Appeal Decision

by [redacted] MRICS

an Appointed Person under the Community Infrastructure Levy Regulations 2010 as Amended

Valuation Office Agency
Wycliffe House
Green Lane
Durham
DH1 3UW

e-mail: [redacted]@voa.gov.uk

Appeal Ref: 1846148

Planning Permission Ref. [redacted]

Proposal: Application under Section 73A to vary Condition 1 (approved plans) of [redacted] to allow for construction of 3 x dormer windows in west elevation roof slope (plot 4), altered dormer design and position to west elevation (plot 3), alterations to fenestration, omission of entrance hall (plot 3), erection of entrance canopy (plot 4) and introduction of roof light.

Location: [redacted]

Decision

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

Reasons

1. I have considered all of the submissions made by [redacted], on behalf of [redacted] (the Appellant) and by [redacted], 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 decision ref [redacted] dated [redacted] ;

    b) Approved planning consent drawings, as referenced in planning decision notice;

    c) CIL Liability Notice [redacted] dated [redacted] ;

    d) CIL Appeal form dated [redacted] , including appendices;

    e) Representations from CA dated [redacted]; and

    f) Appellant comments on CA representations, dated [redacted].

2. On [redacted] , I requested additional representations from both parties in respect of the GIA of the retained parts. Their responses were then exchanged for comments. I have therefore also had regard to the following additional information:

    g) Additional representations from the Appellants, received [redacted];

    h) Additional representations from the CA, received [redacted] ;

    i) CA comments on Appellant's additional representations, dated [redacted] ; and

    j) Appellant's comments on CA representations dated [redacted].

3. Planning permission was granted under application no [redacted] on [redacted] for *'Application under Section 73A to vary Condition 1 (approved plans) of [redacted] to allow for construction of 3 x dormer windows in west elevation roof slope (plot 4), altered dormer design and position to west elevation (plot 3), alterations to fenestration, omission of entrance hall (plot 3), erection of entrance canopy (plot 4) and introduction of roof light.'*

4. The property had originally been granted permission for a change of use to provide two independent dwellings on [redacted] under permission [redacted]. The plans were then changed under planning permission [redacted] permitted on [redacted] . The [redacted] permission as shown above was then granted, further altering the plans.

5. The CA issued a CIL liability notice on [redacted] against planning permission [redacted] in the sum of £ [redacted]. This was calculated on a chargeable area of [redacted] m² at the 'Residential dwellings – 10 or less (Zone [redacted]) rate of £ [redacted] m² plus indexation. No earlier liability notices had been issued in respect of the earlier consents.

6. The Appellant requested a review under Regulation 113 on [redacted]. The CA responded on [redacted] , confirming their view that the liability notice was correct.

7. On [redacted], the Valuation Office Agency received a CIL appeal made under Regulation 114 (chargeable amount) contending that the CIL liability should be [redacted] .

8. The Appellant's grounds of appeal can be summarised as follows:

   a) Plot 3 (now addressed [redacted]) was occupied as a dwelling under permission [redacted] from [redacted] . Therefore, part of the building was 'in use' so the whole building should be deducted from the chargeable area.

   b) There was an ability to use the whole of the building for residential purposes on the day before planning permission [redacted] was granted. Therefore, CIL should not be charged as the building could continue to be used lawfully and permanently without further planning permission.

   c) The total GIA of the development should be [redacted] m² (previously stated as [redacted] m² but amended within the comments dated [redacted]).

9. The CA has submitted representations that can be summarised as follows:

   a) The occupation of Plot 3 [redacted] () was contrary to the approved plans and in breach of multiple conditions. It was therefore not in lawful occupation and so does not qualify for deduction from the CIL charge.

   b) There is no ability to lawfully and permanently continue the residential use without further planning permission, as the building was in breach of the earlier permission. Therefore, a new planning permission was required to allow the building to be used lawfully.

   c) The total GIA has been reviewed in accordance with the RICS code of measuring practice and should be [redacted]m². The chargeable amount should therefore be increased to £ [redacted].

Net Chargeable Area

10. The CIL Regulations Part 5 Chargeable Amount, Schedule 1 defines how to calculate the net chargeable area based on the following formula:

$$G_R - K_R - \left(\frac{G_R \times E}{G} \right)$$

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.

11. The appellants argue that deductions could be made under either KR(i) or KR(ii) and I have therefore considered these points in turn.

KR(i) deductions

12. KR(i) relates to retained parts of in-use buildings. "In-use building" is defined in the Regulations as a relevant building that 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.

13. "Relevant building" means a building which is situated on the "relevant land" on the day planning permission first permits the chargeable development. "Relevant land" is "the land to which the planning permission relates" or where planning permission is granted which expressly permits development to be implemented in phases, the land to which the phase relates.

14. The appellant argues that Plot 3 (now known as [redacted]) was occupied as a dwelling from [redacted] until [redacted], covering a period of six months before planning permission was granted in [redacted]. They have provided evidence of this occupation in the form of photographs, utility bills and statutory declarations from the occupiers. The occupation itself does not appear to be in dispute but the lawfulness of the occupation is disputed by the CA.

15. The CA state that the development was in breach of conditions 1, 8 and 13 of planning permission [redacted] and therefore any use would not be lawful. The appellants argue that details relating to conditions 2, 7, 8 and 12 were submitted to the CA in [redacted] but no formal decision was issued. A deemed discharge application was then submitted on [redacted] and as no decision was issued, the conditions are deemed to be discharged. The planning officer report for the [redacted] permission confirms that conditions 2, 7, 8 and 12 of [redacted] have been discharged.

16. The appellants acknowledge that the visual appearance of [redacted] in [redacted] differs from that shown on the approved plans for [redacted] and that the elevations as built are different from those approved. However, they state that this affects only the external appearance and not the use of the building as a dwelling.

17. The Appellants refer to several pieces of case law to determine whether planning permission commenced in contravention of conditions can be lawful.

18. The Court of Appeal decision in Greyfort Properties Ltd v SSCLG [2011] applied both the Hart Aggregates judgement (R (Hart Aggregates Ltd) v Hartlepool BC) and the Whitley principles (Whitley & Sons v SOS for Wales [1992]) and specifically endorsed the need for the conditions to go to the "heart of the matter" to be a true condition precedent. In the Greyfort case, the judge found that a condition requiring that the ground floor levels of the building be agreed before any work commenced did go to the heart of the matter.

19. The Appellant also refers to the case of Ellaway v Cardiff County Council & Others [2014]. In this case, the High Court ruled the authority's decision to retrospectively approve the discharge of the pre-commencement conditions as lawful. The appellants state that this case proves that conditions can be discharged retrospectively, making the earlier commencement of the development lawful. They also refer to a Certificate of Lawfulness reference WA/2021/02163 where the CA concluded that a development had been lawfully implemented despite pre-commencement conditions not being discharged.

20. In determining whether the occupation of [redacted] was lawful, I have considered the relevant planning conditions.

21. Planning permission [redacted] included 13 planning conditions. With the exception of the plan references in condition 1, the conditions are all identical to those in the [redacted] permission. Below are the conditions that have been referenced by either the Appellant or CA.

    1. *The plan numbers to which this permission relates are: [redacted] rev C, [redacted] , existing floor plans dated [redacted] and existing elevations dated . [redacted] The development shall be carried out in accordance with the approved plans… No material variation from these plans shall take place unless otherwise first agreed in writing with the Local Planning Authority.*
    2. *Before any relevant work begins, the following details must be approved in writing by the Local Planning Authority. The works must not be executed other than in complete accordance with these approved details:*
        a. *Samples or specifications of external materials and surface finishes*

    7. *No development shall take place until a detailed landscaping scheme (including details of all hard and soft landscaping) has been submitted to and approved by the Local Planning Authority in writing. The landscaping scheme shall include details of all planting, hard surfaces and fencing. Landscaping shall be carried out strictly in accordance with the agreed details and shall be carried out within the first planting season after commencement of the development or as otherwise agreed in writing with the Local Planning authority. The landscaping shall be maintained to the satisfaction of the Local Planning Authority for a period of 5 years after planting, such maintenance t include the replacement of any trees and shrubs that die or have otherwise become, in the opinion of the Local Planning Authority, seriously damaged or defective. Such replacements to be of same species and size as those originally planted.*

    8. *Prior to commencement of development, details of how foul sewerage is to be accommodated for the proposed units shall be submitted to and approved by the Local Planning Authority. The development shall be carried out in accordance with the approved details.*

    12. *Prior to the first occupation of the development hereby approved, details of the bin storage shall be submitted to and approved by the Local Planning Authority. Once approved the development shall be completed at all times in accordance with the approved details.*

    13. *The windows in the east elevation of the dwelling shall be glazed with purpose made obscure glazing and non-opening to the extent that intervisibility is excluded and shall be retained as such.*

22. The CA state that the development was in breach of conditions 1, 8 and 13 and is therefore unlawful.

23. The appellants agree that condition 1 was not complied with but state it does not go to the "heart of the permission" such that failure to comply with this condition would render the entire development unlawful. For condition 8, the appellants state that whilst the details were never formally discharged, the detail submitted in [redacted] was sufficient and acceptable. They make no reference to condition 13.

24. I have reviewed the approved plans for both the [redacted] permission (as approved during the relevant period) and the [redacted] permission (which I understand is as built). The plans show significant changes to the elevations including external windows and doors, the addition of a covered entrance and some changes to the internal layout.

25. In my opinion, condition 1 does go to the heart of the matter. I do not accept that a building constructed contrary to the approved plans can be lawful and it is not possible to retrospectively discharge these conditions without major construction work to alter the building to accord with the plans. I therefore do not accept that [redacted] can be considered a lawful in-use building for the purposes of CIL.

KR(ii) deductions

26. KR(ii) allows for the deduction of 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.

27. "Retained part" is defined as 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 [redacted].

28. The appellants argue that the building had an ability to be used for residential purposes on the day before planning permission was granted. They state therefore that this use could continue lawfully and permanently without further planning permission.

29. The appellant refers to the case of Giordano v Camden LBC [2019] in which the court of appeal upheld a KR(ii) deduction when there was an existing planning permission to convert an office block to six flats. In this case, Camden LBC argued that the floor space should be capable of the intended use under the chargeable development without the need for further physical adaptation. The judge decided against Camden LBC and found that the need to carry out physical works did not preclude a valid KR(ii) claim.

30. The appellants argue that the Giordano case shows that the requirement for works to be carried out, does not prevent the lawful use from existing. The appellants in this case had the option to carry out works to make the [redacted] consent lawful and there is no requirement in the CIL regulations that this work had to have been carried out. They have supported their view with legal advice from Christoper Cant of the Barrister's Group.

31. The CA argue that that this appeal differs to the Giordano case because the amended permission in the Giordano case was granted prior to the work being carried out. They do not consider the building to be a relevant building because the works were completed in breach of planning. They also argue that the permission includes new build additions and is not purely a conversion of the existing property.

32. In my opinion, the property is a relevant building as it existed on the relevant land. The original building (excluding new build) also falls within the definition of a "retained part" as it remains on the land at completion of the chargeable development and is part of the chargeable development.

33. The question therefore is whether "*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.*"

34. Para 31 of the Giordano case states. *"…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, 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. There is no stipulation, or necessary implication, that the use must already have been put into effect; or that it is, on that day, the "extant lawful use" of the retained parts of the building; or that any works for which planning permission has been granted to convert or adapt the building must already have been fully carried out, to achieve "physical suitability" for it; or that it must be likely that such work would in fact have been carried out had the new planning permission not been granted. To read any of these qualifications into regulation 40(7)(ii) would be inappropriate. The legislature could have inserted them if it had seen a need to do. But it did not."*

35. Para 37 states *"The "statutory deduction" under regulation 40(7)(ii) has a sound legislative purpose…. It excludes a liability to pay CIL under a newly granted planning permission where the landowner is already lawfully entitled to use the same floorspace in the same way, and presumptively with the same burden on local infrastructure, and, in a case such as this, without paying CIL. And it achieves this without obliging the owner of the premises, before it can avail itself of the "statutory deduction", to have carried out all the works required to adapt or convert the building for the use in question under a prior planning permission, and to incur the cost and delay in doing that, only to have to undo some or all of those works after the new permission has been granted. ''*

36. In my opinion, the facts of the Giordano case are similar to this case, in that the property had planning permission for residential use on the day before planning permission was granted. Although the building had been converted contrary to the existing planning permission, there is no requirement under KR(ii) that any use must have been lawful. The judge in the Giordano case makes it clear that works need not have been carried out, provided that there is an extant and implementable planning permission. I am therefore of the opinion that a KR(ii) deduction of the GIA of the retained parts of the original building (excluding new build) should be applied in this case.

GIA of retained parts

37. The KR(ii) deduction requires the "gross internal areas of…retained parts" to be deducted from the GIA of the chargeable area. The definition of retained part is a building that sits on the relevant land on completion of the chargeable development (excluding new build). New build is defined as *"that part of the chargeable development which will comprise new buildings and enlargements to existing buildings, and in relation to a chargeable development granted planning permission under section 73 of TCPA 1990 ("the new permission") includes any new buildings and enlargements to existing buildings which were built pursuant to a previous planning permission to which the new permission relates."*

38. I do not consider that the GIA of the building that existed on the site at the date of the planning permission should be deducted in full, as is the opinion of the appellant. Additional representations were requested from both the CA and the Appellant as to their opinion of the GIA of the retained parts, excluding new build that was approved under [redacted] and any variation permissions. They provided the following figures:

Floor	Appellant GIA	CA GIA
Ground	[redacted] m²	[redacted] m²
First	[redacted] m² + [redacted] m²	0m² [redacted] *[m² + [redacted] m²]*
Total	[redacted] **m²**	[redacted] **m²** *[[redacted] m²]*

39. The appellants comment in their additional representations that by the date of the grant of the [redacted] permission, the whole of the first floor had been floored and the second floor constructed so that these areas as well as that of the ground floor are comprised in the GIA of the retained parts. They state that the [redacted] permission is a section 73a permission and not a section 73 permission, so these additions do not comprise "new build." Their opinion of the total GIA including these areas is [redacted] m^2.

40. The CA comment that only the ground floor area should be included within the retained parts as it is not clear whether the first floors were retained or removed and replaced. Due to the comments in the structural report that the proposed upper floors require strengthening work, they consider that these were not retained. They have however included these measurements for completeness and these are shown within brackets in the table above.

41. The CA disagree with the appellant's GIA calculation of the ground floor as they state it includes an area that was not retained. From the plans provided, I agree that the appellants have included a small area of building that appears to have been demolished as part of the development.

42. The appellants comment on the CA assumptions regarding the first floor by stating that the photographs show that the timbers were substantial and in good condition. With regards to the structural report they comment that *"Whilst the report didn't specifically refer to the first-floor sections being retained, it doesn't automatically follow that they must have been removed, which is what the Council is concluding. Notably, the report states that the floor is recently installed, so it would have been fit for purpose."* They do not conclusively state whether the floor was replaced or not but comment that *"work providing a complete first floor unlike with the second floor is neither new build nor enlargement."*

43. The chargeable development in this case is labelled as a section 73a permission and not a section 73 permission. The purpose of the application was to allow for the [redacted] permission (itself a s73 permission) to be completed without compliance with Condition 1 (approved plans), which would typically be considered a section 73 permission. However, as the consent was granted retrospectively, it was granted under section 73a. Although the CIL regulations do not explicitly refer to 73a permissions within the definition of new build, I consider that the purpose of this application is the same for any amendment permission, whether granted under section 73 or 73a. As a result, I consider that the section 73 rules should apply and any new build constructed as a result of the previous amendment planning permissions should be disregarded.

44. In determining the GIA of the "retained parts," I have included only floor areas that existed at the time of the [redacted] permission. The appellant and CA have provided their opinions of value of these parts and I have compared these figures against the available plans. I have had regard to the RICS code of measuring practice definition when determining GIA.

45. I consider there to be an error in the appellant's calculation of the ground floor GIA as they have included an area that was demolished as part of the development. I have therefore adopted to CA figures for the ground floor GIA. I consider that the areas of first floor that were previously in situ can be included within the GIA as a retained part. The appellants have excluded the stairwells from their calculation, which I believe should be included within GIA as the RICS definition specifically includes "voids over stairwells and lift shafts on upper floors". I have therefore again adopted the CA figures. My opinion of GIA of the retained parts is therefore [redacted] m^2.

GIA of the chargeable development

46. The GIA of the chargeable development is disputed by the Appellant and the CA. The CA initially measured the GIA at [redacted] m² (as contained in the Liability notice) and then revised this to [redacted] m² in their representations. The appellant initially measured the GIA at [redacted] m² but then revised this to [redacted] m² in their response to the CA representations.

47. According to the plans provided, the main difference in the calculation of GIA is whether the void area on the second floor should be included. This void is an area above the stairs that service the ground to first floor only. The void is correctly included on the first floor by both parties. In my opinion, the void should also be included on the second floor as the definition of GIA specifically includes "voids over stairwells and lift shafts on upper floors."

48. I have carried out a full review of the measurements and I have accepted the Appellant's measurements of the ground and first floor but I have adopted the CA measurements of the second floor. I conclude that the total GIA is therefore [redacted] m².

Calculation of CIL Charge

49. I have calculated the net chargeable area in accordance with the regulations by deducting the GIA of the retained parts (excluding any new build permitted by permission reference [redacted]) under KR(ii) *([redacted] m²)* from the GIA of the chargeable development [redacted] *(m²)*. This results in a net chargeable area of [redacted] m².

50. The Liability notice shows that the development is chargeable at a rate of £ [redacted] /m² at an indexation rate of [redacted]. On this basis, the CIL liability should be £ [redacted].

51. On the basis of the evidence before me, I determine that the Community Infrastructure Levy (CIL) payable in this case should be £ [redacted] ([redacted]).

[redacted]

MRICS
Valuation Office Agency
18 September 2024