Appeal Decision

by 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: @voa.gov.uk.

Appeal Ref: 1851333

Planning Permission Reference:

Location:

Development: Retrospective application for demolition of existing detached dwelling, garage, carport and swimming pool enclosure; construction of 5 bedroom detached dwelling with accommodation at loft level, crown roof with roof lantern, 3 x rear dormers and 3 x rooflights to each side elevation.

Decision

1. 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) including surcharges and late payment interest payable in this case is £ ( ) as calculated by the Collecting Authority and hereby dismiss this appeal.

Reasons

2. I have considered all the submissions made by (the Appellant) and 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 for "*Demolition of existing conservatory, single storey rear extension, garage, car port and swimming pool enclosure. Construction of a part single, part two storey side extension, part single, part two storey rear extension, single storey front porch canopy; alterations to fenestration and new brick facade. Conversion of loft to habitable space with associated roof alterations to include an increase in ridge height, 3 x rear dormers, side rooflights and chimney stack removal.*"
   b. CIL - Form 1: CIL Additional Information in respect of "*Construction of a detached replacement dwelling following demolition of existing*" dated .
   c. The [undated] delegated officer report by in respect of permission .
   d. Planning permission dated for "*Retrospective application for demolition of existing detached dwelling, garage, carport and swimming pool enclosure;*

construction of 5 bedroom detached dwelling with accommodation at loft level, crown roof with roof lantern, 3 x rear dormers and 3 x rooflights to each side elevation."

e. CIL Liability Notice issued by the CA dated with liability calculated at £
f. CIL Liability Notice issued by the CA dated with liability calculated at £
g. CIL Demand Notice issued by the CA dated to the sum of £
h. Appendix 9 Photo A submitted by the Appellant taken on .
i. Appendix 9 Photo B submitted by the Appellant taken on .
j. Photographs dated submitted by the CA.
k. Drawings (dated), (dated) and (dated) provided by the Appellant within their Appeal submissions dated .
l. The CIL Appeal Form dated submitted by the Appellant under Regulation 114, together with documents and correspondence attached thereto and also on .
m. The CA's representations dated together with documents and correspondence attached thereto.

Background

3. Planning permission was granted on for "*Demolition of existing conservatory, single storey rear extension, garage, car port and swimming pool enclosure. Construction of a part single, part two storey side extension, part single, part two storey rear extension, single storey front porch canopy; alterations to fenestration and new brick facade. Conversion of loft to habitable space with associated roof alterations to include an increase in ridge height, 3 x rear dormers, side rooflights and chimney stack removal*."

4. On the CA wrote to the Appellant to advise that a site visit on the same day undertaken by the CA had found the property to have "*been substantially demolished*".

5. An application for planning permission was submitted on behalf of the Appellant dated for: "*Retrospective application for construction of a detached replacement dwelling, following demolition of the existing*" along with CIL - Form 1: CIL Additional Information in respect of "*Construction of a detached replacement dwelling following demolition of existing*" and advising of the existing building GIA m2 and a total GIA proposed of m2.

6. CIL Form 7: Self Build Exemption Claim Form - Part 1 was submitted by the Appellant dated and was subsequently refused by the CA in a decision dated .

7. The [undated] delegated officer report by notes that in respect of the earlier permission "*a demolition plan was requested and it was confirmed by Officers that the proposal would not require a FUL application, due to some external walls being retained. However, following approval, the entire house was demolished and has started to be re-built. The photos* [included within the report] *indicate the current progress of the new build.*"

8. Planning permission was granted on for "*Retrospective application for demolition of existing detached dwelling, garage, carport and swimming pool enclosure; construction of 5 bedroom detached dwelling with accommodation at loft level, crown roof with roof lantern, 3 x rear dormers and 3 x rooflights to each side elevation*."

9. CIL Liability Notice was issued by the CA dated with liability calculated as:

Residential Area – A
GIA of development m2
<u>Less</u>
GIA of demolitions m2

= Chargeable area m2
X £ CIL Rate indexed at
= £ CIL liability

10. CIL Liability Notice was issued by the CA dated in respect of planning permission with liability recalculated as:

    Residential Area – A
    GIA of development m2
    X £ CIL Rate indexed at
    = £ CIL liability

11. On receipt of the later CIL Liability Notice the Appellant queried the removal of the demolitions GIA from the calculations, and on the CA responded "*Upon reviewing the case, we have acknowledged that the pre-existing house was not in-situ at the time planning permission was granted. Therefore, as per regulation 40 of the CIL Regulations 2010 (as amended), a deduction for existing floor space cannot be applied*."

12. On the CA further advised the Appellant's agent "*Whilst we acknowledge your client had submitted a Form 7 part 1 received by the council . I must draw your attention to the legal precedent established in the case of Gardiner v Hertsmere Borough Council [2021] EWHC 1875 (Admin), dated 6th July 2021. According to this ruling, self-build exemption is not applicable to developments authorised retrospectively under section 73A of the Town and Country Planning Act 1990. Therefore, in accordance with Regulation 54B of the Community Infrastructure Levy (CIL) Regulations 2010 (as Amended), we have refused your clients claim for self-build relief for the chargeable development in question as it does not comply with the requirements of the CIL Regulation 2010*."

13. A CIL Demand Notice LN was issued by the CA dated to the sum of £ comprising:

    £ *CIL Liability*
    <u>Plus</u> £ *surcharge 83. Failure to submit a commencement notice*
    <u>Plus</u> £ *surcharge 85. (1) Surcharge for late payment - 30 days*
    <u>Plus</u> £ *late payment interest total*

14. A Regulation 114 Appeal was submitted to the VOA dated .

Appeal Grounds

15. The Appellant contends that the GIA of the remaining parts of the original building together with the extended parts permitted under which existed on should be considered as an 'In-Use Building' and off-set against the GIA of the proposed development for the purposes of calculating the CIL Liability.

Consideration of the Parties' Submissions

16. The Appellant states that work began in accordance with permission on . During the construction period it became necessary to carry out additional demolition work to the original house to ensure structural integrity of the extended property.

17. On (Planning Enforcement Officer) from Council (as CA) visited the site and recommended that a retrospective application be submitted to regularise the apparent breach of planning control as a result of the additional demolition that had taken place. This was submitted on , including a Self-Build Exemption Claim Form 7. The

application was approved on ████ whilst Self-Build Exemption was refused on ████ based on the CA's assumption that the development had already commenced.

18. The Appellant states they are aggrieved by the CA's decision to refuse to amend the CIL Liability to incorporate a deduction or off-set of existing GIA from the proposed GIA and also in relation to the CA's refusal of the Self-Build Exemption claim, although they do not specifically seek to appeal on this latter basis.

19. The Appellant notes that at the time of determining permission ████ the CA had accepted that the existing GIA of the original dwelling could be discounted from the CIL Liability. This is evidenced where the original Liability Notice discounts or off-sets ████ m2 existing GIA. CIL Form 1 submitted with the application specifically includes this floorspace and it was not contended at the time of submission, determination or initial Liability Notice that this GIA existed.

20. When permission application ████ was made on ████ some works of demolition had already begun, but the majority of the building remained in-situ. By the date of the decision, some further demolition had taken place, albeit all of the building footings, ground level and some external walls remained. These were retained and works continued in accordance with earlier permission ████. Photographs are included at Appendix 9 B. These fundamental parts of the building reflect the large structure which existed in full at least ████ years prior to the date of the planning permission. The extension works also became part of this dwelling and were lawful under the terms of permission ████. No enforcement or Stop Notice was served in respect of that permission.

21. The Appellant notes that "*in accordance with Regulation 40, Schedule 1, Part 1, Paragraph 6, the gross internal areas of parts of an 'in-use building' that are to be demolished before completion of the chargeable development may be discounted against the chargeable development*".

22. They further argue that an 'in-use' building is further defined (at Paragraph 10) as a 'relevant building' and contains a part that has been in lawful use for a continuous period of at least six months within the preceding three years. 'Relevant Building' is then defined (Paragraph 10) as a building which is situated on the relevant land on the day planning permission first permits the chargeable development. No further definition of 'Building' is provided with the exception of exclusions (none of which, they argue, are relevant in this case).

23. The Appellant contends that the remaining parts of the original building, together with the extended parts permitted under ████ (which existed on████) should be considered as an 'In-Use Building' in the context of the spirit of the CIL Regulations. They further argue that a 'part' of the building remained which would have been in lawful use of six months of the preceding three years, in accordance with the definition of 'In-Use' at Paragraph 10 of Part 1, Schedule 1. They also consider that the remaining and extended parts could be considered as 'Retained Parts' of an In Use Building and discounted (or off-set) accordingly.

24. The CA note that one of their officers visited the site following the grant of permission ████ and concluded that the level of demolition works went beyond those considered by planning permission ████ and, consequently, had been undertaken unlawfully. The officer requested that the building works cease, and invited the Appellant to submit a retrospective planning application in order to regularise the demolition works that had taken place along with the subsequent re-build development.

25. The CA comment that during the planning determination process it was noted within the officer's delegated report that works did not cease at the property, at which point the

officer notes "*The agent was advised that this was at their own risk*." The CA are of the opinion that this decision to commence with construction prior to the grant of permission [redacted] was a decision made at the applicant's own risk. The officer provided photographs of the state of the development at that time. The proposed development was deemed retrospective, in that the house, carport and swimming pool enclosure had already been demolished and external walls had started to be constructed. The CA also state they have evidence obtained during planning enforcement visits to show the state of the development during this time.

26. Following the grant of approval the CA deemed the application commenced on the date the planning permission was granted, being [redacted] in accordance with CIL Regulation 7 (Commencement of Development) which specifies that development is considered to have commenced on the earliest date on which any material operation begins to be carried out on the land to which the planning permission relates. On [redacted] a surcharge of £[redacted] was imposed on the Appellant for failure to submit a commencement notice, although the CA made the decision not to apply a Surcharge for Failure to Submit a Form 2.

27. The existing GIA off-set of the development was discarded in line with Schedule 1, Part 1, and Paragraph 10 of the CIL Regulations 2010 (as amended), as the CA were of the opinion they had sufficient evidence to confirm that there were no relevant buildings in-situ at the time planning permission was granted.

28. Photographs dated [redacted] submitted by the CA show the building to have been substantially demolished at that date with the only structure remaining being brick/block work to the ground floor side adjoining the neighbouring property at number [redacted] and also in two sections of walling at ground floor level only along what would have been the rear elevation.

Consideration of the Decision

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

30. Disagreement has arisen due to Schedule 1 of the CIL Regulations 2010 (as amended) which provides for the deduction or off-set of the GIA of existing buildings from the GIA of the total development in calculating the CIL charge. The Appellant is of the view that the original building was not demolished and so the GIA of the original building should be off-set, whereas the CA is of the opinion they had sufficient evidence to confirm that there were no relevant buildings in-situ at the time planning permission was granted and that GIA off-set cannot therefore be applied.

31. Schedule 1 of the CIL Regulations 2010 (as amended) Part 1 – standard cases – 1 (4) states the amount of CIL chargeable at a given relevant rate (R) must be calculated by applying the relevant formula,
where—
A = the deemed net area chargeable at rate R, calculated in accordance with subparagraph (6);

32. Subparagraph 1 (6) states the value of "A" must be calculated by applying the following formula:

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

33. This formula includes possible deductions for “E” and “KR” in relation to existing buildings.

34. Value “E” represents,
    (i) the gross internal areas of parts of in-use buildings that are to be demolished before completion of the chargeable development

35. Value “KR” represents,
    (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;

36. Schedule 1 of the CIL Regulations 2010 (as amended) Part 1 – standard cases – 1 (10) 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.

37. Therefore for either an “E” or a “KR” deduction to apply there must be a “relevant building” on the relevant land on the day planning permission first permits the chargeable development.

38. It is clear from the CIL Liability Notice issued by the CA that the development permitted under reference ████ was the basis for the CA’s CIL calculation, described as “*Retrospective application for demolition of existing detached dwelling, garage, carport and swimming pool enclosure; construction of 5 bedroom detached dwelling with accommodation at loft level, crown roof with roof lantern, 3 x rear dormers and 3 x rooflights to each side elevation*”. CIL Regulation 9 (1) is clear on this point, that the “*chargeable development is the development for which planning permission is granted*”.

39. The extensive demolition work would appear to have been carried out in breach of the prior approval ████ dated ████ for “*Demolition of existing conservatory, single storey rear extension, garage, car port and swimming pool enclosure. Construction of a part single, part two storey side extension, part single, part two storey rear extension, single storey front porch canopy; alterations to fenestration and new brick facade. Conversion of loft to habitable space with associated roof alterations to include an increase in ridge height, 3 x rear dormers, side rooflights and chimney stack removal*”, which only permits partial demolition work (ie of the “*existing conservatory, single storey rear extension, garage, car port and swimming pool enclosure*”) and thus required the later planning permission ████ to regularise the development. Planning permission ████ is a new full permission for the erection of a house.

40. The CA does not believe that a relevant building existed on the site at ████ - the date planning permission was granted.

41. The Appellant considers, however, that the remainder of the original dwelling structure should be classed as a “relevant building” for CIL purposes.

42. Whilst Schedule 1 of the CIL Regulations 2010 (as amended) discusses the types of building not to be included for CIL purposes, it does not define what a “building” is.

43. The Planning Act 2008 defines “building” as having the meaning given by section 336(1) of the Town and Country Planning Act 1990, which defines “building” as something that “*includes any structure or erection, and any part of a building, as so defined*”. However, the definitions in the Planning Act are not applicable for CIL purposes, being specifically excluded from Part 11 of the Planning Act 2008 which references CIL.

44. In the absence of any clear guidance from Schedule 1 of the CIL Regulations 2010 (as amended) as to what a “building” is, the only obvious option available is to refer to the dictionary for a clear definition as to what constitutes a “building”.

45. The Pocket Oxford English Dictionary (POED) definition of a building is “*a structure with walls and a roof*”.

46. The Appellant states they have submitted photographs at Appendix 9 B to their Appeal submission that show some works of demolition had already begun, but that the majority of the building remained in-situ. They argue that by the decision date for planning application ████ some further demolition had taken place, albeit all of the building footings, ground level and some external walls remained, and that these were retained and works continued in accordance with earlier permission ████. They argue that these fundamental parts of the building reflect the large structure which existed in full at least █ ██ years prior to the date of the planning permission.

47. Appendix 9 Photo A submitted by the Appellant is marked as being taken on ████ before permission ████ was granted (on ████) and shows a considerable portion of the original structure in place, including floor slabs, lower and upper external elevations and internal dividing walls and part of the first floor structure. It is noted that this photograph was taken almost ███ weeks before permission ████ was granted.

48. Appendix 9 Photo B submitted by the Appellant is marked as being taken on ████ some ███ days after permission ████ was granted, and shows the new ground floor structure taking shape at the right-hand side (viewed with the road behind the observer) of the building footprint with new footings and external elevations and window openings in-situ along with (in the background) what appears to be a ground floor slab and one element of vertical steelwork.

49. In contrast, thirteen photographs dated ████ submitted by the CA show the building to have been substantially demolished at that date with the only structure remaining being brick/block work to the ground floor side adjoining the neighbouring property at number █ ███ and also in two single storey sections along the rear. Ten of these photographs appear to contradict the content of Appendix 9 Photo A submitted by the Appellant and do not show any of the structure indicated to be in place on that latter photograph, which was taken some ███ days later on ████.

50. The (undated) delegated officer report by ███ notes that in respect of the earlier permission ████ “*a demolition plan was requested and it was confirmed by Officers that the proposal would not require a FUL application, due to some external walls being retained. However, following approval, the entire house was demolished and has started to be re-built. The photos* [included within the report] *indicate the current progress of the new build*.”

51. No evidence has been provided to me in relation to the state of the structure that stood on the relevant land specifically on the ████. However, the photographs provided by the CA dated ████ and the Appellant dated ████, along with the delegated officer report stating that “…*following approval*, [of permission ████ on ████] *the entire house was demolished*…” are sufficient evidence to demonstrate that the original building had been demolished by ████ . Applying the POED definition of a building, I determine that what was left of the original dwelling on the relevant date did not amount to a “building”. I

therefore consider that the CA are correct not to make any GIA deduction or off-set for the area of the original building.

52. As there was no existing building in place, it is therefore of no consequence whether the lawful use criteria regarding any relevant in-use building is satisfied or not.

53. The GIA of the proposed development is calculated by the CA as m2 GIA, whilst the Appellant refers to a proposed total GIA for the development of m2 (on CIL Form 1 Additional Info dated).

54. I have checked the floor areas using the *Adobe PDF Measuring Tool* on drawings ; and (all dated) as provided by the Appellant within their Appeal submissions of and confirm both total GIAs to be within tolerance. I am satisfied to utilise the slightly larger GIA of the proposed development at m2 used by the CA in their CIL Liability Notices dated and , as the Appellant has not indicated any intention of objecting to that GIA.

55. The GIA of the proposed development is therefore m2 GIA for the purposes of calculating CIL, and there appears to be no dispute in relation to the area charge or to the indexation rate used in calculating CIL Liability.

56. The CIL Liability is therefore correctly calculated as:

    Residential Area – A
    GIA of development m2
    X £ CIL Rate indexed at
    = £ CIL liability

57. It is noted that, in strictly applying the above indexation figure, the total equals £ which would appear to be the result of indexation rounding, but it is confirmed that £ is more accurately correct.

58. The surcharges of £ (*surcharge 83. Failure to submit a commencement notice*) and £ (*surcharge 85. (1) Surcharge for late payment - 30 days*) plus £ late payment interest are outside the scope of this Regulation 114 Appeal, but must also be included within the CIL Liability calculation, which therefore totals £

59. The only other matter referred to within the Appeal documents regards the issue of whether an exemption for self-build housing should be applied to the chargeable amount to determine the overall liability for CIL. This does not fall for consideration in a Regulation 114 Appeal however, and the matter is not an issue the Appointed Person can determine under a Regulation 114 appeal.

60. There is an appeal mechanism under Regulation 116B, where a CA has granted an exemption for self-build housing in relation to the value of the exemption. In this case, in relation to planning permission , there has been no such exemption granted for self-build housing and therefore there can be no appeal under Regulation 116B to consider whether the value of an exemption was correct.

Decision

61. 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) including surcharges and late payment interest payable in this case is £ ( ) as calculated by the Collecting Authority and hereby dismiss this appeal.

MRICS

RICS Registered Valuer
Valuation Office Agency
6 November 2024