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: 1792893

Address: [redacted]

Proposed Development: Erection of a detached dwelling and associated works; Erection of an agricultural storage barn together with alterations to existing estate machinery barn; Erection of an agricultural estate management office building with attached car port and alterations to access and landscape including the siting of an underground diesel tank and construction of gates and piers all following demolition of outbuildings (revision of [redacted]).

Planning Permission Details: Granted by [redacted] on [redacted], under reference [redacted].

Decision

I determine that no Community Infrastructure Levy (CIL) should be payable in this case.

Reasons

Background

1. I have considered all the submissions made by [redacted] of [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) The Decision notice by [redacted], dated [redacted].
    b) The CIL Liability Notice (Reference: [redacted]) dated [redacted] for a sum of £[redacted].
    c) The Appellant's Grounds of Appeal document dated [redacted]).
    d) Planning Application plans of the subject property (location and drawing plans as part of application [redacted]).
    e) The Appellant's request for a Regulation 113 Review, dated [redacted].
    f) The CA's Regulation 113 Review, dated [redacted].
    g) The CIL Appeal form submitted to the VOA, under Regulation 114, dated [redacted].
    h) The CA's representations to the Regulation 114 appeal, dated [redacted].

i) The Appellant's response to the CA's representations, dated [redacted].

2. Planning permission was granted for the development on [redacted], under reference [redacted] (Permission B). Planning permission was originally granted under application [redacted] (Permission A) on [redacted] for:-

Erection of a detached dwelling and associated works; Erection of an agricultural storage barn together with alterations to existing estate machinery barn; Erection of an agricultural estate management office building with attached car port and alterations to access and landscape including the siting of an underground diesel tank and construction of gates and piers all following demolition of outbuildings.

Of note, the CIL chargeable amount for Permission A was £0 (zero).

3. On [redacted], the CA issued a Liability Notice (Reference: [redacted]) for a sum of £[redacted]. This was based on a net chargeable area of [redacted] m² comprised as follows:-

		Charging Schedule Rate
Residential Floorspace	- [redacted] m² @	£[redacted] (indexation at [redacted]) =£[redacted]
All Other Uses Floorspace	- [redacted] m² / [redacted] m² @	£0

4. On the [redacted], the Appellant requested a review of this charge within the 28 day review period, under Regulation 113 of the CIL Regulations 2010 (as amended). The CA responded on [redacted], stating that it was of the view that its original decision was correct and should be upheld.

Grounds of Appeal

5. On [redacted], the Valuation Office Agency received a CIL Appeal made under Regulation 114 (chargeable amount) from the Appellant, contending that the CA's calculation is incorrect. The Appellant is of the opinion that no CIL should be payable, contending that the provisions of Regulation 74B - '*Abatement: implementation of a different planning permission'* should have been taken into account.

6. The Appellant's appeal can be summarised as follows:-

The Appellant opines that the previous application ([redacted]) should be taken into account when assessing the CIL charge, as per Regulation 74B. Under [redacted] (Permission A), the Appellant demolished buildings of [redacted] m² GIA and was authorised to commence construction of buildings of [redacted] m² GIA. As the new floorspace was less than the old, no CIL was payable. The Appellant opines that no CIL should be payable, contending that the provisions of Regulation 74B apply.

7. The CA disagrees, contending that it does not consider that the Appellant's request complies with the validity requirements set out in 74B(2) and 74B(3) – the previous granted planning permission ([redacted]) had a CIL chargeable amount of zero; consequently, no CIL payment was due or has been paid in relation to that permission. At the heart of the CA's contentions is that the request for abatement was not accompanied by proof of the amount of CIL that has already been paid – the CA contends that it does not consider that the requirement under Regulation 74B(3) to provide proof of the amount of CIL that has already been paid can be satisfied, where no payment has been made.

8. It appears that there is no dispute between the parties in respect of the applied Chargeable Rate per m² (or to the indexation) or the GIA measurements.

Provisions of Regulation 74B

9. The appellants have requested abatement of the CIL charge under Regulation 74B - *'Abatement: implementation of a different planning permission'* This states:-

"74B.—(1) This regulation applies where—
a) a chargeable development has been commenced under a planning permission (A);
b) a different planning permission (B) has been granted for development on all or part of the land on which the chargeable development under A is authorised to be carried out; and
c) the charging authority receives notice from a person who has assumed liability to pay CIL in relation to B that the chargeable development under A will cease to be carried out and that the chargeable development under B will commence.

(2) Where this regulation applies a person who has assumed liability to pay CIL in relation to B may request that the charging authority credits any CIL paid in relation to A against the amount due in relation to B."

(3) To be valid a request under paragraph (2) must be—
a) made before the chargeable development under B is commenced; and
b) accompanied by proof of the amount of CIL that has already been paid.

Furthermore, Regulation 74B (paragraphs 12 and 13) have additional demolition credit provisions:-

(12) Paragraph (13) applies where a request under paragraph (2) in respect of the amount due in relation to B is made within the period ending three years after the grant of A and that request is granted.

(13) Where this paragraph applies, any parts of buildings which—

a) were demolished under A,
b) were taken into account in reducing the chargeable amount in relation to A through the operation of regulation 40,
c) would have been taken into account under regulation 40 in relation to B had they not been demolished, and
d) are not otherwise taken into account under regulation 40, are to be taken into account under regulation 40 in relation to B as if they are parts of in-use buildings that are to be demolished before the completion of the chargeable development under B (or, if B is a phased permission, in relation to the first phase of B).

Decision

10. As per The CIL (Amendment) (England) (No. 2) Regulations 2019 (the '2019 Regulations') the CIL Regulations Part 5 Chargeable Amount, Schedule 1 defines how to calculate the net chargeable area. Part 1 applies to standard cases and Part

2 applies to 'amended' planning permissions granted under section 73 of the Town and Country Planning Act 1990 (TCPA 1990).

In this instance, the approved planning consent [redacted] was a fresh planning application submitted by the Appellant (rather than a variation under s73 of the TCPA 1990). Accordingly, the CIL calculations should be carried out in accordance with Part 1.

11. At the heart of this Appeal is the parties' different interpretation of Regulation 74B. The CA asserts that monetary payment must be made to benefit from the Regulation 74B provisions; the Appellant disagrees and cites that Reg 74B can apply, where the amount of CIL due / paid was zero. The Appellant further asserts that there is no stipulation that CIL must have been paid in the first instance, just a requirement that the request is made. The Appellant opines that this case satisfies Reg 74B - the request is deemed to be valid (under paragraph 74B (3)); was made before the chargeable development was commenced and accompanied by proof of the amount of CIL already paid – in this case £0 (zero) as per a letter which was submitted to the CA. The Appellant contends that the CA's interpretation of Regulation 74B in this instance results in an unfair and perverse CIL charge.

    In support of the CA's contention, the CA cites paragraph 139 of the CIL National Planning Guidance (as published by the Department for Levelling Up, Housing & Communities) :-

    "When can the abatement provisions, applicable to a completely new planning permission, be applied for?

    > *Development must have commenced (see regulation 7, and section 56(4) of the Town and Country Planning Act 1990, for the definition of 'commencement of development') under one planning permission, but not been completed, and the levy must have been paid in relation to that development."*

    [Paragraph: 139 Reference ID: 25-139-20190901 - Revision date: 01-09-2019]

    However, the Appellant cites paragraph 142 of the CIL National Planning Guidance (as published by the Department for Levelling Up, Housing & Communities) :-

    What about buildings that were demolished in relation to the first development on site?

    > *When calculating an abatement under regulation 74B, demolition 'credit' from the first development (A) permitted on the site can be carried forward to an alternative development (B) on the same land under a new planning permission, provided that abatement is granted in relation to this new development. Two main criteria must be met in order for this 'credit' to be claimable. First, the request for abatement must be made within 3 years of the date of grant of the original planning permission under which the buildings were demolished. Second, the demolished buildings reduced the CIL liability for A, would have been taken into account in calculating the levy liability for B if they had not already been demolished and are not otherwise taken into account in calculating the CIL liability for B.*

    [Paragraph: 142 Reference ID: 25-142-20190901 - Revision date: 01-09-2019]

12. As part of its representations, the CA cites two (separate) previous CIL Appeal Decisions. Of note, the two previous CIL Decisions (respectively, VOA Appeal Decision References: 1765959 and 1574144) are publicly available redacted versions, which do not show the full facts of the particular cases. Having examined the unredacted decisions, I am satisfied that the circumstances of both Appeals are different and a comparison to those decisions is inappropriate. Indeed, Appeal Decision 1574144 is somewhat dated as it relates to a 2015 planning permission (the CIL Regulations have been subsequently updated twice since 2015).

13. The Appellant contends that in law, a purposive approach to Tax legislation applies, and that such a purposive approach extends to the CIL Regulations, citing the case of *Lambeth v SS HCLG & Thornton Park (London) Limited* (2021) EWHC 1459. In addition, the Appellant cites *R (Heronslea (Bushey 4) Ltd) v Secretary of State for Housing, Communities and Local Government* (2022)] EWHC 96 (Admin). The Appellant cites the wording under Regulation 74B(2) - "*any CIL paid in relation to A*" to be credited; it does not expressly require CIL to have been paid and the Appellant opines that the CA is taking a literal interpretation of the meaning '*paid*'.

14. The dispute between the parties appears to be a unique situation, which is not expressly covered by the CIL Regulations. Given the lack of express provisions, the only recourse I have in determining this Appeal is by reference to CIL case law and (as suggested by *Lambeth*) have regard to the purpose of the particular provision and interpret its language only so far as possible, in the way which best gives effect to that purpose (i.e. Regulation 74B in its entirety).

15. It is clear to me that the provisions of Regulation 74B(12 and 13) were enabled for demolition credit purposes. Indeed, Regulation 74B '*Abatement: implementation of a different planning permission'* was enabled by Statutory Instrument 385 - The Community Infrastructure Levy (Amendment) Regulations 2014. It is interesting to note that in the explanatory memorandum document to this Statutory Instrument (prepared by the then Department for Communities and Local Government) Regulation 74B was enabled to ensure that levy charges paid in relation to development that has begun but not been completed, can be credited against alternative development on the same site in order to ensure developers are not charged twice for the impact of the development on infrastructure. Such a purpose is clear to me and I am fully persuaded to take a simple interpretation and meaning of the purpose of Regulation 74B(12 and 13) as an overriding meaning to the stated language in Regulation 74B(2) insofar as the word '*paid*'. In this instance, I agree with the Appellant that the CA's literal interpretation of the meaning '*paid*' is incorrect and inequitable.

16. In conclusion, based upon the submitted evidence, I agree with the Appellant that he is eligible for abatement pursuant to 74B(1). I further agree that he has made a valid claim under 74B(2) and can benefit from 74B(12 and 13) even though no monetary payment was made and the amount was £0 (zero) in this instance. I determine that the demolished buildings under Permission A must be taken into account in relation to Permission B.

17. As the floorspace demolished under Permission A (i.e. [redacted] m²) exceeds the new floorspace to be constructed under Permission B (i.e. [redacted] m²) I have determined the GIA of the chargeable development to be a nil (zero) sum.

18. In conclusion, having considered all the evidence put forward to me, I determine that the CIL payable in this case is to be a nil (zero) sum.

[redacted] MRICS VR
Principal Surveyor
RICS Registered Valuer
Valuation Office Agency
8th June 2022