Appeal Decision

by 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: @voa.gov.uk

Appeal Ref: 1818915

Address:

Proposed Development: Application under S73 of the Town & Country Planning Act 1990 to carry out development without compliance with condition 1 (Approved plans) of planning permission ref: (Full planning application for the demolition of and the erection of 2(two) Office buildings [Use Class - E(g)(i)] Building A and Building B: Building A ((GEA) sqms) Building B 11 storeys ((GEA) sqms). The erection of a replacement multi storey car park of spaces plus cycle parking (for use as a public car park at weekends) landscaping, public realm upgrades, servicing, pedestrian and vehicular access) dated . Variations to include alterations to bridge link, elevations, floorplates, ground floor level access, rooftop plant and screen, service yard, reduction to height of Buildings A and B, alterations to landscaping/public realm, removal of basements and stairs on sides of Building A. This application is accompanied by an Environmental Statement.) Variation to consist of revisions to the Car Park (Building C). This application is accompanied by an Environmental Statement.

Planning Permission details:

Decision

I determine that the Community Infrastructure Levy (CIL) payable in this case should be £ ( ).

Reasons

Background

1. I have considered all the submissions made by (acting on behalf of the appellant,) and the submissions made by the Collecting Authority (CA), .

   In particular, I have considered the information and opinions presented in the following documents:-

   a) CIL Appeal form dated .

b) CIL Appeal Statement of Case document from Appellant, dated [redacted].

c) Grant of Conditional Planning Permission [redacted], dated [redacted] (the s73 permission).

d) Grant of Conditional Planning Permission [redacted], dated [redacted] (the original planning permission).

e) The CIL Liability Notice (ref: [redacted]) dated [redacted].

f) The CA's Regulation 113 Review, on an e-mail dated [redacted].

g) CA's Statement of Case e-mail received on [redacted]

h) Appellant's comments on the CA's Statement of Case e-mail, which is dated [redacted].

i) The CIL Liability Notice (ref: [redacted]) dated [redacted].

j) The CIL Liability Notice (ref: [redacted]) dated [redacted].

Grounds of Appeal

2. Planning permission was granted for the development on [redacted], under reference [redacted] for:-

   Full planning application for the demolition of [redacted].

   This planning permission was initially varied under a first s73 application under reference [redacted].

3. Planning permission was further varied by a s73 application under reference [redacted] on [redacted] for:-

   Application under S73 of the Town & Country Planning Act 1990 to carry out development without compliance with condition 1 (Approved plans) of planning permission ref: 20/02495/FUL (Full planning application for [redacted]. This application is accompanied by an Environmental Statement.

4. 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 and Charging Schedule rates and indexation as follows:-.

   [redacted]

   [redacted] m² @ £[redacted] per m² (Retail) x index [redacted] = £ [redacted]

   [redacted] m² @ £[redacted] per m² (All other Uses) x index [redacted] = £ [redacted]
   £ [redacted]

   [redacted] m² @ £[redacted] per m² ([redacted] General) x index [redacted] = £ [redacted]

   [redacted] m² @ £[redacted] per m² ([redacted] General) x index [redacted] = £[redacted]
   £[redacted]

   Total CIL ([redacted]) £[redacted]

5. On ████, 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 ████, stating that it was of the view that its original decision was correct and should be upheld.

6. On ████, 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 the ████ payable should be the sum of £████ (which the Appellant calculates from £████ x ████ m²).

7. At the heart of the matter, the basic dispute between the parties is the treatment in the rate of the GIA Chargeable Area of the ground floor of Building A – the dispute relates to the CA's adopted ████ rate; the Mayoral CIL (████) rate is not in dispute. Of note, there would not appear to be any dispute between the parties on the *calculation* of the GIA nor of indexation – the Appellant disputes the CA's Retail applied rate of £████ and contends the rate should be £████ per m² (All other Uses).

8. The Appellant opines that the ground floor of the Building A property is not planned to be used as retail floorspace, nor is it authorised to be used as retail floorspace and so the correct rate should be an "All other Uses" rate of £████ per m². The Appellant cites that there is no mention of any proposed retail floorspace and that the entire building, once developed, will be let to ████ to be used as offices at an office rent.

9. In support of the Appellant's argument, the Appellant cites an e-mail received from ██ ██ (the Head of Development Management at the Charging Authority), who confirmed in an e-mail dated ████, *"I see these as ancillary space to the B1 i.e. occupied by ████ or a subsidiary. The permission would be for office accommodation"*.

10. The Appellant further opines that the architects have advised that the site is prevented from being used for retail. The building is affected by significant flood risk and to create safe conditions the ground floor slab is set at a level that equates to ██ ██mm above the surrounding pavement level. A system of ramps and steps gives access into the building from ████ through a single set of doors meaning a conventional terrace of retail shops with front doors to ████ is impossible to configure.

11. The Appellant concedes that the ground floor layout plan (reference ████ - Ground Floor GA Plan) identifies the relevant part of the ground floor as retail space. However, the Appellant explains the labelling of the disputed area on the plan - the Appellant's architect (████ and the author of the plan) confirmed that the reason behind the labelling of this area as "retail" is because they were not aware that there was any implication in the difference between showroom and retail use. The Architects have confirmed that it was their understanding that all discussions with the Charging Authority were on the basis that the area would be a display showroom and that it was not intended that any items would be for sale to the general public, and the current detailing of the building reflects this.

12. The Appellant cites that the use authorised is solely office use. There is no mention of a retail use in the description of the Development or the application form seeking the Original Planning Permission or the s73 Planning Permission. Therefore, the Appellant contends that the chargeable rate in respect of the entire Development ought to be "All other Uses" at £████ per m².

13. The CA contends that fundamentally, the planning permission is granted pursuant to the approved plans in the (varied) condition 1 and all other conditions attached to the

decision notice, irrespective of any other materials. The CA further elaborates that Condition 1 of [redacted] lists a plan (reference [redacted] Building A - Ground Floor GA Plan) which clearly identifies the disputed area as retail space.

14. In addition, the CA cites condition 50 of the decision notice of [redacted], which (emphasis underlined) comprises:-

    A retail management plan to include opening hours and the link to the wider occupation of the site shall be submitted to the local planning authority for approval prior to commencement of the use of the [redacted] retail units. The retail units shall operate in accordance with the approved management plan.

15. The CA further cites that there are no planning conditions on the approval or clauses in the s106 legal agreement stating that Building A (or B) is restricted to a certain use class (in this case as an office, or Class E (f) (i)).

Decision

16. The dispute between the parties relates to part of the ground floor accommodation of a [redacted] office HQ building (Building A), situated in the heart of [redacted] town centre, known as the [redacted] site. The building is one element in a development scheme which includes a [redacted] building (Building B).

17. Regulation 9(1) of the CIL Regulations 2010 states that chargeable development means *"the development for which planning permission is granted*".

18. Having reviewed the evidence and arguments of both parties, I consider that the development for which planning permission is granted is primarily an office development and that the disputed ground floor showroom accommodation to be ancillary to the primary office use. Whilst I acknowledge that minor elements of the supporting documentation contain the word 'retail', it is clear to me that the main description of the permitted development does not contain any reference to the word 'retail' or indeed the word 'showroom'; the description is clearly *Office buildings [Use Class - E(g)(i)]* and of note, there is no mention of this being a Mixed Use development. I am not persuaded by the Appellant's citation of the evolving discussions between the CA and the Appellant (the CA's e-mail dated [redacted]) but by the factual description of the development as *Office buildings [Use Class - E(g)(i)].* I consider the primary use to be offices and agree with the Appellant that the chargeable rate in respect of the entire development should be "All other Uses" at £[redacted] per m².

19. However, where an appeal under this regulation is allowed, the appointed person must calculate a revised chargeable amount. I do not agree with the Appellant's CIL calculation of £[redacted], as the Appellant has erroneously not reflected indexation in their calculation. Consideration of the two separate rules in respect of 'standard cases' and 'amended planning permissions' in respect of the subject s73 planning permission must be made, which I clarify as follows:-

20. The Community Infrastructure Levy (CIL) (Amendment) (England) (No. 2) Regulations 2019 (the '2019 Regulations') came into force in England on 1 September 2019. Regulation 5 of the 2019 Regulations requires the substitution of paragraph 9(8) (along with 9(6) and 9(7)) of the 2010 Regulations) with – *"(6) Where a planning permission is granted under section 73 of TCPA 1990, the chargeable development is the most recently commenced or re-commenced chargeable development*".

21. Furthermore, the new Part 5 also amends Regulation 40 to now require the CA to calculate the amount of CIL payable 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'*. Given this Appeal relates to a s73 variation, this is a non-standard 'amended planning permission' s73 permission case and CIL will fall to be assessed under Schedule 1 Part 2 of the 2019 Regulations.

22. The rules relating to 'amended planning permissions' in Schedule 1 Part 2 are complex but essentially provide as follows:-

    - Where a s73 permission is granted it is necessary to compare the 'notional amount' for the s73 permission (B) and the 'notional amount' for the previous permission (A). (The 'notional amount' is essentially the chargeable amount that would be payable minus any applicable relief but calculated as if B was permitted on the same day as A, and I_P for B were the index figure for the calendar year in which A was granted. (I_P is the index figure for the calendar year in which planning permission was granted)).

    - Where the 'notional amount' for B is the same as for A the chargeable amount is that shown in the most recent liability notice for permission A.

    - Where the 'notional amount' for B is greater than for A paragraph 4 applies.

    - Where the 'notional amount' for B is less than for A paragraph 5 applies.

    In addition to the Appellant not reflecting indexation in their CIL calculation, the CA had (on Liability Notice [redacted] to which the Appellant has made this Appeal) erroneously reflected a calculation under Schedule 1 Part 1 for standard cases, containing the original indexation relating to the original permission granted in 2021. The indexation erroneously stated on the Liability Notice was the 2021 RICS CIL Index (333) and there is no reference to a Part 2 calculation for 'amended planning permissions'. As indexation forms part of the calculation of the Chargeable Amount, I am required to determine the appropriate indexation as part of my decision.

23. In this instance, the 'notional amount' for A, being the original permission, is less than the 'notional amount' for B, being the latest s73 permission, therefore paragraph 4 applies.

24. According to Paragraph 4 Schedule 1, the CIL charge for an 'amended planning permission' is calculated by the formula:

$$(X - Y) + Z$$

Where:

X = the chargeable amount for the development for which B was granted calculated in accordance with paragraph 1;

Y = the chargeable amount for the development for which A was granted calculated in accordance with paragraph 1; (but per sub para (3) this must be calculated using the indexation relevant to the date that B was permitted)

Z = the chargeable amount for the development for which A was granted calculated in accordance with paragraph 1 (as shown in the most recent CIL notice issued in relation to A);

25. The RICS CIL index when A was permitted was [redacted]. The RICS CIL index for the date when B was permitted was [redacted].

26. Having considered the ‘amended planning permission’ calculation route, I calculate the CIL charge with my determination of the appropriate indexation as follows:-

X = m² @ £ per m² (All other Uses) x = £
Y = m² @ £ per m² (All other Uses) x = £
Z = m² @ £ per m² (All other Uses) x = £

(X – Y) + Z = (£ - £) + £) = £

Mayoral CIL ( )

X = m² @ £ per m² (General) x = £
Y = m² @ £ per m² (General) x = £
Z = £

(X – Y) + Z = (£ - £) + £ = £

Total CIL ( )

£
£

£

27. On the basis of the facts in this case and the evidence submitted before me, I therefore determine a CIL charge of £ ( ).

MRICS VR
Principal Surveyor
RICS Registered Valuer
Valuation Office Agency
22nd June 2023