Appeal Decision

by MRICS

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

Valuation Office Agency
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Durham
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Appeal Ref: 1853846

Planning Permission Ref.

Proposal: Alterations to existing barn to provide 3 dwellings (retrospective)

Location:

Decision

I do not consider the Community Infrastructure Levy (CIL) charge of £ ( ) to be excessive and I therefore dismiss this appeal.

Background

1. I have considered all of the submissions made by (the Appellant) and by , 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 dated ;

    b) CIL Liability Notice dated

    c) CIL Appeal form received together with documents and correspondence attached thereto;

    d) Representations from CA dated .

    e) Additional comments received from the Appellant and Interested Party(ies) (IP) on .

    f) Counter representations received from the Appellant and the IPs dated .

2. On ███, Prior Approval was granted for; "*the change of use from Agricultural barns to 3 dwellings*" at ███ under reference ███ . From the Appellant's representations, I understand construction commenced in ███ but that the barn was burnt to the ground in an arson attack on ███. At this time, construction is said to have been circa 70 per cent complete. This original permission was not liable to CIL as the area of the existing floorspace was offset under Regulation 40 of the Community Infrastructure Levy Regulations 2010 (as amended) as "in use" at that time.

3. The Appellant continued with the development of the site after the fire with Unit 1 being completed in ███ , Unit 2 in ███ and Unit 3 in ███ .

4. Despite the involvement of ███ planning department during construction, retrospective consent was not applied for until ███ .

5. The subject permission was granted on ███ under reference ███ and allowed for "*Alterations to existing barn to provide 3 dwellings (retrospective).*"

6. On ███ the CA issued CIL Liability Notice ███. This stated the CIL liability to be £ ███. The charge was calculated based upon a chargeable area of ███ square metres (sq. m.) at a chargeable rate of £ ███ and indexation at ███ .

7. A demand notice was also issued on the ███ stating the total amount of CIL due to be £ ███. This sum includes surcharges and late payment interest incurred as the Appellant had not notified the CA development had commenced.

8. The Appellant requested a Regulation 113 review on the ███. In this request the Appellant explained to the CA that the Units had been completed during ███ with Units 1 and 3 also being occupied that year. Given this the Appellant was of the view the building was a relevant and in use building when ███ was approved and as such the gross internal area (GIA) should be offset under Regulation 40 as had happened for ███.

9. The Appellant also requested that the CA allow relief under Regulation 55- Discretionary relief for exceptional circumstances, explaining that the arson attack was an exceptional circumstance,

10. The CA issued their Regulation 113 Review on ███ maintaining that a CIL liability of £ ███ was correct. The CA advised that ███ has not adopted exceptional circumstances relief and as such has not completed the regulatory process to assess claims. Given this the CA is unable to consider claims for exceptional circumstances relief.

11. The CA also responded to the Appellant's request to offset the area of the development as an "in-use building". The CA advised that they are unable to offset the area of the original barn as it did not exist on the day the subject permission was granted. The CA also explained that they are unable to offset the area of the three existing dwellings. They advise that as the subject permission is retrospective, these buildings did not become lawful until the ███ when the permission was granted. As such the dwellings cannot be considered "in-use" as

they did not contain 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.

12. The Appellant then submitted a Regulation 114 review to the Valuation Office on the ███. The grounds of appeal can be summarised as follows:

    a) The CA should exercise their discretion under Regulation 65 (7) and withdraw the Liability Notice.

    b) The CA should have applied the relief for exceptional circumstances under Regulation 55 expressing that an arson attack is such a scenario that the legislation foresaw.

    c) The Appellant contends that at the date planning permission was granted, the subject development was a relevant building and the dwellings were in lawful use. As such, their area should be offset by virtue of Schedule 1 Part 1 1(6) KR (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."* The Appellant advises that Units 1 and 3 had been lawfully in use as C3 residential units for between ███ and ███ months as per the implemented permission ███ and contends that as part of the building was in use, the whole building is eligible for offset.

       The Appellant opines that the use immediately before the grant of the subject permission was C3 as permission ███ had been implemented. The Appellant references the Giordano case, (*Giordano Ltd, Regina-v-London Bourgh Camden [2019] EWCA Civ 1544)* in which it was determined a previously extant permission was sufficient to bring the offset into use to achieve a neutral position, *"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."*

    d) The Appellant considers that as there are multiple permissions, abatement can be applied under Regulation 74B. This allows for the credit for CIL paid on the first permission to be requested against the amount due on the latter. The Appellant acknowledges no CIL was paid under the original permission but considers the offset of the existing GIA should have been carried over to the subject permission. The Appellant quotes CIL appeal decision 1792893 to support this position.

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

    a) Exceptional Circumstances relief is a matter outside of a chargeable amount review. Notwithstanding this, the CA has chosen not to offer exceptional circumstances relief and as such has not completed the regulatory process to assess such claims. The CA also point out that

even if discretionary relief was available, this development would not be eligible since a claim cannot be made after the development has commenced.

b) The GIA of the development cannot be offset under KR (i) as permission ██ ██ was granted to regularise the dwellings which had been constructed without a lawful grant of planning permission. The three dwellings did not become lawful until ███ when the subject permission was granted. As such they cannot be considered an "in-use" building under KR (i) as they did not contain a part that had 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.

c) The CA contend that offset under KR (ii) is not applicable as both parties agree that a fire completely destroyed the original barn. The provisions of permission ███ permitting residential use do not carry over to a different building on site. As there was no ability to lawfully and permanently continue the residential use of the site without further planning permission, a KR (ii) deduction cannot be applied. The new buildings were constructed without planning permission and as such were unlawful until the grant of █ ██. The Giordano case is factually different due to the barn building in this case not being a relevant building.

d) The CA opine that abatement under Regulation 74B is not applicable and highlights that a request has not been made under this Regulation to their knowledge. The CA go on to state that even if a request had been made, it would not be valid as development under ███ has already commenced and furthermore, because no CIL monies were paid under previous permissions on the site.

Decision

14. As Appointed Person I am unable to consider the granting of any reliefs or decide whether a Liability Notice can be withdrawn, these matters being outside of my jurisdiction. Whilst I agree with the Appellant, Regulation 55 would seem to have been drafted to help appellants in similar circumstances, I do not have the power to grant relief and as the CA has not made this relief available in their area, they are also unable to grant this relief.

15. Schedule 1, Part 1 of the CIL Regulations 2010 (as amended) provides that the net chargeable area of the proposed development should be calculated based upon a formula which is essentially the GIA of the proposed development **less** retained parts of lawfully in-use buildings or 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*".

16. An 'in-use building' is defined in paragraph 10 as a building which is a relevant building (a building which is situated on the relevant land on the day planning permission first permits development) and 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.

17. Retained parts are defined as "*part of a building which will be*
    (i) On the relevant land on completion of the chargeable development (excluding new build)
    (ii) Part of the chargeable development on completion, and
    (iii) Chargeable at rate R"

18. Paragraph (10) also defines "new build" as follows: "*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";*

19. Both parties agree that the original barn building which had consent for the change of use from Agricultural barns to 3 residential dwellings under ████, was completely destroyed by the arson attack on the ████. Therefore, I agree with the CA, the area of the original barn cannot be offset under KR (i) as it was not a relevant building on the ████ when the subject planning permission was granted.

20. The Appellant has also argued that in this case a deduction under KR (i) is applicable as the three residential dwellings existed on the ████ and had been in continuous lawful use for in excess of the six months required in the three years leading up to the relevant date. Whilst I acknowledge the dwellings did constitute a relevant building at the date planning permission was granted, it is evident their use was not lawful in planning terms at that time as the subject retrospective permission was required to regularise their construction and use. For that reason, the GIA of the subject dwellings cannot be offset under KR (i).

21. The Appellant has also explained why they consider the area of the subject dwellings can be offset under KR (ii) advising that units 1 and 3 had been in C3 residential use at the time planning permission was granted in accordance with the implemented permission ████ and as part of the building was in use the whole building is eligible for offset. The Appellant has also referenced the Giordano case noting that a previously extant permission is sufficient to allow offset under KR (ii).

22. On this point, I agree with the CA. The Giordano case concerned a relevant building where there was a change of use to retained buildings. Here, whilst the building can be said to have been relevant on ████, it was not lawful as it was constructed without planning permission and constitutes new build under the subject permission. Therefore, its residential use could not continue without further planning permission. I acknowledge that the earlier permission was for a residential use however, this permitted the change of use to the existing agricultural building. The building that now exists is a new building and although it is akin to the original, the permission for ████ ended when the barn was destroyed. The dwellings cannot be offset under KR(ii) as they are, "*part of the*

chargeable development which will comprise new buildings and enlargements to existing buildings." Regulation 9 defines the chargeable development as, "*the development for which planning permission is granted."* As the subject permission permits the three dwellings, they constitute new build under the subject permission and cannot be offset under KR(ii).

23. Considering the issue of abatement, Regulation 74B (3) states to be valid, a request must be made before the chargeable development is commenced. I understand that no request for abatement has been made and as the chargeable development is complete the Appellant has no recourse under this Regulation. In his representations of ████, the Appellant acknowledges the opportunity to consider abatement has passed given the Appellant was encouraged to progress the project immediately after the fire by ████.

Conclusion

24. The original barn was demolished prior to the subject planning permission being granted. The new building did not have the required planning permission to allow for its lawful use until permission ████ was granted. Therefore, there was no lawful in use space that could be netted off from the chargeable area under KR (i) nor any retained parts that are eligible for offset under KR (ii), the dwellings being new build under the chargeable development. I understand there is no dispute between the parties as to the area of the chargeable development at ████ sq. m and that the chargeable rate and indexation applied in the Liability Notice are accepted as correct.

25. This appeal is unable to order the grant of any reliefs. I note the Appellant's comments that it should be mandatory for Regulation 55 to be adopted by all Local Planning Authorities. Given the unfortunate circumstances here, I empathise with the Appellant's predicament. However, there is no scope available within the legislation to allow the Appointed Person to decide upon this matter.

26. A request for abatement has not been made and as the development has commenced, a request at this point would be deemed invalid. I note the Appellant has referenced the High Court case of *R (oao Trent) V Hertsmere Borough Council [2021] EWHC 907 (admin)*) to support their contention that the CIL Liability Notice should be quashed claiming Waverley Borough Council directly advised the parties to progress the scheme after the fire and this has meant the Appellant did not have time to obtain advice or fully understand the CIL implications including those around abatement. The consideration of the planning history and associated procedural matters of this case are beyond the scope of this appeal and I am unable to comment further upon this point.

27. On the basis of the evidence before me, I determine that the Community Infrastructure Levy (CIL) payable of £ ████ (████) is not excessive and dismiss the appeal.

████
MRICS
Valuation Office Agency

06 December 2024