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: 1797330

Planning Permission Reference: [redacted]

Location: [redacted]

Development: Proposed use of a building as a single dwelling with the laying out of a private garden including erection of woodstore, two car parking spaces and driveway. Landscaping. (part retrospective).

Decision

I determine the CIL charge of £[redacted] ([redacted]) as calculated by the Collecting Authority excluding surcharges to be appropriate and hereby dismiss this appeal.

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. Lawful Development Certificate reference [redacted] dated [redacted].
    b. CIL Form 1 – Additional Information dated [redacted].
    c. A planning officers delegated report issued on [redacted] in respect of [redacted].
    d. Planning permission [redacted] granted on [redacted] for "*Proposed use of a building as a single dwelling with the laying out of a private garden including erection of woodstore, two car parking spaces and driveway. Landscaping. (part retrospective).*"
    e. The CIL Liability Notice [redacted] issued by the CA dated [redacted] with CIL Liability calculated at £[redacted]
    f. The Appellant's request to the CA dated [redacted] for a Regulation 113 review of the chargeable amount.
    g. The CAs formative response dated [redacted] to the Appellant's request for a Regulation 113 review.
    h. The CIL Appeal Form dated [redacted] submitted by the Appellant under Regulation 114, together with documents and correspondence attached thereto.
    i. The CA's representations to the Regulation 114 Appeal dated [redacted] together with the Appellant's response dated [redacted].

Background

2. Planning application [redacted] was submitted dated [redacted] for "*Prior approval for the change of use of part of the agricultural building to use as a single dwelling under use class Q(A) and building operations under Q.2(6) including changes to the external appearance of the building.*"

3. A Planning Officers report dated [redacted] proposed the grant of permission subject to conditions, one of which related to materials and the outside appearance of the building, and these were approved in a planning officer report reference [redacted] dated [redacted]

4. There were then three subsequent planning applications refused between [redacted] and [redacted] and an application for a lawful development certificate was refused on [redacted]

5. On [redacted] a Lawful Development Certificate reference [redacted] was issued by the CA for "*the substantial completion of building operations for a single dwelling*". This also states "*On the balance of probability, the building operations, (contemplated by Section 191(1)(b) of the Town & Country Planning Act 1990 (as amended), comprising the construction of a single dwelling were substantially complete more than 4 years prior to the submission of the application and are lawful within the terms of Section 171B(1) and 191(2)(a) of the Town and Country Planning Act 1990 (as amended)*."

6. Planning application [redacted] ([redacted]) was submitted by the Appellant dated [redacted] for "*Proposed use of building as a single dwelling. The laying out of a private garden including two car parking spaces and driveway. Landscaping (part retrospective)*." This form advised that work had commenced on [redacted] and was ongoing. The Appellant further advised that the existing building Gross Internal Area (GIA) was [redacted] m2 and the new building GIA would be [redacted] m2 with additional net GIA being [redacted] m2. The Appellant further commented in a covering letter "*A certificate of lawfulness was granted under [redacted] on [redacted] for the substantial completion of building operations for a single dwelling at [redacted]. However, an anomalous situation has arisen as a result - there is now a lawful structure but with no lawful residential use. This application seeks consent for the use of the [redacted] building as a single dwelling, and the use of immediately adjoining land, as described, to serve the dwelling.*"

7. The Appellant had also submitted CIL Form 1 – Additional Information dated [redacted] stating the total GIA [redacted] m2 and that the building was last occupied for its lawful use on [redacted].

8. A planning officers delegated report was issued on [redacted] recommending development in respect of the application and planning permission [redacted] was granted on [redacted] for "*Proposed use of a building as a single dwelling with the laying out of a private garden including erection of woodstore, two car parking spaces and driveway. Landscaping. (part retrospective)*."

9. CIL Liability Notice [redacted] was issued on [redacted] with CIL calculated as:-

   Residential (outside UB) – 99
   Chargeable Area [redacted] m2 @ Rate £[redacted] /m2
   Indexed at [redacted]
   = £[redacted] CIL Liability

10. A CIL Demand Notice [redacted] was also issued on [redacted] by the CA for £[redacted] including a surcharge of £[redacted] due to failure by the Appellant to submit a commencement notice.

11. On [redacted] the Appellant requested a Regulation 113 Review from the CA.

12. On [redacted] the CA advised the Appellant "*a person cannot request a review of a liability notice (under regulation 113, as amended) after development begins"* therefore the *"request letter dated [redacted] will be treated as an enquiry*".

13. On [redacted] the CA issued the outcome of the enquiry, advising that "*A Lawful Development Certificate (LDC) was granted in [redacted] which was to regularise the operational development of the building and acknowledge that the build had been carried out more than 4 years previously. This thereby exempted the building from enforcement action. More importantly, the LDC did not confirm a 4-year residential use.*

With a building exempt from enforcement action but with no lawful use as a residential dwelling, only a full permission for the building to be used as a dwelling could give it a lawful use. The application therefore became a CIL chargeable development as there is a creation of new residential floorspace. The application is also part retrospective because the building had already commenced without permission."

14. The CA also advised "*Following the introduction of the Community Infrastructure Levy (CIL) on [redacted], CIL is charged on all new residential floorspace (including conversions) approved for applications for full planning permission, including householder applications and reserved matters following an outline planning permission, and applications for lawful development certificates*." and "*The current approved development [redacted] for residential use of a building which has already commenced is CIL liable and is subject to a CIL charge. As the development is acknowledged as part retrospective, the CIL regulations do not allow self-build exemptions and the date from which commencement is deemed for CIL purposes would be the date on which the permission was granted. The charging authority can reduce a CIL charge by deducting any 'in use' floorspace or demolition, but this cannot be granted on floorspace that has previously been demolished.*

Therefore, the charging authority confirms the liability notice, and the CIL charge is due in full by the 30 days of the date of the demand notice - £[redacted]."

15. An appeal under Regulation 114 was then submitted to the Appointed Person dated [redacted].

Appeal Grounds

16. The Appeal is made on the basis that the development was substantially completed before the CIL Charging Schedule came into effect. The Appellant considers the current permission [redacted] to be incorrectly determined, as no new material operations were involved, therefore there should be no CIL liability.

Consideration of Appeal Grounds

17. With regards to the planning application submitted and granted under permission [redacted], the Appellant's argument is that the work under this permission was already complete when planning permission was retrospectively granted.

18. They argue that building works that involved the conversion were started in [redacted] and substantially completed by [redacted] and had been permitted before CIL came into existence under application reference [redacted] under Schedule 2, Part 3, Class Q of the Town and Country Planning (General Permitted Development) Order by notice dated [redacted]

19. They further comment that a Lawful Development Certificate for "*the substantial completion of building operations for a single dwelling*" was granted [redacted] which confirmed the substantial completion occurred four years earlier. A planning application for the "*Proposed use of a building as a single dwelling with the laying out of a private garden including erection of wood store, two car parking spaces and driveway. Landscaping. (part retrospective)*" was granted on [redacted] under [redacted].

20. The Appellant argues that the relevant permission is that granted under Class Q as the permitted development including change of use to a "dwelling". They refer to a sworn statement from the Appellant that attests to the intermittent use made of the barn following substantial completion (Annex P to the Appellant's submission) and that in granting the Lawful Development Certificate the CA accepted the barn had been substantially completed by [redacted]. They refer to the planning officer's report on the application made under [redacted] that development had met the change of use criteria - on page 6 of that report "*In reference to these criteria [Policy DM 31] the building lawfully exists and requires no adaptation to enable its use*" (Annex Q to the Appellant's submission).

21. The Appellant therefore argues that under section 73A Town & Country Planning Act 1990 (TCPA 1990), the permission granted had effect from the date on which the development was carried out (s73A(3)(a)).

22. Following the CA's review of the chargeable amount, the Appellant notes the CA refers to the Class Q permission under "relevant planning history", but the Appellant argues that a substantial part of the frame was retained in the conversion and the CA eventually accepted the build-out had much the same dimensions as the original building. They also note that whilst the CA says the Lawful Development Certificate did not confirm a four-year residential use, the certificate itself did refer to a use, as it was issued in respect of a "dwelling" and not simply as a "building".

23. The CA note that prior notification approval was granted on [redacted] for the change of use of part an agricultural building to a dwelling under reference [redacted], and that no CIL would have been charged on this application as the CA did not implement their charging schedule and commence charging CIL until [redacted].

24. The CA state that planning enforcement became involved in [redacted] when it was discovered that the works carried out did not accord with the prior approval granted and were contrary to the CA's local plan policy of development in the countryside.

25. The CA argue that the Appellant conceded that the development had not been built in accordance with the approval, and over the following four years various applications were made by the Appellant to avoid formal enforcement action (which could have required the demolition of works built outside of the approval).

26. The CA state that the Lawful Development Certificate was issued after the breach of the prior notification and was for the substantial completion of building operations for a single dwelling under reference [redacted]. This was not a grant of planning permission but a statement that the CA acknowledged on the balance of probabilities that the building operations were substantially completed four years previously. This afforded the building works immunity from enforcement action but did not extend to the use of the building, which had never been used as a dwelling. The only lawful part was the erection of the building for a single dwelling, not its use.

27. The CA argue that the prior approval could no longer be implemented as the building conversion had been substantially changed without permission and only the building operation had been given a certificate of lawfulness. Therefore, to establish a use for the

building a new full planning application under section 73A TCPA 1990 proposing the material change of use to a dwelling was necessary, and this was submitted and approved under reference [redacted]. The CA argue that such grants of retrospective planning permissions under section 73A TCPA 1990 give rise to CIL liabilities and this was after a Charging Schedule had been brought into force. The CA therefore issued a CIL Liability Notice and a Demand Notice because the date of commencement of the development authorised by the retrospective permission is the date of grant (CIL reg. 7(5)(a)).

28. The CA argue that relief under regulation 128A is not available because the permission granted in exercise of section 73A TCPA 1990 does not trigger its operation. To do so requires a permission granted under section 73. Section 73 cannot operate retrospectively but only prospectively (Lawson Builders v Secretary of State for Communities and Local Government [2015] EWCA Civ 122).

29. The CA note that the Appellant did not claim off-set of the GIA of the existing building at the date of the retrospective permission. They note the Appellant stated in CIL Form 1 – Additional Information dated [redacted] that the last time the building was in actual lawful use was as an agricultural barn on [redacted], which precedes the relevant three-year period for CIL purposes.

30. The CA therefore argue that reliance cannot be placed on the earlier permission to establish lawfulness because the Appellant's failure to comply with its terms had led to the need for retrospective planning permission under [redacted]. As this later permission was granted after the introduction of CIL it is liable for CIL, and the trigger for a CIL charge is the commencement of a development authorised by a grant of planning permission.

31. The CA also argue that for the later planning permission [redacted] self-build exemption cannot be claimed by the Appellant as development authorised by that retrospective permission will have commenced before any claim for exemption could be made and decided. No commencement notice could be given because the date of grant is the date the development commences (reg. 7(5)) and it is therefore not possible to gain self-build exemption for a retrospective permission.

32. The CA argue that for this retrospective planning permission granted under S73A the development had already commenced before the grant of that permission, as the Community Infrastructure Levy (CIL) regulations 2010 (as amended) states:-

    'CIL Reg 7 (5) Development for which planning permission is—
    (a) granted under section 73A of TCPA (planning permission for development already carried out); or (b) granted or modified under section 177(1) of TCPA 1990 (grant or modification of planning permission on appeals against enforcement notices), is to be deemed or treated as commencing on the day planning permission for that development is granted or modified (as the case may be).

33. The CA argues that it was not possible for the Appellant to provide a commencement notice and consequently the surcharge for failing to submit this information could not be avoided.

34. The Appellant comments that the CA appear to be suggesting permission [redacted] includes the building works, so bringing those works within the ambit of the planning permission and therefore regulation 7(5)(a). The Appellant argues that the description of the development sought does not include the '*Proposed erection of a dwelling…*' as there was no need for it to do so as the building was lawful and whatever works were either already present or were to be constructed at the time of the application were either lawful

pursuant to the certificate, or did not amount to chargeable development, and no additional floor space to the barn was proposed.

35. The Appellant notes that planning enforcement visited the site in late [redacted] and early [redacted] and the CA has provided a photograph and modelling of the barn's frame at Appendix C of their submission. The Appellant notes that documents they submitted in support of their appeal included plans approved under the general consent, and that *plan reference* [redacted] shows a new floor requiring replacement of the roof frame. Without the roof works practical use could not have been made of the permitted upper floor and it was the CA's reading of that plan in determining the application for prior approval that has been the root of the problem in this case.

36. The Appellant notes the CA says the S73A application was part retrospective for a building substantially completed without planning permission. They argue, however, that the build was substantially completed pre CIL and it is not considered the part retrospective element related to the substantially complete building. If the CA considered the development to be a new build, the description of the development sought under [redacted] would otherwise have needed to have said so.

37. The Appellant concludes that planning permission [redacted] did not relate to the substantial completion of building operations to the building; the proposed change of use was prospective. Whilst, under regulation 9(1), application [redacted] is considered to be the chargeable development, commencement is not determined under regulation 7(5)(a). In the circumstances of this case, they argue that commencement can be taken to have been the date on which the material operations were confirmed as lawful in the Lawful Development Certificate as [redacted], on which basis no liability under CIL arises.

Decision on the Appeal

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

39. The Appellant does not make any reference to appealing against the surcharge amount, but this is not, in any event, something that I can consider in an appeal under Regulation 114. Any appeal against a surcharge should be made to the Planning Inspectorate under Regulation 117.

40. The matter for the Appointed Person to consider is therefore the appropriate level of CIL Liability.

41. Whilst conversion of the building became immune from planning enforcement action following issue of the Lawful Development Certificate reference [redacted] on [redacted] (based on the planners' assumption that the converted building had been in place for more than four years), this certificate does not in itself authorise the building's use as a residential dwelling.

42. Planning permission [redacted] specifically refers to the proposed use of the building as a single dwelling and was granted to regularise the change to residential use.

43. 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 "*Proposed use of a building as a single dwelling with the laying out of a private garden including erection of woodstore, two car parking spaces and driveway. Landscaping. (part retrospective)*." The fact that the building was already in existence is supported by the findings within the Delegated Officer report following their site visit on [redacted].

44. CIL Regulation 9 (1) is clear on this point, that the "*chargeable development is the development for which planning permission is granted*".

45. With regards to the date of commencement of the development, the CA argue that for retrospective planning permission CIL Regulation 7 (1) *Commencement of Development* has effect for determining when development is to be treated as commencing subject to the provision of 7 (5) "*Development for which planning permission is (a) granted under section 73A of TCPA (planning permission for development already carried out)*", which was [redacted]. The Appellant argues that "*there are grounds to set aside regulation 7(5) and to rely instead upon clause (2)*" which states "*Development is to be treated as commencing on the earliest date on which any material operation begins to be carried out on the relevant land*", but this clause is itself subject to clause (3):-

    "(3) Paragraph (2) is subject to the following provisions of this regulation.

    (4) Development is to be treated as commencing on the day planning permission is granted for that development if planning permission had previously been granted for that development for a limited period.

    (5) Development for which planning permission is—
    a) granted under section 73A of TCPA (planning permission for development already carried out); or b) granted or modified under section 177(1) of TCPA 1990 (grant or modification of planning permission on appeals against enforcement notices), is to be treated as commencing on the day planning permission for that development is granted or modified (as the case may be)."

46. Following CIL Regulation 7 it is therefore my decision that the date of commencement of the development is to be taken as the date planning permission [redacted] was granted on [redacted].

47. S73A 1 and 2(a) 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 regularising 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.

48. 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.

49. **Value *G*** (the GIA of the chargeable development): [redacted] m2.

50. **Value *GR*** (the GIA of the part of the chargeable development to be charged at rate R) is 588.5 m2 as above.

51. **Values *KR(i)* and *(ii)*** are both zero, as the lawful in-use requirement of Schedule 1 of the CIL Regulations 2010 (as amended) is not met.

52. **Value *E(i)*** is zero.

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

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

    [redacted] *m2 – 0 m2 – ([redacted]* $\frac{\text{m2 x 0}}{\text{m2}}$*)*

    = [redacted] *m2 GIA chargeable area*

Calculation of CIL Liability

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

    Residential (outside UB) – [redacted]
    Chargeable Area [redacted] *m2 @ Rate £*[redacted] */m2*
    Indexed at [redacted] *to £*[redacted] */m2 (rounded)*
    = £[redacted] *CIL Liability*

56. It is noted that the above CIL Liability is negligibly higher (£[redacted]) that that calculated by the CA – this is due to the effect of rounding throughout the indexation calculation.

Decision on CIL Liability

57. On the basis of the evidence before me and having considered all the information submitted in respect of this matter, I therefore determine the CIL charge of £[redacted] ([redacted]) as calculated by the Collecting Authority excluding surcharges to be appropriate and hereby dismiss this appeal.

58. The Appellant does not make any reference to appealing against the surcharge amount, but this is not, in any event, something that I can consider in an appeal under Regulation 114. Any appeal against a surcharge should be made to the Planning Inspectorate under Regulation 117.

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