Appeal Decision

by [redacted] MRICS FAAV

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

Valuation Office Agency
Wycliffe House
Green Lane
Durham
DH1 3UW

Email: [redacted]voa.gov.uk

Appeal Ref: 1837618

Address: [redacted]

Development: Vary Condition 2 of Application [redacted] **Date of Decision:** [redacted]**• To seek minor alteration to vehicular access, layout, floorplan and external elevations**

Planning permission reference: [redacted]**.**

Decision

I determine that the Community Infrastructure Levy (CIL) payable in this case should be nil.

Reasons

1. I have considered all the submissions made by [redacted] of [redacted] on behalf of [redacted] (the appellant) and [redacted] (the Collecting Authority (CA)), in respect of this matter. I have considered the information and opinions presented in the following documents:

    a. The Decision Notices and delegated reports, issued by [redacted] on [redacted] ,[redacted] and [redacted] for planning applications [redacted], [redacted] and [redacted] respectively.
    b. The CIL Liability Notice (reference [redacted]) issued by the CA dated [redacted] for planning application [redacted].
    c. The appellants' request for a Regulation 113 Review dated [redacted] together with representations.
    d. Representations from CA dated [redacted].
    e. Appellants comments on CA representations dated [redacted] .

Background

2. Planning permission (reference [redacted]) was approved by [redacted] on [redacted] for 'the demolition of agricultural buildings (units 1,2,3,4,5,6 and 7), erection of four dwelling houses and associated development.' There was a nil CIL liability as the GIA of the existing agricultural buildings exceeded the GIA of the proposed development and could be offset against any charge.

3. This permission was varied, (ref [redacted]), date of decision [redacted]. The description of the development was 'Application to vary Condition 2 (approved plans) imposed on [redacted] to seek minor alteration to vehicular access, layout, floorplan and external elevations (original application titled Demolition of agricultural buildings (units 1,2,3,4,5,6 and7), erection of four dwelling houses and associated development.' The CIL liability remained nil for the afore mentioned reason.

4. The permission was varied a second time (ref [redacted]), date of decision [redacted]. It is this, most recent variation which forms the subject of the CIL Appeal. The description of the development being 'Vary condition 2 of Application [redacted] Date of Decision [redacted], to seek minor alteration to vehicular access, layout, floorplan and external elevations.' (Note the date stated for application [redacted] was incorrect.)

5. A CIL Liability Notice (ref [redacted]), dated [redacted], was served for a chargeable area of [redacted] sqm giving rise to a charge of £[redacted].

6. The appellant confirms that the agricultural barns were demolished. This work commenced on [redacted] and was completed [redacted]. It was the consequences of the removal of these buildings which gave rise to a CIL Liability Notice being served for the second planning variation.

7. The agent for the appellants challenged the CIL liability, emailing the CA on [redacted] and requested a Regulation 113 review be carried out by the CA. The appellant considers a nil CIL liability should remain.

8. The CA issued its Regulation 113 review decision, by email, on [redacted], confirming the amount in CIL Liability notice was considered to be correct. They stated the CIL liability for [redacted] and [redacted] were both £0 as the agricultural buildings had not been demolished when planning consent was awarded and the existing floorspace could therefore be offset in calculating the CIL liability. The floorspace of the existing buildings being greater than the floorspace of the proposed dwellings.

9. As the agricultural buildings had been demolished prior to the submission of [redacted] and the CA considered the application fell to be determined under S73A. The existing floorspace of the agricultural buildings could not therefore be deducted as they were not standing on the site when the variation consent first 'permits development' which the CA considered to be [redacted].

10. On [redacted], the Valuation Office agency received a CIL appeal made under Regulation 114 (Chargeable Amount) contending that the CIL liability should be Nil.

11. The Appellants grounds of appeal can be summarised as follows:

    a. The CIL Liability should be nil.

b. That the only development carried out prior to the submission of the second variation, was in full accordance with the original planning permission and the first S73 variation.
c. The appellant considers the demolition of the agricultural buildings ([redacted]) was undertaken lawfully in accordance with the first variation (granted [redacted]).
d. Schedule 1 (3) (1) of the Regulations provides that: Where a planning permission (B) for a chargeable development, which is granted under section 73 of the TCPA 1990, changes a condition subject to which a previous planning permission (A) for a chargeable development was granted, then:-
    i. Where the notional amount for B is the same as the notional amount for A the chargeable amount shown in the most recent liability notice or revised liability notice issued in relation to the development for which A was granted;
    ii. Schedule (1)(3) goes on to set out the basis for calculating the notional amount:
    iii. The notional amount for B is the amount of CIL that would be payable in relation to the development for which B was granted, calculated in accordance with paragraph 1 (as modified by sub paragraph (4)).
    iv. In turn sub paragraph 4 provides that:
        1. For the purposes of calculating the notional amount for B, paragraph 1 applies as if-
            a. B first permits development on the same day as A;
    v. Therefore provided that the second variation was made pursuant to Section 73 of the Act then the CIL calculation must be made as if it permits development on the same day as the original permission ie when the demolished buildings were in situ.

e. The appellant contests that the second planning variation fell under S73A as they do not consider there to have been a breach of the earlier planning permissions. The agricultural buildings were still standing at the date of the previous permissions and could therefore be offset against CIL liability for the latest permission as it was granted under s73.
f. The appellant considers the only pre-commencement conditions attached to the first variation related to a wheel wash facility, a turning area and a footpath diversion which they state were all 'completed prior to the commencement of the development'.

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

a. The second planning variation was granted under S73A and not S73.
b. The barns had been demolished prior to the second variation, which they considered started development, thus making the second variation application part retrospective.
c. The date the second consent 'first permits development' would therefore be after the barns had been demolished so the GIA of the agricultural buildings, could not be offset against the CIL liability.
d. The CA therefore consider the CIL liability of £[redacted] to be correct.
e. Pre commencement conditions: the CA consider the demolition of the agricultural buildings makes the second variation application part retrospective, as the pre-commencement planning conditions in relation to the earlier permission had not been discharged before the buildings were demolished.
f. The demolition of the agricultural buildings was not therefore a lawful commencement of either permission.
g. The CA consider these pre-commencement conditions went to the heart of permission [redacted].

13. The CA do not consider that the permission granted under [redacted] was lawfully commenced as a number of pre-commencement conditions had not been discharged.

    1. Pre-commencement conditions included:
    2. Condition 3: Provision of materials samples above slab level
    3. Condition 4: Provision of a hard and soft landscaping scheme
    4. Condition 5: Measures to ensure mud is not deposited on the highways
    5. Condition 7: Provisions of surfacing in bound material for the site access
    6. Condition 8: Provision of a turning area
    7. Condition 9: Submission of a land contamination Phase I Desk Study
    8. Condition 10: Submission of a land remediation strategy.

14. The CA raise Lawson Builders Ltd vs Secretary of State for Communities and Local Government (2015) which ruled on a decision maker granting an application under S73A rather than S73 with prior notification not being required. The relevance being that under S73A the calculation for CIL must be undertaken in accordance with Schedule 1 Part 1 for standard cases and since the buildings had been demolished by the date of the planning permission there could be no offset.

15. The CIL liabilities for the original planning permission ([redacted]) and the first variation ([redacted]) were both nil (£0). The existing agricultural buildings were present and had a greater floorspace than the proposed dwellings and the existing floorspace could be offset against the CIL liability.

16. In Lawson Builders Ltd vs Secretary of State for Communities and Local Government (2015) EWCA Civ 122 the judge held that if appropriate, a decision maker considering an application under S73 of The Town and Country Planning Act 1990 (as amended), without complying with conditions attached to an existing permission, could grant, under S73A instead, retrospective permission for a development already carried out, without having to forewarn the applicant.

17. The CA also mention case law decisions contained within Bedford BC vs Secretary of State for Communities and Local Government and Aleksander Stanislaw Murzyn 920080 EWHC 2304, FH Whitley and Sons v Secretary of State for Wales and Clwyd CC (1991) JPL 856 and R (Hart Aggregates Ltd v Hartlepool Borough Council (2005 EWHC 840.

18. The Whitley case states that works that contravene true conditions cannot be taken as lawfully commencing development. The Hart case sets out that in order to consider whether the Whitley principle applied (and whether the effect of the breach made the development unlawful) it was necessary to consider: how the condition was phrased and the effect of the condition in the context of the permission. The CA considered the pre-commencement conditions for [redacted] went to the heart of the permission so that the failure to comply made the starting of the development unlawful.

19. The CA consider the planning conditions 3,4,9 and 10 go to the heart of the permission granted and therefore they maintain that by not discharging these conditions prior to the demolition of the agricultural barns, that the second variation was awarded under S73A as opposed to S73 of the TCPA 1990.

20. The appellant disagrees with the CA. The appellant considers the development was lawfully commenced under the first variation/consent and the GIA of the agricultural buildings could therefore be offset against CIL liability. The relevant date in the notional calculations referred to in Schedule 1 Part 2 would have been the date the original planning permission ([redacted]) was granted. The buildings were in situ as at that date.

21. The appellant considers the Lawson ruling irrelevant, as they maintain that all development was carried out pursuant to the first S73 consent rather than the original permission.

22. The appellant upholds that no development had taken place prior to the first variation being granted. An email, confirming the organising demolition has been provided by the appellant to evidence the barns were not demolished until after this date.

23. Relevant, pre-commencement conditions were considered to be discharged by the appellant. They opined the only relevant pre-commencement conditions were conditions 3, 5 & 9 of permission [redacted], being the implementation of a wheel wash facility, a turning area provision and a footpath diversion. The appellant considers that demolition of the buildings was lawfully undertaken under [redacted] with all pre-commencement conditions having been satisfied.

24. The appellant considers that other planning conditions in relation to [redacted] numbered 4,6,10 and 17, require the submission of details prior to development above slab level and are therefore irrelevant.

25. The CA consider the action of demolishing the agricultural buildings signified the commencement of development on the site. They do not consider this to be lawful as the pre-commencement conditions had not all been discharged and thus the development had been started unlawfully. They therefore consider the second variation of planning to be part retrospective, which meant the agricultural buildings could not be offset against CIL Liability.

26. I have fully considered the arguments and evidence provided by both parties. At the date the agricultural buildings were demolished, the original planning permission and the first variation existed as two separate permissions. As such the first variation permission could have been implemented as is suggested by the appellant. The pre commencement conditions attached to that permission included and were limited to:
    a. The wheel wash location with drainage shall be installed (condition 3).
    b. The diversion of the footpath has been implemented in full (condition 5).
    c. A turning area to be provided within the site so as to enable vehicles to enter and leave the site in a forward gear (condition 9).

27. The appellant confirms that conditions 3, 5 and 9 had been discharged prior to the demolition works. The CA say that none of the conditions had been discharged. No evidence has been provided to me by either party. However I am satisfied that none of the other conditions in permission [redacted] needed to be satisfied prior to the demolition of the buildings and whilst it is unclear if conditions 3, 5 & 9 had been discharged, I do not consider that any of these three conditions went to the heart of the matter. I therefore consider that permission [redacted] could have been lawfully implemented and as there was no breach of permission when the buildings were demolished. [redacted] was not part retrospective and is therefore a s73 permission rather than a s73A permission.

28. Since permission [redacted] is a s73 permission, Schedule 1 Part 2 of the CIL Regulations should be applied. The appellant has referred to the notional calculations required by

paragraph 3 of this section to justify a nil liability based on no additional floor area being permitted under the second variation permission.

29. There is a degree of uncertainty as to any increase in floor area permitted under the second variation compared with the original permission. The appellant in [redacted] written representation suggests that no additional floor area was permitted by the later permissions (Grounds para 1 viii) however the CIL1 forms accompanying the applications show a gross internal area proposed under the original permission of [redacted] sq m and a gross internal area proposed under the 2nd variation permission of [redacted] sq m. The area of the demolished buildings is shown as [redacted] sq m. I am relying on these forms in the absence of any evidence to the contrary.

30. Permission B referred to in para 3(1) of Part 2 Schedule 1 to the CIL Regulations 2010 (as amended) will therefore be the s73 permission [redacted] and Permission A is the original permission [redacted]. The notional amount for A is the amount of CIL that would be payable in relation to the development for which A was granted, calculated in accordance with paragraph 1 of Schedule 1 for standard cases. I calculate the deemed net chargeable area for A to be zero as the area of the buildings offset within the calculation is greater than the area of the proposed development. The notional amount for A is therefore £0.

31. The notional amount for B is the amount of CIL that would be payable in relation to the development for which B was granted, calculated in accordance with paragraph 1 but for the purposes of calculating the notional amount for B, paragraph 1 applies as if—

    (a) B first permits development on the same day as A;

    (b) IP for B were the index figure for the calendar year in which A was granted;

    (c) a reference to a relevant charging schedule were a reference to the charging schedule of the charging authority which was in effect—

    (i) at the time A first permits development; and

    (ii) in the area in which the development will be situated.

32. I therefore calculate that the net chargeable area for B, under the condition that B first permits development on the same day as A (i.e. prior to the demolition of the previous buildings), is also zero and the notional amount for B is also £0. This is because the GIA of the buildings offset in the calculation of the net chargeable area is greater than the GIA of the proposed development.

33. Paragraph 3(1)(a) states that where the notional amount for B is the same as the notional amount for A (in this case both are £0), the chargeable amount for the development for which B was granted is the chargeable amount shown in the most recent liability notice or revised liability notice issued in relation to the development for which A was granted. In this case that was £0 in accordance with Liability Notice issued pursuant to the first variation [redacted].

Decision

34. On the basis of the evidence before me and having considered all of the information submitted in respect of this matter, I confirm a CIL charge of nil.

[redacted] MRICS FAAV
RICS Registered Valuer
Valuation Office Agency
11 March 2024