

# Appeal Decision

by [REDACTED] BSc (Hons) MRICS

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

Valuation Office Agency



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Appeal Ref: [REDACTED]

Address: [REDACTED] and [REDACTED].

*Development: Change of use of [REDACTED] from a [REDACTED] (Use class D1) into a 1 x 2bed flat (Use class C3) and retail unit (Use class A2) and change of use of [REDACTED] from retail (Use class A2) into a 1 x 2bed flat (Use class C3) and retail unit (Use class A2) with associated external alterations, provision for car parking and bin stores, landscaping and fencing.*

*Planning permission details: Planning permission [REDACTED] was granted by the [REDACTED] on [REDACTED].*

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## 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] CIL: £[REDACTED], [REDACTED] CIL: £[REDACTED]).

## Reasons

### Background

1. I have considered all the submissions made by [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 (LN) issued by the CA on [REDACTED].
- c. A copy of the CA's decision dated [REDACTED] on the appellant's request for a Regulation 113 Review dated [REDACTED].
- d. The CIL Appeal Form dated [REDACTED] although not received until [REDACTED] with the attached supporting documents.
- e. The CA's representations dated [REDACTED].
- f. The appellant's comments on the CA's representations dated [REDACTED].

2. From the evidence submitted the relevant planning history prior to the granting of the planning permission which is the subject of this appeal, is essentially as follows:-

[REDACTED]. **Full Planning. Granted.** [REDACTED].  
 Erection of a [REDACTED] storey residential development containing [REDACTED] dwellings, 4 no. retail units ([REDACTED]), doctor's surgery ([REDACTED]) and nursery building with associated vehicular access to [REDACTED], pedestrian/cycle access through the site to [REDACTED], car-parking, landscaping and open space.

[REDACTED]. **Full Planning. Granted.** [REDACTED].  
 Change of use of ground floor at [REDACTED] from vacant retail unit (Use Class A1) into a community centre (Use class D1)

[REDACTED]. **Full Planning. Granted.** [REDACTED].  
 Change of use of the ground floor [REDACTED] centre (Use class D1) into a childrens nursery (Use class D1) and associated cycle parking spaces at [REDACTED].

[REDACTED]. **Full Planning. Refused.** [REDACTED].  
 Change of use of the ground floor [REDACTED] centre (Use Class D1) into [REDACTED] self contained flat ([REDACTED] - Use Class C3) at [REDACTED] and change of use of ground floor retail unit (Use Class A2) into 2 self contained flats ([REDACTED] - Use Class C3) at [REDACTED] with new front entrances and associated landscaping.

3. Planning permission [REDACTED] was granted on [REDACTED] for Change of use of No [REDACTED] from a [REDACTED] centre (Use class D1) into a 1 x 2bed flat (Use class C3) and retail unit (Use class A2) and change of use of No [REDACTED] from retail (Use class A2) into a 1 x 2bed flat (Use class C3) and retail unit (Use class A2) with associated external alterations, provision for car parking and bin stores, landscaping and fencing. I have noted that the Planning Officer's Delegated Report indicates that for [REDACTED], the last lawful use class was D1.

4. On [REDACTED] the CA issued a Regulation 65 LN seeking a CIL payment of £[REDACTED]. This figure was arrived at based on a chargeable area of [REDACTED] square metres (sqm) of dwelling houses and [REDACTED] sqm of financial and professional services giving the following:-

[REDACTED] - £ [REDACTED]

[REDACTED] - £ [REDACTED]

5. The appellant submitted a request for a Regulation 113 Review on [REDACTED] and the CA issued a decision on [REDACTED] confirming the figure in the LN on the basis there was no supporting evidence of lawful use.
6. The appellant submitted an appeal under Regulation 114 on [REDACTED] seeking the CIL payment be reduced to £[REDACTED].

### Grounds of Appeal

7. The appellant did not set out specific grounds of appeal, but stated 'Letter as attached from the tenants'. The letter gave details of the occupation of the properties, I assume to support a claim that the properties were in lawful use, as follows:-

We were the tenant at [REDACTED] and [REDACTED], [REDACTED], [REDACTED]. We had taken over both premises in [REDACTED], on a [REDACTED] year lease. We took over these premises for storage, for our off-licence/groceries store which is located next door ([REDACTED]). But then the stores were partly licensed out to,

- Front of [REDACTED] was licensed out to [REDACTED], and back was kept for our Off-licence storage.
- Front of [REDACTED] was licensed out to [REDACTED], and the back was kept for groceries/ off-licence storage.

### The CA's Representations

8. The CA submitted representations on the [REDACTED] as follows:-

We had received a request for a review on [REDACTED], to which we replied on the same date. The issue was in relation to the 'in use' of existing premises to apply as credit floorspace towards the proposed conversion. The CIL Additional Information Requirement form that had been provided at the time of the application confirmed that the existing floorspace was not in use for 6 consecutive months of the last 36 months. (As attached).

During the planning application stage the case officer also requested further clarity from the planning agent acting on behalf of the applicant at the time, and a statement was received dated [REDACTED] confirming that both no. [REDACTED] and [REDACTED] was not in use (As attached)

The above was also noted in the delegated officer's report. A copy has already been provided to you by the appellant.

The appellant had provided some evidence to support 'In use' during the Regulation 113 review period. This was an undated statement from the tenant of the premises ([REDACTED] [REDACTED]) who stated that he had a [REDACTED] year lease from [REDACTED] and used the premises for storage purposes and was partially licenced out. The storage was not for the purposes of the use of the premises which were D1 and A2, although the A2 was deemed unlawful and therefore both uses were considered as D1. Therefore this statement confirming the lease does not satisfy as evidence in relation to the active use of the premises as D1 for a period of at least 6 months of the last 36 months.

Furthermore in the Design and Access statement submitted with the planning application the very first introduction confirms that the premises has been vacant since [REDACTED]. In fact this very issue of being vacant was used to strengthen the position of the planning application that there would be positive effect of bringing a vacant premises in to use.

Regulation 40 (9) states that where a collecting authority does not have sufficient information, or information of sufficient quality, to enable it to establish that a relevant building is an in-use building, it may deem it not to be an in-use building.

In addition the CA provided a copy of an email from the appellant's architect, [REDACTED] dated [REDACTED] including the following:-

- 1) The Applicant has confirmed to us that the Premises has been vacant since its approved use. The tenant has not been able to sustain his services of D1/[REDACTED] for not even couple of months. And have left the Premises without even paying the Rents.

2) The applicant has also confirmed that the premises have been vacant since [REDACTED] due to the decline in the retail business it's previous Use.

They also provided a copy of the Community Infrastructure Levy (CIL) - Determining whether a Development may be CIL Liable Planning Application Additional Information Requirement form (CIL Information form) dated [REDACTED] in which [REDACTED] in answer to the statement *Was the building or part of the building occupied for its lawful use for 6 continuous months of the 36 previous months (excluding temporary permissions)?* answered No.

9. The appellant submitted comments on the CA's representations on [REDACTED] as follows:-

*Kindly note that in the scanned statement from our architect [REDACTED] of [REDACTED] [REDACTED] had an error in it as when he visited the premises, the shops shutters were closed, which can also be noted in the photograph taken by him on site, he falsely assumed that the shops were vacant as they were given to D1 [REDACTED].*

*For your reference, I have attached herewith documents including proof that we are the Leaseholders for [REDACTED] years and a Letter from sub leaseholders [REDACTED] and [REDACTED] [REDACTED] who the premises was leased to for [REDACTED] years each.*

*Both these sub leaseholders further rented the premises to Licencees as mentioned in the letter. (One of the Licencees shop is clearly visible in the provided onsite photograph.)*

*Also attached is the Title from Land Registry for [REDACTED] and [REDACTED] respectively for the aforementioned periods of their [REDACTED] year lease.*

The letter from [REDACTED] and [REDACTED] which they both signed included the following

*It is further confirmed that the said two premises were occupied by the following tenants (Licensees) (under D1 User) for the periods mentioned hereunder:*

[REDACTED] – Tenant: [REDACTED] ([REDACTED])

From [REDACTED] Till [REDACTED]; And

– Tenant: [REDACTED]

From [REDACTED] Till [REDACTED]

[REDACTED] – Tenant: [REDACTED] (Charity No. [REDACTED])

From [REDACTED] Till [REDACTED]; And

– Tenant: [REDACTED]

From [REDACTED] Till [REDACTED]

## Decision

10. 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.

11. Regulation 40(7) allows for the netting off of the floor area of in-use buildings and Regulation 40(11) includes

(i) is a relevant building, and

(ii) 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

12. I have read through the various documents that have been provided by the parties regarding the use of the properties which can be summarised as follows:-

(a) A copy of a letter from the tenants of [REDACTED] and [REDACTED] stating they occupied the rear part of the properties for off-licence storage and they licensed the front parts out [REDACTED] and [REDACTED]. There were no dates given as to when the tenants or licensees were in occupation.

(b) An email from the architect to the Planning Officer including the following:-

1) *The Applicant has confirmed to us that the Premises has been vacant since its approved use. The tenant has not been able to sustain his services of D1 [REDACTED] for not even couple of months. And have left the Premises without even paying the Rents.*

2) *The applicant has also confirmed that the premises have been vacant since [REDACTED] due to the decline in the retails business it's previous Use.*

(c) The CIL Information form dated [REDACTED] where the architect answered no to the question of whether the property was in use for 6 continuous months in the last 3 years.

(d) A copy of a letter from the tenants confirming details of the licensees and the dates of their occupation.

13. In respect of the occupation of part of the properties by the tenants [REDACTED], they state they occupied the rear of the properties for storage purposes. Therefore, I am in agreement with the CA's contention that their occupation could not constitute lawful use for the purposes of Regulation 40(11)(ii) as not being within the existing lawful use class. There is no indication in the first letter from the tenants when the licensees were in occupation so this provides no assistance in determining whether there was lawful use in respect of the licensees.

The email from the architect and the completion of the CIL form are both quite clear in supporting the CA's contention that there has been no continuous D1 use sufficient to satisfy the lawful use requirements of the Regulations. The CA have also pointed out that the properties being stated as vacant was used to strengthen the position of the planning application.

The second scanned letter from the tenants indicates that there were two licensees who were in occupation for more than six continuous months and would appear to be [REDACTED] and therefore could potentially satisfy the D1 use if the properties were occupied as non-residential [REDACTED] centres. From the photographs that are available from the evidence provided by the parties there is signage over [REDACTED] for [REDACTED], but there is no signage in respect of [REDACTED], and both units have their shutters closed. No further evidence has been provided by the

appellant to support the grounds of their appeal in respect of the lawful use of the properties.

14. There is guidance in the Regulations as to what the CA may do if they have insufficient information, or information of sufficient quality to establish lawful use in Regulation 40(10) as follows:-

(10) Where a collecting authority does not have sufficient information, or information of sufficient quality, to enable it to establish—

(a) whether part of a building falls within a description in the definitions of  $K_R$  and E in paragraph (7); or

(b) the gross internal area of any part of a building falling within such a description,

it may deem the gross internal area of the part in question to be zero.

However, there is no guidance in the Regulations as to what constitutes sufficient evidence, or information of sufficient quality in order to establish lawful use. Therefore, I consider that what constitutes lawful use for the purposes of the Regulations is a matter of fact and degree based on the evidence made available by the parties. The appellant has provided a letter from the tenants supporting his contention that each of the properties were occupied for D1 use for over six consecutive months. However, there is also contradictory evidence from the architect acting on behalf of the appellant both on the completed CIL Form and in correspondence with the Planning Officer. In addition, no further evidence has been provided by the appellant to support his contention, for example correspondence directly from the licensees, evidence of use and marketing from the internet, internal photographs etc. Therefore, on balance having considered all the evidence that has been provided by both parties I have concluded that the properties do not meet the lawful use requirement in Regulation 40(11) and the area cannot be netted off the area of the chargeable development for the purposes of calculating the CIL charge.

15. On the evidence before me, having regard to the particular facts of this case, I dismiss the appeal and confirm the CIL chargeable amount as follows:-

Mayor of London

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

Plus indexation = £ [redacted]

(Index [redacted] - [redacted])  
(Index [redacted] - [redacted])

However, I am unable to increase the CIL charge in respect of an appeal under Regulation 114 from that in the LN which in this case is £[redacted]. Therefore, I can confirm the [redacted] CIL charge at £[redacted] for the purposes of this appeal. The difference from the figure in the LN is as a result of [redacted] adopting an incorrect [redacted] rate of £[redacted] sqm, but also adopting an incorrect index of [redacted] for [redacted].

[redacted]

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

Plus indexation = £ [redacted]

(Index [redacted] - [redacted])  
(Index [redacted] - [redacted])

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

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