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: 1850233

Planning Permission Reference: [redacted]

Location: [redacted]

Development: Retrospective application for the use of the existing building as a dwelling.

Decision

I determine the CIL charge of £[redacted] ([redacted]) as calculated by the Collecting Authority to be appropriate and hereby dismiss this appeal.

Reasons

1. I have considered all the submissions made by [redacted] on behalf of [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. Delegated Report [redacted] which accompanied the Certificate of Lawfulness in respect of existing building operations and creation of a dwelling house (Use Class C3).
b. Planning permission [redacted] granted on [redacted] for "*Retrospective application for the use of the existing building as a dwelling*" along with the accompanying Delegated Report.
c. CIL Liability Notice [redacted] issued by the CA dated [redacted] with CIL liability calculated at £[redacted].
d. Correspondence between the Appellant and CA taking place between [redacted] and [redacted] which was treated as a Regulation 113 request and review.

e. The CIL Appeal Form dated [redacted] submitted by the Appellant under Regulation 114 and 115, together with documents and correspondence attached thereto.
f. The CA's representations to the Regulation 114 Appeal dated [redacted] together with the Appellant's response dated [redacted].
g. Counter comments received from the CA on [redacted] and the Appellant's response dated [redacted].

Background

2. From the parties' submissions, I understand planning permission [redacted] was granted [redacted] for, "*Conversion of existing farm buildings to live/work dwelling with access from existing drive. Proposed installation of new doors/windows, change flat roof to pitched, infill extension and part demolition to create a courtyard."* During the construction process amendments were made to the development that differed from the original plans and the Appellant sought to regularise these via a non-material amendment application in [redacted]. The CA were of the view these changes went beyond the scope of a non-material amendment, the demolition of the existing building and new works creating a new build rather than the conversion which was permitted under [redacted].

3. As a result, on [redacted] a Certificate of Lawfulness was sought, "*in respect of existing building operations and creation of a dwelling house (Use Class C3).*" [redacted] issued a split decision granting a certificate in respect of the building works but not for the residential use of the building. The Council acknowledged within their decision that the occupation of the building as a dwelling began on [redacted] but determined that the use had to have been established for over 10 years as the building was erected as a dwelling and did not involve a change of use (S171B (3) of the Town and Country Planning Act 1990 (as amended) (TCPA) "*In the case of any other breach of planning control, no enforcement action may be taken after the period of ten years beginning with the date of the breach.")* The Delegated Report issued in respect of the Certificate of Lawfulness recommended that planning permission be sought to regularise the use of the building as a dwelling.

4. Planning application [redacted] ([redacted]) was submitted by the Appellant on the [redacted] for *"Use of existing building as dwelling (retrospective)".* The Council granted the permission on the [redacted].

5. CIL Liability Notice [redacted] was issued on [redacted] with CIL calculated as follows:-

Zone C Residential (NOT a[redacted])= £[redacted]
Chargeable Area[redacted] m2
Indexed at[redacted]
= £[redacted] CIL Liability

6. A CIL Demand Notice was also issued on [redacted] by the CA for £[redacted]. This included a surcharge of £[redacted] due to failure by the Appellant to submit a commencement notice and £ [redacted] for failure to assume liability.

7. Between the period of the [redacted] and [redacted], the Appellant and the CA were in correspondence about the CIL liability, the Appellant opining that the development is not CIL liable and the CA contending that it is. Whilst a formal Regulation 113 review

was not requested, both parties accept this correspondence to be a request by the Appellant and a review by the CA under Regulation 113.

8. The Appellant subsequently submitted an appeal under Regulation 114 to the Appointed Person dated [redacted].

Appeal Grounds

9. The Appellant has requested an appeal under both Regulation 114 (chargeable amount) and 115 (apportionment of liability). Regulation 115 is concerned with apportioning any CIL liability between different owners. As far as I am aware, the subject building is within the sole ownership of [redacted] and therefore no apportionment has taken place nor is required. I am therefore considering this appeal under Regulation 114 only.

10. The Appellant asserts that CIL is not chargeable in respect of the approved development seeking to rely upon questions 1 and 4 in CIL Form 1. Question 1 asks, "*does the application include a new build development (including extensions and replacement) of 100 square metres (sq. m.) gross internal area (GIA) or above?"* The Appellant states that in this case, the application did not include a new build development as no building works of any size were included within the permission applied for. Question 4 asks, "*(b) Does the application include the creation of one ore more new dwellings (including residential annexes) either through new build or conversion (except the conversion of a single dwelling house into two or more separate dwellings with no additional gross internal area created?".* The Appellant explains that the development does not create a new build dwelling as described above nor can the works have created a dwelling through conversion this being in line with the CA's interpretation of the *Beesley* case (*Welwyn Hatfield Council v SoSCLG [2011*]).

11. The Appellant opines that as neither Question 1 nor 4 applies CIL has not been triggered in this case. The Appellant also states Question 6 does not apply as that pertains to change of use and there was no pre-existing use of the building.

12. In response, the CA maintain the development is liable to CIL and that their calculation of the liability at £[redacted] is correct. The CA highlight that the purpose of CIL Form 1 is to provide additional information to the CIL Team not to solely determine whether an application is CIL liable. The CA point to CIL Regulation 9 (1), "*The chargeable development is the development for which planning permission is granted."* The CA state in this case, the development comprises a new dwelling.

13. The CA advise they have calculated the liability in accordance with Schedule 1, Part 1 Standard cases of the CIL Regulations. The CA state they calculated the GIA of the development by measuring the approved plans and as the development falls within CIL Zone C of the adopted Charging Schedule, they have applied a rate of [redacted]£ per sq. m.

14. The CA note that the Appellant has not disputed the CIL liability on the grounds of existing floor space and affirm that they do not consider the existing floorspace would be eligible to be offset when calculating the chargeable area as the building was not

in lawful use on the day before planning permission first permitted the development. The CA therefore maintain CIL is due on [redacted] sq. m.

15. The CA reference CIL appeal 1797330 that considered a similar case in support of their position. In this case a Lawful Development Certificate was issued in respect of the erection of the subject building but not for its use hence a new planning application was required under S 73A of TCPA 1990. In this case, the Appointed Person found in favour of the CA and CIL was calculated based upon the description of the development which regularised the use of the building as a dwelling.

16. In response, the Appellant highlights that the building/site within case 1797330 had last been in an agricultural use not residential. The Appellant points to the CA's commentary here, "*With a building exempt from enforcement action but with no lawful use as a residential dwelling, only a full permission for the building to be used as a dwelling could give it a lawful use. The application therefore became a CIL chargeable development as there is a creation of new residential floorspace. The application is also part retrospective because the building has already commenced without permission."* The Appellant states this differs from the subject case where there is residential use at an otherwise physically unchanged and lawful building. As the planning permission in case 1797330 also regularised building works, this case concerned the new build residential floorspace and its subsequent occupation on a site with previous residential use. The Appellant highlights the starting land use in this case, was residential with the officer report in [redacted] making this clear. The Appellant opines that in this case a separate residential unit was created from "*an already well established lawful residential use."*

17. In response, the CA summarises the history of the site and reiterates that both the Non-Material Amendment and Lawful Development Certificate confirm that the use of the new building as a dwelling was unlawful. The CA quote the officer's assessment given within the Lawful Development Certificate; "*Based on the Council's evidence the current dwellinghouse constitutes a new build and not a conversion. It is concluded that the permission granted by* [redacted] *for the conversion of the building was not implemented in accordance with the approved plans and it is therefore not lawful by the grant of a planning application."* The CA point out that the existing buildings were demolished and a new dwelling erected unlawfully, and therefore no lawful residential use existed meaning the subject retrospective permission was required.

18. The CA also point out that the subject permission did not have any retained parts where the intended use following completion of the chargeable development could be carried on lawfully and permanently without further planning permission. The CA refer to the Giordano case (*Giordano Ltd,. R (On the Application of) V London Brough of Camden Council [2019] EWC Cuv 1544)* but state Giordano does not apply here as original permission [redacted] was neither extant nor implementable. The CA states the agent's statement; "the starting land use immediately prior to the building operations regularised pursuant to the Certificate was C3 residential" is incorrect. The existing buildings which were subject to [redacted] had been demolished and the planning was not implemented. Whilst the Lawful Development Certificate meant the building itself was lawful, on the day before planning Permission [redacted] permitted the development, the use of the building as a dwelling as it then was, was a use that required planning permission. As the building was not in lawful use its GIA cannot be deducted from the chargeable amount under KR(i) or KR(ii). The CA

concludes that the development is liable to CIL as planning permission [redacted] regularises the use of the building as a dwelling. The building did not have a lawful residential use just because it had been built and occupied and this is demonstrated by the withdrawn Non-Material amendment, split decision of the Lawful Development Certificate and the need for a full planning application to be submitted.

19. In response, the Appellant states that in their opinion, permission [redacted] was lawfully implemented and the [redacted] then lawfully occupied. The Appellant provides the supporting planning statement setting out the planning history and basis for seeking a certificate. The Appellant suggests that the Council encouraged the Appellant to submit a retrospective application as a pragmatic and expedient way to regularise the planning status of the site rather than appealing the decision reached in respect of the Lawful Development Certificate and states that the CIL implications were not made clear to them.

20. The Appellant has provided sales particulars from [redacted] for [redacted] which includes the [redacted] in question. The Appellant explains the land and buildings were purchased in one transaction, as one residential property. The Appellant highlights that the particulars describe the [redacted] as recently renovated and as including a sitting room, kitchen/dining room, cloakroom and bedroom.

21. The Appellant therefore concludes that the starting point here is that the preceding land use and original outbuilding was residential and that the lawfully completed [redacted] was in nil use prior to its first occupation (as supported by the Beesley case). The Appellant states this is in contrast to the CIL appeal case referred to by the CA. In this case there has plainly been no change of use and therefore the current lawful occupation by the Appellant cannot represent a chargeable development and as such the CIL liability should be nil.

Decision on the Appeal

22. I have considered the comments and supporting documents in determining this appeal and appreciate this a complex and long ongoing planning matter. Whilst it is evident there is disagreement between the parties about whether Planning Permission [redacted] was lawfully implemented and whether the Council came to the correct decision when they refused to issue a Certificate of Lawfulness in respect of the subject building's use as a dwelling, I am bound to consider this Regulation 114 chargeable amount appeal in line with the Community Infrastructure Levy Regulations 2010 (as amended) only and not to reconsider the planning history of the site.

23. It is the CIL Regulations themselves that determine when CIL applies and how it is calculated. The CIL Form 1 cannot be considered in isolation and I find in favour of the CA on this point. CIL Regulation 9 (1) is clear, the "*chargeable development is the development for which planning permission is granted*". The chargeable development therefore is "*Retrospective application for the use of existing building as a dwelling."*

24. S73A 1 and 2(a) allows permission to be granted retrospectively, and so, I consider that in allowing planning approval for [redacted], the planning authority was exercising a power under section 73A of the TCPA 1990, as it was regularising development that had already been carried out. As such, the chargeable amount

must be calculated in accordance with Schedule 1, Part 1 – Standard Cases - of the CIL Regulations as the CA have done.

25. The formula within Schedule 1 Part 1 is:-

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

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.

26. From the submissions provided, I understand that the Appellant is not disputing the GIA of the chargeable development, the charging rate adopted nor the indexation rate used and as such I accept the CA's calculation of G and GR at [redacted] sq. m.as stated within the appealed Liability Notice.

27. I consider that the subject does not fulfil the criteria of KR allowing the area of the existing building to be offset. In respect of KR (i), to qualify as an in-use building, the building must be a relevant building, which the subject is having being on the site on the day when planning permission was granted. However, (10) (ii) of Schedule 1 also stipulates that an in-use building means a 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."* I agree with the CA on this point. Both parties agree that the building had been used as a dwelling from [redacted] . However, that use as a dwelling was not lawful. The building was erected for the purpose of a dwelling and did not involve a change of use. Therefore, for the use of this new building to have become lawful without planning permission it must have been established for 10 years as set out in Section 171B (3) TCPA 1990. The historic residential use of the demolished building cannot be taken into account as this building was not a relevant building on the date the subject planning permission was granted.
28. KR (ii) states; "*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."* The subject permission granted consent for the use of the building as a dwelling. Prior to

that, the new building had no lawful use and as such the area of the existing building cannot be offset under KR(ii).

29. I note the Appellant is of the view that as no change of use has occurred then CIL should not apply. I refer to the legal advice they received and have provided as part of their submissions; "*My view is regarding* [redacted] *that no change of use has ever occurred. The Supreme Court was very specific in saying that* [redacted] *argument that the 4 year rule applied was incorrect because no change of use had occurred. On that basis, if you are granted planning permission for the use of a building as a dwelling in accordance with 1) above, I don't believe that it is for a change of use in which case CIL is not engaged."* I also note the Appellant has provided evidence that the original [redacted] building was in a residential use prior to the original consent to convert the buildings back in [redacted] ([redacted]) supporting this view that no change of use has occurred.

30. Whilst it is clear the previous building had a residential use, once this building was demolished the existing use ceased. As permission [redacted] was not implemented in accordance with the approved plans, the new building and its use were unlawful. Whilst the Certificate of Lawfulness determined the building itself to be lawful, its use has not been established for the required ten year period and as such at the relevant date the building had no lawful use. The subject permission was required to regularise the residential use in the new building and this permission created a chargeable development. Whilst the subject permission may not be observed as granting a change of use under S171B of TCPA 1990, it retrospectively allows the residential use of the new building and creates a chargeable development under the CIL regulations. As the subject building was not in lawful use at the relevant date, I agree with the CA, the area of the existing building cannot be offset under KR.

31. I therefore calculate the CIL liability as follows:

Zone C Residential £[redacted]
Chargeable Area [redacted] *m² @ Rate £*[redacted]*/m²*
Indexed at [redacted]
= £ [redacted] *CIL Liability*

Decision on CIL Liability

32. On the basis of the evidence before me and having considered all the information submitted in respect of this matter, I determine the CIL charge of £[redacted] ([redacted]) as calculated by the CA to be appropriate and hereby dismiss this appeal.

[redacted]MRICS
RICS Registered Valuer
Valuation Office Agency
06 November 2024