Appeal Decision

by [redacted] MRICS

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: 1840587

Planning Permission Reference: [redacted]

Location [redacted]

Development: Change of use of existing building to [redacted]no. dwelling houses with associated works.

Decision

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

Reasons

1. I have considered all the submissions made by [redacted] (the Appellant) and [redacted] I 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 dated [redacted] ref [redacted] for "*Demolition of existing Greenhouse and construction of new ancillary building*" and approved plans.
    b. Planning permission dated [redacted] ref [redacted] for "*Non-material amendment relating to*" and [redacted] approved plans.
    c. Planning permission dated [redacted] ref [redacted] for "*Change of use of existing building to 1 no. dwelling house with associated works*" and approved plans.
    d. Planning permission dated [redacted] ref [redacted] for "*Change of use of existing building to [redacted]no. dwelling houses with associated works*" and approved plans.
    e. The CIL Liability Notice [redacted] issued by the CA dated [redacted] with CIL Liability calculated at £[redacted]
    f. The CA's Regulation 113 Review Decision ref [redacted] dated [redacted] .
    g. The CIL Liability Notice [redacted] issued by the CA dated [redacted] with CIL Liability calculated at £[redacted]
    h. The CIL Appeal Form dated [redacted] submitted by the Appellant under Regulation 114, together with documents and correspondence attached thereto and including an affidavit signed [redacted] by [redacted] , the Appellant.

i. The CA's representations dated [redacted] and [redacted] together with documents and correspondence attached thereto.
j. The Appellant's further comments dated [redacted] .

Background

2. Planning permission [redacted] was granted [redacted] for "*Demolition of existing Greenhouse and construction of new ancillary building*" where Condition no. 4 states: "*The outbuilding hereby permitted shall not be occupied at any time other than for purposes ancillary to the residential use of the dwelling known as* [redacted] ."

3. This was followed by permission [redacted] granted [redacted] for "*Non material amendment relating to* [redacted] relating to changes to the approved drawing numbered [redacted] where the original internal plans for a *bar/lounge, games room, shower/changing and sauna* were replaced with a *gym, a kitchen worktop and sink/drainer, male changing room with bath/shower, female changing room with shower, female workout room, store room*.

4. Planning permission [redacted] was granted [redacted] for "*Change of use of existing building to* [redacted] *no. dwelling house with associated works*" with existing drawing [redacted] dated [redacted] (showing *two bathrooms and two shower-rooms*) to be replaced under this new permission in line with proposed drawing [redacted] dated [redacted] (showing *four bedrooms, each with an ensuite, and a kitchen*).

5. Planning permission [redacted] was granted [redacted] for "*Change of use of existing building to* [redacted] *no. dwelling houses with associated works*" and based on a Planning Officer's Delegated Report dated [redacted] with the proposed scheme shown on drawing [redacted] dated [redacted] (showing a *3 bed unit (including 1 ensuite) with a separate shared bathroom and open plan kitchen/dining/living area* and the other part of the building comprising a *4 bed unit (including 2 ensuites) with a separate shared bathroom and open plan kitchen/dining/living area*) and an application for planning permission reference PP- [redacted] dated [redacted] . The *CIL Form 1: CIL Additional Information* as completed by the Appellant and dated [redacted] specifically includes ticks in the "*No*" boxes at part 5c (regarding any claim for self-build exemption) and 5d (regarding any claim for exemption for a residential annex or extension). At part 6c the Appellant stated that [redacted] m2 GIA of new space would be built.

6. CIL Liability Notice [redacted] following planning permission [redacted] was issued by the CA dated [redacted] with CIL Liability calculated thus:

   Residential Zone 5
   Chargeable Area GIA [redacted] *m2*
   @ CIL Rate (R) £[redacted] */ m2 indexed by* [redacted]
   = £[redacted] *CIL Liability*

7. A Regulation 113 review was undertaken by the CA at the Appellant's request, and a decision issued on [redacted] .

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

9. A further CIL Liability Notice [redacted] was issued by the CA dated [redacted] following a correction by the CA of the GIA as a result of their Regulation 113 review, with CIL Liability recalculated thus:

   Residential Zone 5
   Chargeable Area GIA [redacted] *m2*

@ CIL Rate (R) £ / m2 indexed by
= £ CIL Liability

10. A CIL Demand Notice was issued by the CA dated for £

Appeal Grounds

11. The Appellant contends that CIL should not apply, as this is a change of use permission and because of the current lawful use of the main dwelling and ancillary outbuilding any calculation of CIL must include GIA offset of the existing ancillary outbuilding, reducing the chargeable area to and resulting in £ CIL.

Consideration of the Parties' Submissions

12. The Appellant states that, as noted within the affidavit they have submitted, the ancillary outbuilding was initially laid out in accordance with the approved floor plans granted under application and used as a leisure building for a period of time. The Appellant notes that this non-material amendment to the earlier planning permission remained subject to Condition no. 4: "*The outbuilding hereby permitted shall not be occupied at any time other than for purposes ancillary to the residential use of the dwelling known as* They argue that there was no requirement for the building to be laid out as a leisure building in perpetuity and, subject to it being constructed and used in accordance with the approved scheme, the only restriction thereafter was that it be occupied for purposes ancillary to the main dwelling house.

13. The Appellant confirms they carried out internal alterations in to enable the outbuilding to be occupied by their children and grandchildren. This work was completed by , as detailed within the photographs submitted with this appeal, and involved the provision of four bathrooms and living accommodation. This was not a material change of use, but simply facilitated a continuation of the ancillary use of the building.

14. The Appellant argues that their affidavit confirms that the outbuilding was constructed and used in accordance with the approved plans for the permission (as amended in) and that the internal alterations were carried out to allow for living accommodation which has only been occupied by family members and, accordingly, the current use remains lawful.

15. The Appellant states that in planning application ref was submitted for the change of use of the existing ancillary outbuilding to one dwelling. The existing floor plans submitted detail the layout of the outbuilding as used for purposes ancillary to the main dwelling continuously since the spring of . The application was approved on and a CIL Liability Notice was issued by the CA confirming that the GIA floorspace of the existing ancillary outbuilding would be off-set from the chargeable area and therefore no CIL payment would arise in connection with the grant of planning permission.

16. The Appellant advises they then submitted a further planning application for the change of use of the ancillary outbuilding to two dwellings under application . This was approved on and CIL Liability Notice was issued by the CA. In the new Liability Notice the CA did not off-set the existing floorspace of the ancillary outbuilding from the chargeable area. The CIL Officer at the CA advised this was because the lawful existing use of the outbuilding was under question and requested evidence that the development had not already been carried out.

17. The Appellant submitted photographs to the CA detailing the existing ancillary use of the outbuilding and requested a Regulation 113 review. The CA concluded however that the development had commenced in advance of the planning permission being granted on and therefore they were unable to off-set the existing building GIA.

18. The Appellant argues that, as confirmed within their affidavit, no works have been carried out in connection with either of the [redacted] planning permissions and a commencement of development has not been made for either of the two consents.

19. The Appellant argues that whilst there have been changes to the internal layout of the ancillary outbuilding since it was approved under permissions [redacted] and [redacted] , planning permission is not required for internal alterations to a property and most especially if they do not give rise to a change of use. The ancillary residential use of the outbuilding to the main dwelling has not changed since its construction.

20. The Appellant contends that the existing outbuilding is linked to use of the main dwelling and has provided separate living quarters for their family whilst remaining ancillary to the main dwelling. They argue that no change of use for the outbuilding has yet taken place.

21. The Appellant further notes that the ancillary use of the outbuilding is underlined by the fact that it remains in the rear garden of the main dwelling and all outdoor space, access and parking is shared via the main dwelling. There is no separate access, parking or amenity space used solely by either the main house or the ancillary building. There is also no separate Council Tax levied in respect of the outbuilding and, in those terms, they remain a single entity. The utilities for the outbuilding such as water and electricity remain billed through the main dwelling. They contend that none of this suggests that the outbuilding has already become a separate dwelling(s) and clearly remains ancillary to the main dwelling.

22. The Appellant also notes that the CA issued two Liability Notices: [redacted] ([redacted]) for £ [redacted] based on a GIA of [redacted] m² and a revised [redacted] dated [redacted] for £[redacted] based on a GIA of [redacted] m² whilst their agent's have calculated the GIA at [redacted] m².

23. The Appellant concludes that a change of use of the existing ancillary outbuilding to a dwelling has not commenced and, therefore, it is their view that the GIA of the existing ancillary outbuilding should be off-set from the chargeable area when calculating CIL.

24. The CA state they deemed development under permission [redacted] to have commenced on [redacted] as a valid *Commencement Notice* had not been submitted to them. They note that the development subject to this appeal was granted full planning permission[redacted] for the "*Change of use of existing building to 2 no. dwelling houses with associated works*" and the application was determined on[redacted] in accordance with the approved plans numbered[redacted] (*Proposed Plans and Elevations*).

25. The CA comment that Liability Notice[redacted] (the subject of this appeal) has been superseded by revised Liability Notice [redacted] containing a reduced CIL chargeable area. A site visit was conducted by the CA after this appeal was lodged and they have concluded that development commenced in relation to this permission in [redacted] . A Demand Notice has been served with the deemed commencement date of[redacted] .

26. The opinion of the CA is that the revised Liability Notice and the Demand Notice have been correctly served in accordance with regulations 65(5) and 68(a) respectively:

    "A collecting authority may at any time issue a revised liability notice in respect of a chargeable development."

    "A collecting authority must determine the day on which a chargeable development was commenced ("the deemed commencement date") if it—
    (b) has not received a commencement notice in respect of the chargeable development but has reason to believe it has been commenced"

27. The CA argue they were not in a position to undertake a Regulation 113 review within the permitted timeframe due to insufficient evidence relating to the relevant existing building being available, and that such requests for evidence had been made to the Appellant.

28. The CA confirm that the CIL chargeable amount has been calculated using the prescribed formula laid down at Schedule 1 Part 1 paragraph 1.

29. The CA refer to Schedule 1 Part 1 paragraph 1 sub-paragraph (8) and sub-paragraph (9) determine:

    "(8) Where the collecting authority does not have sufficient information, or information of sufficient quality, to enable it to establish that a relevant building is an in-use building, it may deem it not to be an in-use building.

    (9) Where the collecting authority does not have sufficient information, or information of sufficient quality, to enable it to establish—
    (a) whether part of a building falls within a description in the definitions of KR and E in subparagraph (6); or
    (b) the gross internal area of any part of a building falling within such a description, it may deem the gross internal area of the part in question to be zero."

30. The CA also reference Schedule 1 Part 1 paragraph 1 sub-paragraph (10) defines an 'in use' building as:

    "… a building which—
    (i) is a relevant building, and
    (ii) contains a part that has been in lawful use for a continuous period of at least six months within the period of three years ending on the day planning permission first permits the chargeable development"

31. The CA note that Full Planning Permission was granted on [redacted] and that *Form 1: CIL Additional Information* and *Form 2: Assumption of Liability* had been received by the CA on [redacted] .

32. The CA argue that in line with regulation 9(1) the chargeable development is "*Change of use of existing building to* [redacted] *no. dwelling houses with associated works*".

33. The CA disagrees with the Appellant's ([redacted] as agent) assertion by email on [redacted] that "*The approved scheme is to convert the building to* [redacted] *no. open-market houses…*"

34. The CA note that the '*Existing Buildings*' section of *Form 1: CIL Additional Information* was incomplete, with no photographic evidence available from either the planning case officer, the Appellant or the Appellant's agent [redacted] .

35. The CA state that Liability Notice [redacted] was issued on [redacted] in accordance with CIL regulation 65(1):

    "The collecting authority must issue a liability notice as soon as practicable after the day on which a planning permission first permits development"

36. The CA argue that on [redacted] following an enquiry from the Appellant's agent they agreed to consider evidence relating to the lawful use of the existing building. Internal and external images were provided, and the Appellant's agent confirmed by email on [redacted] that development in relation to permission [redacted] had not commenced consistent with the Planning Application received by the CA dated [redacted] .

37. In considering the 'in use' status of the existing building, the CA note that they identified inconsistencies between approved proposed plans for the original ancillary building the [redacted] non-material amendment ancillary building plans [redacted] and the existing building plans submitted with the permission subject to this current appeal.

38. The CA determined that a site visit was required to establish whether the existing buildings satisfied the 'in use' rule and to confirm that development had not commenced. They comment that it was clear from this site visit that the ancillary building had been already sub-divided into two independent living spaces with their own entrances, fully equipped kitchens, living rooms and a total of 5 bathrooms.

39. The CA advise that the Appellant confirmed to them during the site visit that the ancillary building sub-division for occupation by the Appellant's children and grandchildren commenced in summer [redacted] and were both occupied in December [redacted] .

40. The CA state they reject the Appellant's argument that "*The existing ancillary outbuilding is not self-contained and therefore a change of use has not taken place*."

41. The CA state they deem the two self-contained living spaces as 'annexes' as defined by regulation 42A(2):

    "The development is a residential annex if it—
    (a) is wholly within the curtilage of the main dwelling; and
    (b) comprises one new dwelling."

42. They further refer to the definition of dwelling is at regulation 2:

    ""dwelling" means a building or part of a building occupied or intended to be occupied as a separate dwelling…"

43. The CA therefore contend that the change of use to two dwellings in line with permission [redacted] has already occurred and reject the Appellant's argument that "*The change of use of the existing ancillary outbuilding to a dwelling has not commenced*".

44. The CA state they are not therefore sufficiently satisfied that the existing building is an 'in-use building' and have deemed it not to be an in-use building –Schedule 1 Part 1 paragraph 1, sub-paragraph (8):

    "Where the collecting authority does not have sufficient information, or information of sufficient quality, to enable it to establish that a relevant building is an in-use building, it may deem it not to be an in-use building"

45. The CA does not agree that the change of use has not commenced and does not agree that an existing building deduction should be applied. They therefore conclude that the chargeable area remains at [redacted] m2, the chargeable amount remains at £[redacted] and the Demand Notice remains valid.

Consideration of the Decision

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

47. The key issues for the Appointed Person (AP) to consider are:

    i) Whether the existing building can be shown to have been lawfully in-use for six months during the three-year period ending on the date planning permission [redacted] was granted.

ii) To review the existing and proposed GIAs and calculate the correct level of CIL charge.

48. With regards to i) the matter of whether the existing building can be shown to be lawfully in-use: disagreement surrounding the issue of identifying if the existing building qualified as a lawful in-use building on the date planning permission [redacted] was granted has arisen in connection with Schedule 1 of the CIL Regulations 2010 (as amended), which provides for the deduction or offset of the GIA of existing in-use buildings from the GIA of the total development in calculating the CIL charge.

49. Schedule 1 of the CIL Regulations 2010 (as amended) Part 1 – standard cases – 1 (10) provides that an "in-use building" means a relevant building which contains a part that has been in lawful use for a continuous period of at least six months within the period of three years ending on the day planning permission first permits the chargeable development.

50. Part 1 – standard cases – 1 (10) also provides that "relevant building" means a building which is situated on the relevant land on the day planning permission first permits the chargeable development.

51. Based on the facts of this case, I consider the building that existed on the day planning permission[redacted] was granted to be a relevant building.

52. The relevant period of continuous lawful use in accordance with Schedule 1 of the CIL Regulations 2010 (as amended) is [redacted]to[redacted], and if the existing building is deemed to satisfy the lawful in-use requirements, then GIA off-set can be applied to the CIL Liability calculation.

53. If, however, lawful in-use cannot be demonstrated then CIL would be calculated with no existing building GIA off-set.

54. It is clear from the CIL Liability Notice issued by the CA that the development permitted under reference [redacted] was the basis for the CA's CIL calculation, described as "*Change of use of existing building to 2 no. dwelling houses with associated works*".

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

56. The CA contend that the internal alterations that took place between [redacted] and[redacted] had the effect of changing the existing building's use from ancillary (to the main house) into two separate dwellings (with a dividing wall in between and separate external access to each part) ahead of planning permission being granted, with the result that the existing building was no longer in lawful use. Thus they consider that development commenced prior to the grant of planning permission.

57. The Appellant argues that, despite the internal alterations, the existing building remained in the occupation of the Appellant's family as ancillary to the main house and thus remained in lawful use throughout the relevant[redacted] period.

58. In an email dated[redacted] of[redacted] Planning (as agent to the Appellant) had advised the CA "*I think there is a misunderstanding – the bathrooms you refer to have been in-situ for a long period of time as the outbuilding is occupied for residential as ancillary to the main house by the owner's family (not as separate dwelling houses) – this was all clear in the planning applications. The existing floorplans for both applications showed the bathrooms in-situ. Bathrooms have not been added – they are clearly shown on the existing plans*

and the photographs we sent to you and are used in association with the lawful ancillary use of the building."

59. In a further email dated [redacted] advised the CA "*The building was erected and laid out pursuant to* [redacted] *and used as a leisure building for a period of time. It was then altered internally to allow for the owner's children and grandchildren to live in the outbuilding, and this included the provision of bathrooms and living accommodation. Planning permission was not required for this. It remained in ancillary use to the main house in accordance with* [redacted] *and* [redacted]."

60. The Appellant has submitted a sworn affidavit dated [redacted] confirming he has occupied the property since April [redacted] and confirming that construction of the outbuilding was completed[redacted] from which it was used as an ancillary leisure building. He confirms that in [redacted] internal alterations were carried out with provision of four bathrooms and living accommodation completed in winter[redacted]. He advises his children and grandchildren have continuously occupied the accommodation since spring [redacted] as ancillary to the main dwelling, and further confirms that "*no works have been carried out pursuant to the* [redacted]*planning permissions …and a commencement of development has not* [occurred] *for either of the two consents (planning reference numbers*[redacted] *and*[redacted]*)*".

61. In the case of Hourhope Ltd v Shropshire CC (2015) 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.

62. 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*".

63. It would appear, on the information available, that the CA have interpreted the amendments to the internal layout as being works in connection with planning permission [redacted]M. The actual use of the altered internal layout had, however, remained as ancillary occupation by the Appellant's extended family in accordance with the existing planning permission Condition no. 4: "*The outbuilding hereby permitted shall not be occupied at any time other than for purposes ancillary to the residential use of the dwelling known as* [redacted]

64. There is nothing in the existing planning permission or Condition 4 to suggest that the Appellant could not change the use/layout of the building from a gym to living accommodation. The restriction only requires that use must be "*for purposes ancillary to the*" main dwelling.

65. I therefore conclude that development under planning permission [redacted] had not commenced when that permission was granted on [redacted] , and it is my decision that the existing building had remained in continuous lawful use (as supported by the Appellant's affidavit) as ancillary to the main dwelling for at least six months during the relevant three-year period[redacted] to[redacted] . Existing building GIA off-set must therefore be applied to the CIL calculation.

66. With regards to ii) the GIA for the existing and proposed buildings: the CA initially calculated the chargeable area to be[redacted] m2 GIA, and this is the area used in their CIL calculation at £[redacted] with no existing building GIA off-set.

67. The CA subsequently revised their chargeable area calculation down to [redacted] m2 GIA and issued a revised CIL Liability Notice at £[redacted] with no existing building GIA off-set.

68. The Appellant's agent calculated the chargeable area to be [redacted] m2 GIA.

69. Both parties would appear to have calculated GIA in accordance with The RICS Code of Measuring Practice 6th Edition (May 2015) s.2.0 which sets out the method of calculating GIA and states it:

    Includes:
    s.2.1 - Areas occupied by internal walls and partitions

70. As it has been determined above that the lawful in-use requirement has been met, and as the existing GIA and proposed GIA are the same (regardless of which parties' figure is applied) this issue remains wholly academic, as the off-set of whichever existing GIA is used will effectively cancel out the proposed GIA with a resultant nil chargeable area for CIL purposes.

71. Applying existing building GIA off-set and utilising the original higher GIA used by the CA in their [redacted] CIL Liability Notice ref [redacted] (which is very close to the [redacted]m2 GIA calculated by the Appellant's agent) CIL Liability is therefore calculated thus:

    Residential Zone 5
    Proposed Building GIA [redacted] m2
    Less Existing Building GIA [redacted] m2
    = [redacted] m2 (nil) Chargeable Area
    @ CIL Rate (R) £[redacted] / m2 indexed by [redacted]
    = £[redacted] CIL Liability

Decision

72. On the basis of the evidence before me and having considered all the information submitted in respect of this matter, I determine that the Community Infrastructure Levy (CIL) payable in this case should be £ [redacted] ([redacted]).

[redacted]DipSurv DipCon MRICS
RICS Registered Valuer
Valuation Office Agency
14 May 2024