and retention of dwelling and associated building operations. Including installation of foul drainage system, installation of roof water drainage system and construction of wall and installation of cladding to enclose N.E elevation of existing agricultural building (partly retrospective)*." It is of particular note that this permission refers to "*retention of dwelling*" in relation to Building B rather than granting permission to build or complete the dwelling, the insinuation being that the building is already in existence. The fact that the building was already in existence is supported by the findings within the Delegated Officer report following their site visit in [redacted] and the Appellant's own statement in the Planning Contravention Notice dated [redacted] that he and his family were living in Building B at the time he signed and dated that form.

49. S73A 1 and 2(c) allows permission to be granted retrospectively, and so I consider that in allowing planning approval for [redacted] the planning authority was exercising a power under section 73A of the TCPA 1990, as it was allowing development that had already been carried out. As such, the chargeable amount must be calculated in accordance with Schedule 1, Part 1 – Standard Cases - of the CIL Regulations.

50. The formula within Schedule 1 Part 1 is:-

$$\text{Net chargeable area} = GR - KR - \frac{(GR \times E)}{G}$$

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.

51. **Value *G*** (the GIA of the chargeable development): The Appellant has previously stated this to be [redacted] m2 total ([redacted] solicitors' letter to the CA dated [redacted] comprising an as-built area of [redacted] m2 plus the un-built remainder. This however relates to an earlier proposed scheme that was amended when the later planning application was submitted for permission [redacted]. The Planning Contravention Notice signed and dated by the Appellant on [redacted] states the dimensions of the blue hatched building on the attached plan (which is Building B) as [redacted] *m x* [redacted] *m,* which gives a GIA of [redacted] m2. It would appear this was for the completed building at the time, and the small extension proposed under permission [redacted] comprising a further bedroom and boot room is assumed to account for the difference against the total chargeable GIA of [redacted] m2 in the CA's calculation from the drawings provided for that planning application. It would therefore seem correct that this latter GIA should be utilised for CIL purposes.

52. **Value *GR*** (the GIA of the part of the chargeable development to be charged at rate R) is [redacted] m2 as above.

53. **Values *KR(i)* and *(ii)*** are both zero, as the in-use Building A is not being retained under planning permission [redacted] – indeed, Condition 3 specifically requires the demolition of Building A.

54. **Value *E(i)*** is stated by the Appellant as being [redacted] m2 for demolition (as per the [redacted] solicitors letter dated [redacted]). The CA did however query if this included the curtilage (ie gardens) or just the building, as GIA should only be for the building. The Certificate of Lawfulness for residential use granted on [redacted] under reference [redacted] refers to floor plan references [redacted] and [redacted] (Issue B) showing the barn and part used for residential purposes – the latter is edged red on Plan [redacted], and the CA have calculated this area to be [redacted] m2 GIA. However, as CIL Schedule 1 Part 1 requires that such areas "*are to be demolished before completion of the chargeable development*", and as Building B has been completed with Building A remaining in place, the value of *E(i)* must be zero.

55. **Value *E(ii)*** is not relevant here, as the planning permission is not phased.

56. Therefore, applying the formula within Schedule 1 Part 1 the net chargeable area is calculated thus:-

[redacted] *m2 – 0 m2 – ([redacted] m2 x 0)*

[redacted] *m2*

= [redacted] *m2 GIA chargeable area*

Calculation of CIL Liability

57. CIL Liability is calculated using rates and indices at [redacted] relevant at the date of planning permission [redacted] as:-

    [redacted]
    Chargeable area [redacted] *m2*
    @ £[redacted] */m2 indexed at* [redacted]
    £[redacted] */m2*
    = £[redacted] *CIL Liability*

Award of Costs

58. 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*."

59. 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

60. 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

61. On the basis of the evidence before me and having considered all of the information submitted in respect of this matter, I conclude that on the facts of this case the CIL charge should be £[redacted] ([redacted]) and the appeal is therefore dismissed.

[redacted] DipSurv DipCon MRICS
RICS Registered Valuer
Valuation Office Agency
10 May 2022