

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: 1821813

Planning Permission Reference: [REDACTED]

Location: [REDACTED]

Development: Construction of [REDACTED] dwellings and alterations to the existing retained dwelling [REDACTED]

Decision

I determine a CIL charge of £[REDACTED] ([REDACTED]) to be appropriate.

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 reference [REDACTED] dated [REDACTED] for the “*Construction of [REDACTED] dwellings and alterations to the existing retained dwelling (including demolition of the later additions and attached garage) with associated works including revised access arrangements and landscaping (revised scheme).*”
 - b. The CIL Liability Notice [REDACTED] issued by the CA dated [REDACTED] with CIL Liability calculated at £[REDACTED]
 - c. (CIL) - Form 1: CIL Additional Information submitted by the Appellant dated [REDACTED].
 - d. The Appellant’s request to the CA dated [REDACTED] for a Regulation 113 review of the chargeable amount.
 - e. The CA’s response dated [REDACTED] to the Appellant’s request for a Regulation 113 review.
 - f. The CIL Appeal Form dated [REDACTED] submitted by the Appellant under Regulation 114, together with documents and correspondence attached thereto and further information provided by the Appellant on [REDACTED].
 - g. The CA’s representations to the Regulation 114 Appeal dated [REDACTED].
 - h. The Appellant’s rebuttal letter dated [REDACTED].
 - i. Approved drawing [REDACTED] dated [REDACTED] in relation to car ports submitted as part of Appendix 3 to the Appellant’s CIL Appeal submission dated [REDACTED].
 - j. Approved drawing [REDACTED] dated [REDACTED] in relation to the existing building submitted as part of Appendix 3 to the Appellant’s CIL Appeal submission dated [REDACTED].

- k. Approved drawings [redacted] to [redacted] dated [redacted] provided by the Appellant to the AP on [redacted] and shared with the CA on the same date.

Background

2. The Appellant has, within their submissions, referred to an earlier planning permission reference [redacted] granted on [redacted] for “Detailed Planning Application for the Construction of Five Dwellings with Associated Works including Access and Landscaping”.
3. However, this current CIL Appeal under consideration relates to planning permission reference [redacted] granted on [redacted] for “Construction of four dwellings and alterations to the existing retained dwelling (including demolition of the later additions and attached garage) with associated works including revised access arrangements and landscaping (revised scheme).”
4. A CIL Liability Notice reference [redacted] in relation to [redacted] was issued by the CA dated [redacted] with the chargeable amount calculated as:-

*Residential small sites up to & inc 10 Plus Indexation - [redacted]
Chargeable Area [redacted] m2
X £ [redacted] indexed at [redacted]
= £ [redacted] CIL Liability*

5. The indexed CIL Rate thus equates to £ [redacted] as per the “2023 CIL Charge for Residential small sites up to & inc 10 Plus Indexation – [redacted]” contained in the CA’s published CIL Rate Summary for 2023.
6. (CIL) - Form 1: CIL Additional Information submitted by the Appellant dated [redacted] states the existing total GIA is [redacted] m2 including an area of [redacted] m2 to be demolished. The form states the proposed development total GIA is [redacted] m2, of which the net additional GIA is [redacted] m2 (ie [redacted] m2 less [redacted] m2). It further indicates that the retained GIA [redacted] m2 existing less [redacted] m2 to be demolished = [redacted] m2 to be retained.
7. The Appellant requested a Regulation 113 review on [redacted].
8. The CA issued its Regulation 113 review decision on [redacted], advising “Whilst you have confirmed that Council Tax and electricity bills have been paid for the property, [redacted] Council Tax department has advised that the property has been empty since at least [redacted] [redacted]. To be regarded in use for the purposes of the CIL regulations, the building would need to have been occupied as a dwelling for at least 6 months of the preceding 36 months. This is clearly not the case and as such I agree with the officer that the retained floorspace of [redacted] cannot be deducted from the proposed floorspace.

On the second matter, the proposed floorspace figure of [redacted] sqm has been calculated based on the approved plans for the dwellings, i.e. the amended plans for Plots 1 and 5. If you remain of the view that the total floorspace for the 5 dwellings has been calculated incorrect [sic], please provide a breakdown of the floor areas for each of the plots (breaking the calculation down to ground and first floor for the two storey units) and I can recalculate to check the accuracy of the area measurements.”

9. On [redacted] the Appellant provided the CA with measurements from their Architects:-

*Plot 1 Ground floor [redacted] m2
Plot 2 Ground floor [redacted] m2, First floor [redacted] m2
Plot 3 Ground floor [redacted] m2, First floor [redacted] m2
Plot 4 Ground floor [redacted] m2, First floor [redacted] m2
Plot 5 Ground floor [redacted] m2
TOTAL [redacted] m2*

10. A Regulation 114 Appeal against the chargeable amount was submitted to the VOA dated [REDACTED].

Appeal Grounds

11. The Appellant would like the GIA of [REDACTED]m² used by the CA in their CIL Notice reduced to [REDACTED]m² reflecting [REDACTED]m² GIA off-set for CIL purposes and also excluding [REDACTED]m² from GIA calculations for the car ports. They argue that the CIL Liability should therefore be reduced to £[REDACTED].

Consideration of Appeal Grounds

12. **Appeal Ground i) GIA off-set** - The Appellant argues that the [REDACTED]m² total GIA of the existing house (comprising the [REDACTED]m² retained part and the [REDACTED]m² part to be demolished) should be off-set against the total GIA of the development and raises the Giordano case in support. They state Giordano defines that an existing lawful use can exist for the purposes of calculating CIL even if that use hasn't continued for 6 months in the preceding three years, irrespective of whether the 6 months of 'in-use' within 3 years can be demonstrated.
13. The Appellant also refers to [Court of Appeal Decision 2019-EWCA-Civ-1544](#) in which they argue that the effect of regulation 40(7) [now Schedule 1 of the CIL Regulations 2010 (as amended)] was to reduce to £nil the amount of CIL payable because on the relevant date (under the planning permission granted on 5 May 2011) the building could be lawfully used for the same purpose as that permitted by the planning permission of 22 June 2017 – residential use within Class C3 of the Use Classes Order. That Appeal was allowed.
14. The Appellant confirmed to the CA as part of their Reg 113 request that Council Tax and electricity bills (neither of which appear to have been submitted to the AP as part of this appeal) have been paid for the property.
15. Whilst the CA agree that the original house is a relevant building, they do not accept the lawful in-use period has been proven / met and have provided photographs covering a number of years and Council Tax team comments in support of their view that the building's use has not actively been carried out since [REDACTED] and citing (in their Reg 113 review correspondence) [R \(Hourhope Ltd\) v Shropshire Council \[2015\]](#). A Council Tax team internal email states the existing building "... is currently on a LEVY charge (so unoccupied properties empty for over 2 years pay double Council Tax)".
16. **Appeal Ground ii) Inclusion of car ports in the proposed GIA** - The Appellant also argues that the car ports should be treated as "canopies" and thus excluded from GIA calculations. They believe that a total [REDACTED]m² GIA for the "canopies" should be deducted from the total [REDACTED]m² GIA of the proposed development.
17. The Appellant challenges the CA's assertion that the car ports have walls and suggests the CA have misinterpreted the architects' drawings. They also refer to an example of a decision where the same CA have not included car ports within GIA, but the CA comment that those car ports in the previous decision appear to be more of an open timber structure with open gables and less supporting columns, thus akin to a canopy.
18. The CA calculate the total GIA of the car ports at [REDACTED]m² based on the approved drawings for the development showing car ports at building plots 1, 3 and 5.

Consideration of the Decision

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

20. **Regarding Appeal Ground i) GIA off-set:** This arises from disagreement surrounding the issue of 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.
21. The Appellant considers that the [REDACTED] m2 total GIA of the existing building should be deducted or off-set as part of the calculation of the chargeable amount, referring to Schedule 1 of the CIL Regulations and the case of R (Giordano Ltd) v London Borough of Camden [2019] EWCA Civ 1544.
22. The CA submitted site photographs taken on [REDACTED] of the existing dwelling and garage along with similar photographs taken on [REDACTED]. Further photographs showing the existing building as at [REDACTED] have also been submitted. The photographs do appear to show curtains/blinds in some of the windows, but all the photographs would, on the face of it, appear to show an empty property. This is further suggested in an email dated [REDACTED] between officers at the CA in which it is stated the property was "...purchased it [REDACTED] and it's been empty since then, prior to that it was occupied by the previous owners" and "This is currently on a LEVY charge (so unoccupied properties empty for over 2 years pay double Council Tax)".
23. The CA also referred to Hourhope Ltd v Shropshire CC (2015) where the High Court held that for the purpose of the CIL Regulations (2010) (as amended) the words "lawful use" meant a use that was lawful for planning purposes.
24. It is noted that The Town and County Planning Act 1990, s.191(2) states that '*uses and operations are lawful if no planning enforcement action may be taken against them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason) and they are not in any contravention of any enforcement notice that is in force*'.
25. Within the prescribed formula contained within Schedule 1 of the CIL Regulations 2010 (as amended), a KR reduction can be applied representing 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;*
26. Schedule 1, Part 1, paragraph 1(10) states:
- " 'retained part' means part of a building which will be –*
- (i) on the relevant land on completion of the chargeable development (excluding new build),*
- (ii) part of the chargeable development on completion, and*
- (iii) chargeable at rate R."*
27. Paragraph 1 (10) also 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.*

28. A “relevant building” is also defined in Schedule 1, Part 1, paragraph 1(10) as “a building which is situated on the relevant land on the day planning permission first permits the chargeable development”.
29. Based on the facts of this case, I consider the building that existed on the day planning permission [REDACTED] first permitted development to be a relevant building.
30. Following on from the above, the relevant period of “at least six months” of continuous lawful use for CIL purposes would fall within the three-year period [REDACTED] to [REDACTED].
31. In the case of R (Giordano Ltd) v London Borough of Camden [2019] EWCA Civ 1544 on the relevant date, under an earlier planning permission, the building could already be lawfully used for the same purpose as that permitted for the new development. The Court of Appeal commented “*The ability to carry on the use in question – or for it “to be carried on” – rests on the lawfulness of doing so, without any further planning permission having to be granted either for the use itself or for any necessary operational development. It does not depend upon the building being actually occupied in that use on the relevant day, [my emphasis] or upon its having already been physically adapted for the use. It entails the possibility of the use being lawfully and permanently carried on. The right to carry it on need not have been exercised yet. An extant and implementable planning permission will suffice.*”
32. It is my opinion that from all the information provided, use of the existing building as a residential dwelling could have been carried out without the need for planning permission on the day before the permission for the proposed development was granted, and the development therefore qualifies for a KR(ii) deduction for those 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 as per Schedule 1 of the CIL Regulations 2010 (as amended).
33. With regard to those parts of the existing building intended for demolition, it is my opinion that from all the information provided it cannot be conclusively established that those parts of the building were 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. A KR(i) deduction is therefore not appropriate for those parts of the existing building intended for demolition.
34. **Regarding Appeal Ground ii) Inclusion of car ports in the proposed GIA:** The CIL Regulations do not define Gross Internal Area, so it is necessary to adopt a definition of GIA. The RICS Code of Measuring Practice 6th Edition (May 2015) sets out the method of calculating GIA and states it:-

Includes:-

- s2.1 - Areas occupied by internal walls and partitions*
- s2.2 - Columns, piers, chimney breasts, stairwells, lift-wells, other internal projections, vertical ducts, and the like*
- s2.3 - Atria and entrance halls, with clear height above, measured at base level only*
- s2.4 - Internal open-sided balconies walkways and the like*
- s2.5 - Structural, raked or stepped floors are to be treated as level floor measured horizontally*
- s2.6 - Horizontal floors, with permanent access, below structural, raked or stepped floors*
- s2.7 - Corridors of a permanent essential nature (e.g. fire corridors, smoke lobbies)*
- s2.8 - Mezzanine floors areas with permanent access*
- s2.9 - Lift rooms, plant rooms, fuel stores, tank rooms which are housed in a covered structure of a permanent nature, whether or not above the main roof level*
- s2.10 - Service accommodation such as toilets, toilet lobbies, bathrooms, showers, changing rooms, cleaners' rooms and the like*
- s2.11 - Projection rooms*
- s2.12 - Voids over stairwells and lift shafts on upper floors*
- s2.13 - Loading bays*
- s2.14 - Areas with a headroom of less than 1.5m*
- s2.15 - Pavement vaults*

s2.16 - Garages
s2.17 - Conservatories

Excludes:-

s2.18 - *Perimeter wall thicknesses and external projections*
s2.19 - *External open-sided balconies, covered ways and fires*
s2.20 - *Canopies*
s2.21 - *Voids over or under structural, raked or stepped floors*
s2.22 - *Greenhouses, garden stores, fuel stores, and the like in residential property*

35. The GIA is defined as the area of a building measured to the internal face of the perimeter walls. Car ports are not specifically detailed in the definition of GIA and are therefore neither expressly included nor excluded within the measurement of a building to the perimeter walls. I therefore consider the actual construction and appearance of a structure (which may be referred to as a car port) determines whether it is better considered a canopy (as per RICS Code s2.20) or garage (as per RICS Code s2.16) for the purposes of its inclusion or exclusion from GIA.
36. Measuring to GIA does not require there to be a “perimeter wall” however. This is supported in the RICS Code of Measuring Practice, which includes an example illustrating how to calculate the GIA of a loading bay by measuring to the internal face of a supporting pillar. This loading bay has walls to only three sides and is open sided at the front. This example indicates that the RICS Code does not envisage that a lack of external walls prevents GIA from being calculated, and shows it is possible to measure the GIA of a structure that does not include walls all round by measuring to the internal face of the supporting pillars.
37. I have reviewed the approved drawing [REDACTED] dated [REDACTED] submitted as part of Appendix 3 to the Appellant’s CIL Appeal submission dated [REDACTED] for the development [REDACTED]:
- Car Port Plot 3* is a double car port detached from the house. It has a pitched, plain tile roof with a dedicated bat loft and rests on timber posts with open sides.
- Car Ports Plots 1 & 5* are two separate single car ports, each detached from the house. Each has a pitched, plain tile roof and rests on timber posts with open sides.
38. Having examined all the evidence, including the proposed drawings and comments made by both parties, whilst it would be possible to measure the GIA of each structure to the internal face of each timber supporting post, I consider that the construction and appearance of the above-described structures determines that they are more appropriately considered as “canopies” under RICS Code s2.20, and thus excluded from GIA.
39. Having considered the facts of this case and the evidence submitted in respect of the calculation of the CIL charge for this development, I am of the opinion that the car port accommodation may therefore be described as being excluded from GIA as defined in the RICS Code of Measuring Practice. It is noted that the CA also appear to acknowledge this possibility in their CIL Appeal submission [REDACTED] “*It must be noted that the car ports do appear to be more of an open timber structure with open gables and less supporting columns, thus a view could have been taken that this structure was a canopy.*”

Calculations of Gross Internal Area (GIA)

Existing building GIA – parts to be retained

40. The CA has calculated the GIA for the existing part to be retained as [REDACTED]m²
41. The Appellant has calculated the GIA for the existing part to be retained as [REDACTED]m²

42. The Appointed Person has calculated the existing GIA to be retained using measurements taken from drawing [REDACTED] dated [REDACTED] submitted as part of Appendix 3 to the Appellant's CIL Appeal submission dated [REDACTED] as follows:-

GF [REDACTED] m2
FF [REDACTED] m2
Total GIA to be retained = [REDACTED] m2

43. As the AP's measurements are constrained by the limitations of using the PDF measuring tool on the submitted plan along with the difficulty of identifying exactly where the line of demarcation between parts to be retained and parts to be demolished lies, it is considered prudent and equitable to adopt the middle measure out of the three for CIL purposes, which would be the GIA of [REDACTED] m2 proposed by the Appellant.

Proposed development GIA

44. The CA's calculation of total GIA used in their CIL Liability Notice is [REDACTED] m2 (including the GIA of the car ports at [REDACTED] m2) which equates to [REDACTED] m2 excluding the car ports.

45. The Appellant provided measurements from their Architects:-

Plot 1 Ground floor [REDACTED] m2 (bungalow)
Plot 2 Ground floor [REDACTED] m2, First floor [REDACTED] m2
Plot 3 Ground floor [REDACTED] m2, First floor [REDACTED] m2
Plot 4 Ground floor [REDACTED] m2, First floor [REDACTED] m2
Plot 5 Ground floor [REDACTED] m2 (bungalow)
TOTAL [REDACTED] m2 excluding the car ports

46. The following approved drawings were provided by the Appellant at the AP's request on [REDACTED] and copied to the CA for information / comment:-

[REDACTED] – Revision A Plots 1 and 5 dated [REDACTED]
[REDACTED] – Plot 2 dated [REDACTED]
[REDACTED] – Plot 3 refurbishment of existing house dated [REDACTED]
[REDACTED] – Plot 4 dated [REDACTED]

47. The AP has calculated the total GIA of the proposed scheme with measurements taken from drawings [REDACTED] to [REDACTED] dated [REDACTED] as follows:

Plot 1 Ground floor [REDACTED] m2 (bungalow)
Plot 2 Ground floor [REDACTED] m2, First floor [REDACTED] m2
Plot 3 Ground floor [REDACTED] m2, First floor [REDACTED] m2 Refurbished existing house
Plot 4 Ground floor [REDACTED] m2, First floor [REDACTED] m2
Plot 5 Ground floor [REDACTED] m2 (bungalow)
TOTAL [REDACTED] m2 excluding the car ports

48. This is very close to the [REDACTED] m2 calculated by the CA but larger than the [REDACTED] m2 calculated by the Appellant.

49. As the AP's measurements are constrained by the limitations of using the PDF measuring tool on the submitted plans, it is considered prudent and equitable to adopt the middle measure out of the three for CIL purposes, which would be the GIA of [REDACTED] m2 proposed by the CA – this will be rounded to [REDACTED] m2.

Calculation of CIL Liability

50. In accordance with Part 1 of Schedule 1, of the CIL Regulations 2010 (as amended) I therefore calculate the chargeable area using the formula within Schedule 1 Part 1:-

Net chargeable area = GR – KR – (GR x E)

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.

Value G (the GIA of the chargeable development): [REDACTED] m2.

Value GR (the GIA of the part of the chargeable development to be charged at rate *R*) is 945 m2 as above.

Value KR (i): [REDACTED].

Value KR (ii): [REDACTED] m2.

Value E (i): zero, as those parts to be demolished are not considered to be in-use buildings.

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

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

$$[REDACTED] \text{ m}^2 - [REDACTED] \text{ m}^2 - \left(\frac{[REDACTED] \text{ m}^2 \times [REDACTED] \text{ m}^2}{[REDACTED] \text{ m}^2} \right)$$

$$= [REDACTED] \text{ m}^2 \text{ GIA chargeable area}$$

52. CIL Liability is calculated using the indexed CIL Rate contained in the CA's published CIL Rate Summary for 2023 as follows:-

Residential small sites up to & inc 10 Plus Indexation - [REDACTED]

[REDACTED] m2 chargeable GIA

X £ [REDACTED] /m2 CIL Rate indexed at [REDACTED]

= £ [REDACTED] CIL Liability

Decision

53. 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]).

[REDACTED] DipSurv DipCon MRICS
RICS Registered Valuer
Valuation Office Agency
3 August 2023