Appeal Decision

by [redacted] BSc (Hons) MRICS

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

Valuation Office Agency
[redacted]

e-mail: [redacted]@voa.gsi.gov.uk.

Appeal Ref: [redacted]

Address: [redacted].

Development: Phase 1 Enabling Works - [redacted] ***of the site following the*** [redacted] ***and structures to construct*** [redacted] ***new buildings*** [redacted] ***from*** [redacted] ***to provide*** [redacted] ***sqm (GIA) of*** [redacted] ***(*** [redacted] ***dwellings) (*** [redacted] ***) sq.m. (GIA) of*** [redacted] ***(*** [redacted] ***) sqm (GIA) of*** [redacted] ***(*** [redacted] ***) with associated*** [redacted] ***, vehicle (*** [redacted] ***)and cycle parking (*** [redacted] ***spaces), hard and soft landscaping to provide*** [redacted] ***(approx.*** [redacted] ***sqm)and*** [redacted] ***areas of*** [redacted] ***and construction of*** [redacted] ***to basement level to*** [redacted] ***operations, construction of*** [redacted] ***over the existing*** [redacted] ***(encloses*** [redacted] ***sqm at basement and ground floor levels)and all other necessary excavation and enabling works.***

Planning permission details: Planning permission [redacted] ***(*** [redacted] ***Planning ref.*** [redacted] ***) was granted by*** [redacted] ***on*** [redacted].

Decision

I determine that the Community Infrastructure Levy (CIL) payable in respect of the development is to be assessed in the sum of £[redacted] ([redacted]: £[redacted] [redacted]: £[redacted]).

Reasons

1. I have considered all the submissions made by [redacted] (the agent) and [redacted] (Counsel) on behalf of [redacted] (the appellant) and the representations received from the Collecting Authority (CA) [redacted]. In particular I have considered the information and opinions presented in the following documents:-

   a. The planning permission in respect of the development dated [redacted].
   b. The CIL Liability Notice issued by the CA on [redacted].
   c. A copy of the agent's request for a Regulation 113 Review dated [redacted] with an attached Counsel's opinion dated [redacted] and a copy of the CA's Review of the LN dated [redacted].
   d. The CIL Appeal Form dated [redacted] requesting that I determine a reduced CIL charge on the basis that the existing service yard should be excluded from the Regulation 40 calculation with an attached Counsel's opinion dated [redacted].
   e. The CA's representations dated [redacted] including a previous Appeal Decision, marked up drawings submitted by the agent, amended floorspace figures and an amended CIL calculation and revised Liability Notice.
   f. The agent's comments on the CA's representations dated [redacted] and including a further Counsel's opinion dated [redacted].

2. Planning permission was granted by the [redacted] on [redacted] for the [redacted] of the site following the [redacted] new buildings [redacted] in height to provide [redacted] sqm (GIA) of [redacted] ([redacted]) sq.m. (GIA) of [redacted] floorspace ([redacted]) [redacted] sqm (GIA) of [redacted] floorspace, ([redacted]) with associated [redacted], vehicle and cycle parking , hard and soft landscaping to provide [redacted], alterations to the [redacted] and [redacted], construction of an [redacted] over the existing [redacted] and all other necessary excavation and enabling works.

3. On [redacted] the CA issued a Regulation 65 Liability Notice (original LN) in respect of the proposed Phase 1 Enabling Works as they considered that a number of pre-commencement conditions associated with the Enabling Works phase had been approved. This LN was issued for a total sum of £[redacted] made up as follows:-

   [redacted] CIL - £[redacted]
   [redacted] CIL - £ 0.00

   The Mayor of London CIL charge was based on a chargeable area of [redacted] sqm at a rate of £[redacted] sqm with an addition for indexation.

   There was no CIL charge for [redacted] as the Charging Schedule has a rate of £[redacted] sqm for uses within General Industrial (B2), Storage or Distribution (B8).

4. The agent requested a Review under Regulation 113 on the [redacted] on the basis that in the Regulation 40 calculation the CA did 'not take account of the existing, covered service yard area'. This request was supported by Counsel's opinion which was that although it was accepted that the roofing of the service yard was chargeable development whose GIA could be calculated, the service yard should be deducted from the area of the chargeable development because it was a 'retained part of an in-

use building'. This opinion included a contention that it was reasonable to consider the definition in section 336(1) Town and Country Planning Act 1990 (TCPA 1990) when deciding on what is a 'building' for CIL purposes.

5. The CA issued their decision on [redacted] confirming the CIL charge as stated in the original LN. They confirmed that they had taken legal advice and this concluded that the definition of 'building' in section 336 TCPA 1990 did not apply for CIL purposes as it was excluded from Part 11 (Community Infrastructure Levy) by section 235 Planning Act 2008 (PA 2008) and the dictionary definition of a building, 'a structure with walls and a roof' was appropriate. Therefore, the service yard was not a building and so could not be a 'retained part of an in-use building' for the purposes of the Regulation 40 calculation.

6. The agent submitted an Appeal Form on behalf of the appellant on [redacted] with a single ground of appeal being 'That the chargeable amount sought is based on a misapplication of the formula in Regulation 40 of the CIL Regulations 2010. In particular, the figure that the charging authority has used to represent the chargeable area for the works in question - [redacted]m2 is excessive as it includes an area of service yard which already exists on the site which the formula requires to be excluded'. The agent did not provide their calculation of the amount of CIL payable as they considered that the basis of the original LN was unclear.

7. A further Counsel's opinion was submitted with the Appeal Form and was dated [redacted]. This opinion also sought to clarify the area of [redacted]sqm that the CA had included in the original LN as well as again challenging the CA's approach of not excluding the service yard as a 'retained part of an in-use building'. The arguments put forward in the earlier Counsel's opinion were repeated, with a further argument that Regulation 40(11) where reference is made to a 'building' not including one into which people do not normally go, supports the contention that a hardstanding may be a building, because otherwise had the intention been to exclude all buildings 'which cannot be physically entered' this would have been stated, and it was not. In addition, Counsel also referred to a further basement service area which was to be covered by a roof and was known as the 'bathtub' and that they would make further submissions about exempting this area if the CA had included it in the chargeable development.

8. The CA submitted representations on [redacted]. They included further confirmation that the definition of 'building' in section 336(1) TCPA 1990 did not apply as it was specifically excluded from Part 11 of the Planning Act 2008 (Community Infrastructure Levy) so no regard should be had to it and therefore the dictionary definition should apply. This was further supported by a previous CIL Appeal Decision made by the Valuation Office Agency where the dictionary definition of 'building' had been adopted. As there was no existing building on the site there could be no 'in-use building' as it had to be a 'relevant building', being one which was situated on the relevant land on the day planning permission first permits development. They also referred to the Valuation Office Agency Guidance 'Code of Measuring Practice: definitions for rating purposes' indicating that 'open vehicle parking areas, terraces and the like will be excluded from the GIA. As regards Regulation 40(11) they did not consider it applied as buildings can generally be entered so no explanation is required as a hardstanding area cannot be classed as a 'building' so Regulation 40(11) is not relevant.

   As a result of the agent providing revised floorspace areas in respect of the Enabling Works since the appeal was made and which it would appear have been agreed by the parties, the CA confirmed that they had recalculated the net chargeable area, although still not excluding the ground floor or basement service yards as 'retained parts of in-use buildings', to give a figure of [redacted] sqm and a revised CIL charge including indexation of £[redacted] arrived at as follows:-

Total GIA "G" (sqm)	Proposed GIA "Gr" (sqm)	Retained GIA "Kr(i)" (sqm)	Demolished GIA "E" (sqm)	Chargeable Area GIA "A" (sqm) *
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Charging Schedule / CIL Rate	Total Charge with indexation **
[redacted] CIL - £[redacted]	£[redacted]
[redacted] CIL Storage or Distribution (B8) - £[redacted]	£[redacted]

* The chargeable area is calculated using the following formula from Regulation 40: Gr - Kr - (Gr x E / G)

** The CIL charge is calculated used the following formula from Regulation 40: R x A x Ip/Ic. The indexation figures used are set out below.

Ip: year planning permission granted ([redacted])	[redacted]
Ic: year charging schedule adopted ([redacted])	[redacted]
Indexation rate stated in Liability Notice (Ip / Ic)	[redacted]

9. The agent submitted comments on the CA's representations on [redacted]. These primarily comprised of a further Counsel's opinion. Counsel provided a number of comments, the majority repeating previous arguments and confirmed that the main point in dispute was whether the definition in section 336(1) TCPA 1990 was of any assistance in assessing what constitutes a 'building' for the purposes of Regulation 40(7). He was of the opinion that section 235 PA 2008 does not prohibit giving any consideration to section 336(1) it simply allows for separate provision to be made in Part 11 PA 2008. However, there is no definition in the CIL Regulations so in the statutory vacuum it is sensible and permissible to look at where Parliament has defined the term elsewhere, particularly when the definition is contained in a statute relating to the same area of law.

10. Counsel proposed three possible alternative CIL charges dependent on which areas should be excluded as 'retained parts of in-use buildings' as follows:-

Excluding both the ground floor and basement ([redacted]) [redacted] - £[redacted]

Excluding ground floor [redacted] - £[redacted]

Excluding basement [redacted] - £[redacted]

11. Having fully considered the representations made by the appellant and the CA, I would make the following observations on the representations and the grounds of the appeal.

12. The point at issue in this appeal is whether areas of the existing property used for the [redacted], being the [redacted] and a further area known colloquially as the '[redacted]' (a [redacted] area surrounded by walls) both areas being open with no roofs, can be considered as 'retained parts of in-use buildings' (K_R in the formula in Regulation 40(7)).

13. It would appear that despite initial uncertainty on behalf of the appellant as to the extent of the [redacted] works included in the original LN, it has now been agreed that the total proposed GIA (G_R in the formula in Regulation 40(7)) is [redacted] sqm. The majority of this area is as a result of the covering of the vehicle parking areas with an [redacted] to maximise noise mitigation. As the area of the proposed GIA is not at issue, I will not comment on it further in this decision.

14. Counsel for the appellant is of the opinion that consideration should be given to the definition of 'building' in the Interpretation section 336(1) Town and Country Planning Act 1990 (TCPA 1990) which is as follows:-

"building" includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building;

Counsel is of the opinion that as planning permission is required for hardstanding because it is a permanent and fixed 'structure' it is therefore a 'building' pursuant to this definition. The CA agree the hardstanding is development and requires planning permission, but do not consider that this necessarily means it is a building; they consider it could more appropriately classified as an 'engineering operation' or 'other operation'.

15. Counsel has also referred to Regulation 40(11) and the reference to a 'building' not including a building into which people do not normally go as support for their opinion that the hardstanding is not excluded from being a building, their argument being that as the hardstanding cannot be physically entered this provision is not engaged. The CA do not accept this view on the basis that buildings can generally be entered so no explanation is required and as the hardstanding is not a building this Regulation is irrelevant.

16. It is agreed by the parties that the PA 2008 clearly indicates at section 235 that the TCPA 1990 definition of 'building' does not apply in respect of Part 11 which provides for CIL. However, the appellant is still of the opinion that consideration should be given to this definition as there is none in the Regulations and no reference in the PA 2008 to a separate definition of 'building'. The CA is of the opinion that as the drafters of the PA 2008 have specifically excluded this definition then no regard should be had to it and the dictionary definition being 'a structure with walls and a roof' should be applied.

17. On the evidence before me and in the absence of any definition in the Regulations I have given consideration as to whether it would be appropriate to adopt the TCPA definition or the dictionary definition. I have noted that in the PA 2008 it was specifically provided that the TCPA 1990 definition should not apply for the purpose of CIL and DCLG guidance specifically says that CIL does not apply to structures that are not buildings (guidance on Community Infrastructure Levy published 12 June 2014 by DCLG states that 'structures which are not buildings, such as pylons and wind turbines' are not liable for CIL). Consequently, on balance I am of the opinion that it is appropriate to adopt the ordinary dictionary definition being 'a structure with walls and a roof' (Oxford English Dictionary).

18. As neither of the existing areas used for vehicle parking have roofs, and this

appears to be agreed by the parties, I am of the opinion that they cannot be considered as buildings for the purposes of the CIL Regulations and so cannot be considered as 'retained parts of in-use buildings' and are unable to be netted off the GIA of the proposed development.

19. As it is understood that the appellant was in agreement with the CIL areas in the revised LN, other than the issue over the exclusion of the two areas of hardstanding, I can confirm that the CIL charge in this case should be based on a net chargeable area of [redacted] sqm. However, the CA have adopted the incorrect indexation figure in respect of the date of the planning permission as the BCIS All-in TPI applicable for [redacted] (the index figure for a given year is the figure for [redacted] for the preceding year) is [redacted].

20. On the evidence before me, having regard to the particular facts of this case, I conclude that the CIL charge should be as follows:-

[redacted]

Net chargeable area - [redacted] sqm @ £[redacted] = £[redacted]

Plus indexation = £[redacted]

(Index [redacted] – [redacted])
(Index [redacted] – [redacted])

[redacted]

Net chargeable area - [redacted] sqm @ £[redacted] = £[redacted]

[redacted] MRICS
RICS Registered Valuer
Valuation Office Agency
[redacted]