Appeal Decision

by [redacted] MRICS FAAV

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

Valuation Office Agency (DVS)
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Appeal Ref: 1845942

Planning Permission Ref.[redacted]

Proposal: Demolish existing building. Erection of a 7 storey self-storage Building (B8 use) with associated car parking including loading bays, EV charging spaces, cycle store and landscaping (Summary).

Location: [redacted]

Decision

The appeal is dismissed.

Reasons

1. I have considered all of the submissions made by [redacted] of [redacted] acting 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 [redacted]
   b) All plans and reports submitted with the application for the above (ref[redacted]), including the Design and Access Statement.
   c) CIL Liability Notice ref Planning Permission [redacted] dated [redacted] for £[redacted]
   d) CIL Regulation 113, Review of Chargeable Amount request made on[redacted] and the decision by the CA dated [redacted] upholding the original Liability Notice.
   e) CIL Appeal form dated[redacted] with appendices and enclosures including [redacted] advice dated [redacted] regarding the GIA (Gross Internal Area) of the development (for which planning permission was granted) and the calculation of CIL payable.

f) The CA's response to the appeal dated [redacted] with enclosures.

g) The appellant's comments on the CA's response with a further legal opinion of [redacted] dated [redacted] .

2. Planning permission was granted by [redacted] (the CA) on [redacted] under application [redacted] for 'Development at [redacted] .'. The development was described as 'Demolish existing building. Erection of a 7 storey Self Storage building (B8 use) with associated car parking including loading bays, EV charging spaces, cycle store and landscaping. (Summary)'

3. The CA issued a CIL Liability Notice on [redacted] in the sum of £[redacted]. This was calculated on a net chargeable area [redacted] m² at the [redacted] CIL rate of £[redacted] psqm and the [redacted] CIL rate of £[redacted] psqm. Both rates were subject to indexation.

4. The Appellant requested a review under Regulation 113 on [redacted] . The CA responded on [redacted] stating their view that the charge was correct.

5. On [redacted] , the Valuation Office Agency received a CIL appeal under Regulation 114 contending that the CIL liability should be £[redacted]

Grounds of Appeal

6. The Appellant's grounds of appeal set out in advice from [redacted] are:

a) That the central issue in the case is "What is the gross internal area of the development for which planning permission is granted?"

b) A decision maker is thus required to construe the Planning Permission to identify the gross internal area of the development that the planning permission **grants planning permission for**.

c) A reasonable reader would construe the Planning Permission as meaning that the precise extent of the internal floorspace to be provided was not known at the date of the grant of planning permission, since it does not impose any requirement to include any of the mezzanine floors.

d) The Planning Permission does not grant planning permission for a specific internal layout, with a specific number of mezzanine floors providing a specific amount of floor space.

e) The Planning Permission grants planning permission for a development that would be substantially complete and lawful if it were constructed without any of the mezzanine floors.

f) Additional floorspace can be inserted at a later stage without any requirement for planning permission (see section 55(2)(a) TCPA 1990)

g) Such additional floorspace does not form part of the "chargeable development" since it is not part of the "development for which planning permission is granted" (see Regulation 9(1) of the 2010 Regulations) and which is required to be built out to substantially complete the development permitted by that planning permission.

h) The Council's calculation of the amount of CIL payable is in error and is based upon an incorrect interpretation of the gross internal floorspace that the Planning Permission permits. The gross internal area would be limited to the ground floor some [redacted] sq m. That is the figure to be used in paragraph 1(6) of Schedule 1 to the 2010 Regulations.

7. It is therefore the appellant's view that the CA's calculation of the amount of CIL payable is in error and is based upon an incorrect interpretation of the gross internal floorspace that the Planning Permission permits. In the opinion of the appellant the gross internal area should be limited to the ground floor of some [redacted] sq m and this is the GIA that should be used in the calculation set out in paragraph 1(6) of Schedule 1 to the 2010 Regulations.

8. The CIL Liability Notice issued on [redacted] is considered by the appellant to be incorrect as it is based upon a net increase in gross internal area (GIA) of [redacted] sqm, which includes mezzanine levels within the assessment of GIA.

9. The appellant considers the GIA to be [redacted] sqm. This is [redacted] sqm less than the [redacted] sqm GIA of the existing building (which would be demolished). Within the covering letter attached to the Regulation 114 Appeal, the agent revises their earlier opinion and states that the existing building was not in lawful use for the required period, as the [redacted] year period had expired by the date of the grant of Planning Permission ([redacted]). The appellant therefore revised their opinion of CIL liability from £0 (as per their Regulation 113 Request and CIL 1 Form), to £[redacted]

10. The appellant does not consider the mezzanine levels form part of the planning permission granted. They state the mezzanines would be installed post construction. They also state separate planning permission would not then be required and CIL is not chargeable for mezzanines created within existing buildings (based on existing case law).

11. The planning application submitted on [redacted] was for 'Demolition of vacant building and redevelopment for a self-storage facility with associated car parking and landscaping'. During the application process, the appellant notes that the Council amended the description of the development to 'Demolish existing building. Erection of a 7 storey self-storage building (B8 use) with associated car parking including loading bays, EV charging spaces, cycle store and landscaping'.

12. The appellant considers the development applied for was a self storage building with a floorspace of [redacted] sqm, (which excluded future, potential mezzanine floors). These were stated to be possibly installed at a later date but the appellant holds that they do not form part of the planning permission applied for, or granted, and thus could be completed at a later date, without incurring additional CIL charges.

13. The advice sought by the appellant from [redacted] of [redacted] confirms the central issue to be 'what is the GIA of the development for which planning permission is granted' which he breaks down further and analyses. His conclusion being that the CA have incorrectly interpreted the GIA that the planning permission permits and that the correct GIA should be the ground floor area of [redacted] sqm.

14. The CA uphold their opinion that their assessment of the GIA and calculation of the CIL charge is correct:

a) The CIL Liability charge and the inclusion of the mezzanine levels within the assessment of the GIA used for CIL calculation are both correct. The CA uphold that without the mezzanines the building would be a large shell and not fit for purpose as a self-storage building which is the permission granted.

b) The CA consider the installation of the upper floors to be inseparable from the development for which planning permission was granted and the mezzanines are therefore liable to CIL charges.

c) The CA references the planning officer's report and the applicant's design and access statement in support of the view that the 7 floors should be included.

d) Unlike the Orbital vs Swindon Borough Council (2016) case (as quoted by the appellant), the CA consider there to be a direct link between the planning application made and the mezzanines as they form an integral part of the proposed new building and its intended use for self storage.

e) The plans of the proposed building, show the ground floor with three sets of stairs and two lifts to service the six upper floors. The upper floors are therefore inextricably linked to the development. Without the mezzanines the CA consider there would not be the storage space that the applicant is seeking to build.

f) The CA reiterate that CIL is calculated by measuring the approved plans of the planning permission granted, in accordance with the RICS Code of Measuring Practice 6th Edition, to establish the GIA. The GIA and CIL charge have been based upon this.

15. In response to the CA's response the appellant has provided a second opinion from [redacted], which in summary concludes:

a) The mezzanines are not integral to the development authorised by Planning Permission [redacted]. The development would be complete without installation of the same and the mezzanines can be installed post-completion such that they would not amount to development under Section 55(2)(a) of the Town and Country Planning Act 1990.

b) The CA's assumptions as to the applicant's subjective intention is not relevant to the objective interpretation of the meaning of a planning permission as a matter of law.

c) The CA erred in law when considering extraneous documents as an aid to interpreting Planning Permission [redacted].

d) The CA has misunderstood and therefore misapplied the Government Guidance.

e) As a consequence of the above, the CA's calculation of the amount of CIL payable is in error and based upon an incorrect interpretation of the gross internal floorspace that the Planning Permission permits.

Decision

16. I agree that it is the GIA of the chargeable development that is to be determined in accordance with Regulation 40 and Schedule 1 of the 2010 Regulations (as amended). Regulation 9(1) provides that "the chargeable development is the development for which planning permission is granted." Accordingly, I agree the central issue in the present case is "What is the gross internal area of the development for which planning permission is granted?" and this requires me to consider the Planning Permission to identify the gross internal area of the development that the planning permission grants planning permission for.

17. GIA is not defined in the CIL regulations but the generally accepted definition is set out in the RICS Code of Measuring Practice 6th Edition (the RICS Code). This requires mezzanine floor areas to be included if they have permanent access.

18. The RICS Code defines that Gross Internal Area (GIA) is the area of a building measured to the internal face of the perimeter walls **at each floor level**. At 2.8 the Code is specific that mezzanine floor areas with permanent access are included. However, it is noted that atria and entrance halls, with clear height above, are measured at base level only. Voids over stairwells and lift shafts on upper floors are included.

19. The description of the development and approved plans submitted with the planning application together with supporting documents, reports and surveys all referred to the proposed self-storage building as being a seven storey building:

    a) The Planning Fire Safety Strategy issued on [redacted] clearly showed and referred to a 7 storey building within its descriptions and calculations (with floors/mezzanines shown).

    b) The External Daylight Assessment report dated [redacted] also referred to the proposed building as being 7 storeys 'stepping up to 7 storeys for the main part of the building'.

    c) The Transport Plan notes that the mezzanines are to be inserted post completion but nevertheless has regard to the 7 storeys in looking at the impact for parking, noting that the maximum car parking standards applied to the proposed [redacted]sqm of self storage would equate to a maximum of [redacted] car spaces.

    d) The Design and Access statement details that "the proposal is for the creation of storage units with a fixed floor space of [redacted]sqm with associated car parking and landscaping.

       Additional demountable mezzanine levels will be inserted at 1st to 6th floor levels post construction to provide additional self storage floorspace for up to [redacted]sqm

The proposed unit comprises of mainly self storage floorspace with areas for a reception lobby, staff facilities, stair cores, a double lift core extending to all floors and associated service bays."

20. In accordance with Condition 2 of the planning permission the development is required to be carried out "in accordance with" plans [redacted] (1st); [redacted] (2nd); [redacted] (3rd and 4th); [redacted] (5th); [redacted] (6th). These approved plans are named in relation to each floor level and show lifts and stairs giving access to each of the six upper floors. There is a note to each of the plans for the floors that says "Internal layout indicative and will be subject to Part B building regulations compliance. Floors 1-6 are mezzanine levels and will be inserted after completion, layouts shown are for illustrative purposes only."

21. The proposed building is a purpose built, self-storage facility with mezzanine levels. On the basis of the evidence contained within the planning application which includes the presence of three stairwells and two lifts and shows floor plans for 7 levels, it would be reasonable to assume that the proposed levels have permanent access and (the appellant's arguments aside) should be included within the GIA of the building if they are part of the development that the planning permission granted.

22. Whilst the appellant states that the mezzanines would be installed at a later date, the chargeable development is the development for which planning is granted (Regulation 9(1)) which is described as 'a seven storey self storage building'. The approved plans show 7 floor levels with permanent access to the 6 upper floors. The CA confirms that no further planning permission would be required for the creation of the mezzanine floors that are indicated on the approved plans 'for illustrative purposes'. In my opinion the planning permission permits a building with 7 floor levels and should be measured in accordance with the RICS Code to the internal face of the perimeter walls at each floor level. The precise layout of the self storage on those mezzanines might vary from the illustrative plans but the position of the fixed stairs and lifts (as approved) indicates six additional floor levels and a seven storey building in line with the planning description and the development for which planning is granted.

23. I recognise that no permission would be required if the floor structures were added later, nor any enforcement possible if the floor structures were not installed, but the description of the permission granted, along with the fixed staircases and lift shafts being part of the application, and the fact that there are approved plans referencing floors 1 – 6 is persuasive that the permission granted was for a building with 7 floors and for CIL purposes the chargeable development is to include all 7 floors.

24. The appellant disputes the CA's reference to supporting documents submitted with the application as they are not part of the permission itself, quoting caselaw that confirms that regard should only be had to such documents in certain circumstances, and then only with caution. I would suggest that a permission that explicitly references a 7 storey building, with approved plans named in accordance with 6 upper floors but which are said to be for illustrative purposes, is sufficiently ambiguous to warrant having regard to extrinsic material for the purposes of the CIL calculation. All supporting documentation, such as the fire safety strategy, transport plan etc, has been prepared on the basis that the building will eventually

have 7 floors, which whilst not determinative, lends further support to the fact that it was essentially a building with 7 floors that was permitted. I see no reason to take a different approach in the calculation of the CIL charge.

25. Following the ruling in in the Orbital Shopping Park Swindon vs Swindon Borough Council (2016) the Planning Practice Guidance (PPG) was updated to clarify that mezzanine floors, inserted into an existing building, are not liable for CIL, unless they form part of a wider planning permission that seeks to provide other works as well. The mezzanines in question do not form alterations to an existing building, instead they form part of a wider permission for a new building. Whilst the CIL regulations do not explicitly mention mezzanine floors it would appear from the guidance that there is an intention for mezzanine floors within a new building to be CIL liable as they will always be part of a wider planning permission.

26. The Orbital case arose as certain works are not to be treated as development for the purposes of CIL. Regulation 6(1)(c) of the CIL Regulations 2010 states that these include: "the carrying out of any work to, or in respect of, an existing building for which planning permission is required only because of provision made under section 55(2A) of TCPA 1990". The Orbital case involved a permission in relation to an existing retail building that was only required due to Article 44 of the Development Management Procedure Order 2015 (DMPO) and hence the application of section 55(2A) of the TCPA (1990) and CIL regulation 6(1)(c was in question. I do not consider it to be relevant in this appeal. The permission in question is in relation to a new building and there is no question of section 55(2A) applying. It is my opinion that the mezzanine levels form part of the planning permission granted for the new building.

27. The appellant has argued that the mezzanines do not form part of the planning permission granted as specific details relating to the floor levels are not included within the wording of the planning permission granted. The appellant considers the floorspace can not form part of the chargeable development for CIL purposes as it does not form part of the permission granted for the wider scheme. I disagree, I consider the mezzanines do form an integral part of a wider planning permission and are therefore liable to CIL.

28. Aside from the material submitted with the planning application indicating 7 floors, I also consider the mezzanine levels to be part of the functioning use of the building; the purpose of the building and use class were specified within the planning permission granted and thus I consider the mezzanines to form part of that planning permission despite them not being individually identified.

29. Whilst accepting the appellants views, regarding subsequent internal development not requiring planning permission, I consider there to be an intrinsic link between the items specified within the planning permission (lift, stairs, building shell) and the internal levels. The fact that the mezzanine structures could be physically inserted after the development is complete, does not detract from the fact that the permission is allowing a 7 storey building multi level building with internal staircases at fixed levels to be used for self storage purposes, and not a hanger.

30. Thus, the calculation of the GIA of the building should include all levels. The GIA of the proposed development is [redacted]sqm with the seven storeys. The CIL charge as currently calculated based on a net chargeable area of [redacted] sqm is not therefore excessive.

31. On the basis of the evidence before me I hereby dismiss the appeal.

[redacted]MRICS FAAV
Valuation Office Agency
03 September 2024