

Appeal Decision

by [REDACTED] BSc(Hons) MRICS

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

Valuation Office Agency (SVT)



Email: [REDACTED]@voa.gsi.gov.uk

Appeal Ref: [REDACTED]

Planning Permission Details: [REDACTED] granted by [REDACTED] on [REDACTED]

Location: [REDACTED]

Development: Demolition of existing building and erection of a new [REDACTED] building comprising [REDACTED] apartments [REDACTED] together with [REDACTED] car parking spaces and landscaping [REDACTED]

Decision

I determine that the Community Infrastructure Levy (CIL) payable in this case should be £ [REDACTED] ([REDACTED]).

Reasons

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

- a. The application for planning permission dated [REDACTED] together with associated plans, drawings and documents.
- b. The Decision Notice issued by [REDACTED] on [REDACTED].
- c. The CIL Liability Notice and covering letter issued by the CA on [REDACTED].
- d. The revised CIL Liability Notice issued by the CA on [REDACTED].
- e. The request for review made to the CA by the appellant on [REDACTED].

- f. The Chargeable Amount review decision issued by the CA on [REDACTED].
- g. The CIL Appeal form and statement received by the VOA on [REDACTED] and submitted by the appellant under Regulation 114, together with documents attached thereto.
- h. The CA's representations to the Regulation 114 Appeal dated [REDACTED].
- i. Further comments on the CA's response made by the appellant on [REDACTED].

Background

2. An original CIL Liability Notice in respect of the proposed development, issued by the CA on [REDACTED], stated a chargeable amount totalling £[REDACTED].
3. Resultant from discussions between the appellant and the CA the CA issued a Revised Liability Notice on [REDACTED]. This superseded the first liability notice and was for a sum of £[REDACTED]. This is the liability notice to which this appeal relates.
4. The appellant requested a formal review of the CIL charge under Regulation 113 which the CA duly undertook but advised that they would not be revising the CIL charge payable.
5. The appellant has submitted an appeal to the Valuation Office Agency under Regulation 114 (chargeable amount appeal) stating that in his opinion the calculation of the amount of CIL payable should be £[REDACTED] plus indexation.
6. The grounds of the appeal are as follows:
 - Part of the property has been occupied on a continuous basis for a six month period during the past three years and therefore the requirements of Regulation 40(11) of the Community Infrastructure Levy 2010 (as amended) are met and the existing floorspace should be taken into account in the calculation of CIL liability;
 - The balconies on the first and second floor on the property should not be included within the calculation of GIA as they do not fall within the definition of "internal open sided balcony"; and
 - The undercroft parking area is external and so cannot be considered/viewed as being internal in any circumstances, therefore it should not be included within the GIA.

Ground 1: Previous occupancy of the property and deduction of floor space within the CIL calculation

7. A disagreement has arisen in respect of the application of Regulations 40(7) and 40(11) of the CIL Regulations 2010 (as amended) which, within a calculation of the *net* chargeable area of a development, provides for the deduction of the gross internal area of an 'in use building' that is to be demolished as part of the development, as well as certain retained parts.
8. Regulation 40(11) provides that an 'in-use building' means a building which 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.
9. 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"

10. The appellant states that a floor within [REDACTED] had been refurbished and had been occupied for its lawful use (B1a - offices) for the requisite period up to [REDACTED]. The following evidence in support of this view has been submitted:

- Licences dated [REDACTED] and [REDACTED] between [REDACTED] and [REDACTED]. The first licence was for the whole building and terminated on [REDACTED]. The second was for premises known as [REDACTED] at [REDACTED] and was for the period [REDACTED] until [REDACTED]. Both licences indicate a licence fee payable for each period of £[REDACTED] and the permitted use is as offices and storage.
- Copy of a rates bill for first floor west in the name of [REDACTED] covering the period [REDACTED] to [REDACTED].
- Copies of delivery notes to/from the building from [REDACTED] and [REDACTED] dated [REDACTED], [REDACTED] and [REDACTED]. They indicate delivery of office furniture and 850 boxes of PPE products.
- Letter from a director of [REDACTED] dated [REDACTED] outlining the company business, which is the development and supply of advanced screws and fixings together with supplying a range of personal protective equipment, and how the building was used by the company. The director states that [REDACTED] was used by 4 salesmen for administrative and internal meetings on an intermittent 'come and go' basis over the period of occupation and also for the ancillary storage of stock.

11. In support of the appellant's view that the intermittency of this use does not preclude the building from qualifying as an 'in use' building for CIL purposes he has referred to the case of R (oao Hourhope Ltd) v Shropshire Council (2015) whereby it was held that for a building to meet the test of the CIL regulations, the building had to be in actual use (rather than a theoretical lawful use. He quotes paragraph 27 of the judgement:

"if a building has a more active use, such as a factory, office or shop, but that use is interrupted for a period, the question whether it thereby ceases to be 'in-use' must be one of assessment of the length of and reasons for the interruption, and the intentions of those who previously used and may in the future use the building. No one would say that any of these uses ceased if the factory, office or shop was temporarily closed on a non-working day or for a holiday period. In those circumstances, generally the stock, furniture and any machinery used would remain in situ so that activity could resume after a short period."

12. The appellant is therefore of the view that [REDACTED] were using the property for office use since the office furniture remained in situ until the end of their occupation and their intention when they left the office after conducting their internal meetings and carrying out office based tasks was to return to it, even if that was not necessarily the next working day. The stock and furniture were left in situ so that the activity could resume after a short period. In the appellant's view it cannot be said that the office use ceased because it was not used every working day. The pattern of office use reflected the nature of the business of the particular occupier. On this basis the appellant considers that the requirements of Regulation 40(11) of the CIL Regulations have been met and that the existing building floorspace should be taken into account as a deduction in the calculation of the CIL liability.

13. The CA maintains that the floorspace of the existing building should not be included as a deduction within the calculation of the CIL charge because Regulation 40(9) applies, in so far as, the CA 'does not have sufficient information, or information of sufficient quality, to enable it to establish that a relevant building is an in-use building', and it is therefore entitled to 'deem it not to be an in-use building'.

14. The CA does not consider that the evidence supplied on behalf of the appellant is sufficient to demonstrate the continuation of an office use within [REDACTED] for the period alleged, or indeed to demonstrate that an office use was present at any stage within that period and is therefore entitled to deem [REDACTED] not to be an in-use building.

15. The CA quotes the condition of the site and the knowledge of its officers as being supportive of its position. The CA states that for a number of years the property has presented the appearance of a vacant building and street view photographs show the building to have been surrounded by hoardings from at least [REDACTED]. The appellant does not dispute that the hoardings were in place throughout the three year period prior to the planning permission. The CA has provided evidence of external photographs taken on [REDACTED] and [REDACTED] (during the licence period to [REDACTED]) which show hoardings surrounding the site and windows at ground floor level boarded up. This is further supported by further photographs taken in [REDACTED] (after the relevant date) showing the car park overgrown and with the building having several upper floor windows broken and/or open to the elements and others boarded up. All is indicative of a lengthy period of neglect.

16. The CA has also submitted an email dated [REDACTED] from a Council employee who was responsible for undertaking inspections of the property for [REDACTED]. He confirms that the property is boarded up and in a state of disrepair but that he had noted boxes of stock being stored on floors at the property on his inspection in [REDACTED]. He notes that there has never been any one working there at the date of his inspections and that to do so would be unsafe as the building had wires hanging down and was in general disrepair.

19. The CA has also submitted extracts with photographs from various independent reports undertaken on the property for planning purposes as well as notes from later planning applications. These show the property generally overgrown and dilapidated with comments in the reports and from members of the public indicating that the property has been vacant for years.

20. In referencing the Hourhope case the CA considers that an active use is required for CIL purposes and it questions if this could have been possible/practical in the subject building where office employees would have had to unlock hoardings, park in an overgrown car park, work in an unsecured office or lock themselves in at a risk to their personal safety in the event of a fire. Furthermore from the floor plans of the areas subject to the licence it is not evident, in the CA's opinion, that the employees would have had access to toilets, washing facilities or running water.

21. Based on the above the CA have therefore started on the premise that an active office use is extremely unlikely and so it has sought further evidence from the appellant in the form of utility bills, numbers of employees present, account arrangements for waste etc. to prove otherwise. It notes that no evidence has been provided to suggest that the building had operative water, gas, electricity or phone connections and the CA also notes that there is no EPC for the building.

22. In respect of the appellant's evidence, the CA notes that the licence fee of £ [REDACTED] bears no commercial relationship to value and in the CA's view the licences gave [REDACTED] permission to use the 'premises' referred to therein but do not prove that the offices were used as offices. Similarly the removal company documents indicate that the material being transported was boxed goods, presumably for distribution to customers and the CA notes that whilst office furniture was transported there is no mention of office equipment which would normally be required for active use of an office. Furthermore the CA is of the opinion that whilst the letter from [REDACTED] fills in the picture of how the property could have been intermittently used as an office it does not record the frequency or duration of visits of staff and moreover the letter seems to imply that the building was of use to the company owing to

'security, flexibility and dryness' considerations which does not necessarily accord with an office use and is more an issue for storage related use. The CA considers that the letter points to an arrangement whereby [REDACTED] sales staff periodically (and probably infrequently) accessed the site in order to collect and distribute stock held there, with any additional administrative or meeting activity arising from directly related logistical concerns and the CA does not consider this to constitute an active continuous office use. Lastly in relation to the business rates demand the CA explains the [REDACTED] have had more of an involvement in the occupation of the property for NDR purposes than the single submitted demand note suggests and the occupations suggested by history of rates demands suggests an occupation pattern common for a lawful practice of mitigation of rates liability. Furthermore the CA notes that the test for what constitutes occupation for rates liability purposes is completely different with a much lower threshold than the requirements for CIL purposes.

23. I have reviewed all of the evidence submitted by both parties in relation to this issue and I consider that in this case there is insufficient evidence to prove that the building has been in continuous lawful use as offices for three months over the three years preceding the planning permission. In view of the evident poor condition of this property and lack of any corroborating evidence in relation to an actual office use, such as utility bills in relation to electricity and water supply, statements from staff indicating frequency and length of visits to the office etc, I consider any actual use as offices has not been adequately proven. Neither the licences nor the delivery notes evidence actual use, rather the licences evidence a permission to use the premises, the delivery notes only prove office furniture and boxes of PPE were delivered and collected and the assessment of an occupation in relation to a rates demand does not indicate actual lawful use of the premises for CIL purposes. It is not contested by either party that [REDACTED] used the premises for storage purposes and there is no reason to doubt that [REDACTED] sales staff did occasionally attend the premises but there is no evidence of their continuous use of the premises as offices. The Hourhope case suggests that for a building that has an active use, such as an office, but that use is interrupted, 'the question of whether it thereby ceases to be 'in-use' must be one of assessment of the length of and reasons for the interruption and the intentions of those who previously used and may in future use the building'. Without evidence as to the frequency and duration of the 4 [REDACTED] staff's visits I cannot assess the length of, or the reasons for, the interruption to use of the premises as offices, nor is there clear evidence that the staff intended to use the building for standard office purposes rather than just being present for visits in relation to logistical/distribution purposes. Hence I do not consider that sufficient evidence has been provided to confirm the property was in continuous use as offices for the requisite period. I therefore consider that it was reasonable for the CA to deem that the property was not an in-use building for CIL purposes.

Grounds 2 and 3: Balconies and undercroft parking are not to be included within the GIA calculation.

24. Both parties appear to accept that the RICS Code of Measurement Practice 6th Edition (May 2015) is the principle source of guidance for the measurement of buildings. The definition of GIA is provided within the Code as follows:

GIA is defined as the area of a building measured to the internal face of the perimeter walls at each floor level.

Including:-

- *Areas occupied by internal walls and partitions*
- *Columns, piers, chimney breasts, stairwells, lift-wells, other internal projections, vertical ducts, and the like*
- *Atria and entrance halls, with clear height above, measured at base level only*
- *Internal open-sided balconies walkways and the like*

- *Structural, raked or stepped floors are to be treated as level floor measured horizontally*
- *Horizontal floors, with permanent access, below structural, raked or stepped floors*
- *Corridors of a permanent essential nature (e.g. fire corridors, smoke lobbies)*
- *Mezzanine floors areas with permanent access*
- *Lift rooms, plant rooms, fuel stores, tank rooms which are housed in a covered structure of a permanent nature, whether or not above the main roof level*
- *Service accommodation such as toilets, toilet lobbies, bathrooms, showers, changing rooms, cleaners' rooms and the like*
- *Projection rooms*
- *Voids over stairwells and lift shafts on upper floors*
- *Loading bays*
- *Areas with a headroom of less than 1.5m*
- *Pavement vaults*
- *Garages*
- *Conservatories*

Excluding:-

- *Perimeter wall thicknesses and external projections*
- *External open-sided balconies, covered ways and fire escapes*
- *Canopies*
- *Voids over or under structural, raked or stepped floors*
- *Greenhouses, garden stores, fuel stores, and the like in residential property.*

25. Approved plans show that the proposed development includes the provision of balconies to most apartments. The balconies are of various designs; all are open fronted along the full extent of the balcony, with no protection from the weather, but 8 of the balconies on the first and second floors to the rear of the building are recessed, falling within the dominant external wall of the building, and accordingly have enclosed sides. The CA has not sought to include balconies which project from the perimeter walls of the building.

26. The appellant considers that all balconies should be excluded from the calculation of GIA since the RICS definition states that the building area should be measured to the internal face of the perimeter walls at each floor level and all balconies should be excluded since they fall within one of the exclusions, namely as "*External open-sided balconies*".

27. The CA takes the view that the 8 recessed balconies constitute GIA for the purpose of CIL and are specifically included within the calculation since they are covered by permanent structures and they fall within the dominant line of external walls. They are accordingly enclosed at the sides and consequently do not comprise "external open sided balconies" in the CA's opinion.

28. The definition of GIA requires measurement to internal face of the perimeter walls of the building at each floor level. In this case where there are recessed balconies I consider a measurement to the perimeter walls of the building will include the recessed balcony areas. There are other instances where the Code suggests it is appropriate to measure to the perimeter of the building, and include an area such as a loading bay, despite it not being fully enclosed at that level. I consider the recessed balconies fit the description of 'internal open sided balconies' which are specifically included.

29. In respect of the undercroft parking area this is located at ground floor level at the rear of the building. Plans show this is below the upper floors which are supported by series of

pillars. It is largely open on three sides and also provides access to external car parking areas on either side. The appellant considers that this area should be excluded within the GIA calculation since it is outside the perimeter of the building. The CA notes that the Code of Measuring Practice definition includes 'external' areas eg. loading bays and pavement vaults while it excludes others (canopies, covered ways and fire escapes). The CA considers there to be a general supposition that areas used for parking which are covered by a permanent structure comprise GIA. It considers that the undercroft parking is more akin to a loading bay than any other area listed within the Code of Measuring Practice and should therefore be included, notwithstanding the example diagram of the loading bay in the Code is enclosed on three sides.

30. The exclusions and inclusions to GIA warrant some consideration. Exclusions include 'external open sided balconies, covered ways and fire escapes' which implies that 'internal open sided balconies, covered ways and fire escapes' should be included within GIA. There are no diagrams or examples as to how these might be differentiated in practice.

31. The inclusions to the RICS code definition do not specifically mention 'covered parking areas' although 'garages' are to be included, as also are 'internal open sided balconies, walkways and the like'. In respect of these later items there are clearly examples of where an area without external walls on some sides can be included within the definition of GIA. This would appear to confirm that in certain situations the RICS code does not envisage that a lack of external walls prevents GIA from being calculated. Diagram D in the RICS illustrates a calculation of the GIA of a 'loading bay' based upon measuring to a supporting pillar on one side of the bay, and indeed I have already decided that the balconies noted above should be included within the definition of an internal open sided balcony.

32. In this case the lack of external perimeter walls in relation to the undercroft area is extensive. There is essentially only a wall on one side, one other side is approximately two thirds open and two sides are completely open albeit there are 4 supporting pillars marking the perimeter of the covered area. Nevertheless the area in question lies beneath the upper floors of the building, it is not covered by a canopy which is specifically excluded. I consider that it is appropriate to measure the building to the internal face of the pillars at ground floor level and include the covered parking area within the GIA calculation. I consider that the area in question then falls to be included much the same as 'internal open balconies, walkways and the like' or a loading bay.

33. Based on the facts of this case, the evidence before me and having considered all of the information submitted in respect of this matter, I therefore determine a CIL charge of £[REDACTED] in line with the revised liability notice and dismiss this appeal.

[REDACTED] BSc(Hons) MRICS
RICS Registered Valuer
Valuation Office Agency
[REDACTED]

1. The first part of the document is a letter from the author to the editor, dated 1st January 1950. The letter is addressed to the Editor of the Journal of the Royal Society of Medicine, London. The author, Dr. J. H. Green, writes to inform the editor of the receipt of the manuscript of the paper 'The Effect of the New Type of X-ray Tube on the Diagnosis of Tuberculosis', which was submitted to the Journal on 15th December 1949. The author expresses his appreciation for the editor's prompt attention to the manuscript and his confidence that the paper will be found of interest to the readers of the Journal.

2. The second part of the document is the title page of the paper, which is headed 'The Effect of the New Type of X-ray Tube on the Diagnosis of Tuberculosis'. The author's name, Dr. J. H. Green, is printed below the title. The paper is published in the Journal of the Royal Society of Medicine, Volume 43, Part 1, January 1950, on pages 1-4. The price of the paper is 2s. 6d. net.

3. The third part of the document is the abstract of the paper, which states that the author has examined 100 cases of tuberculosis of the lungs, and has found that the new type of X-ray tube has a marked effect on the diagnosis of the disease. The author concludes that the new type of X-ray tube is a valuable addition to the diagnostic armamentarium of the radiologist.

4. The fourth part of the document is the main text of the paper, which is divided into three sections: 'Introduction', 'Material and Methods', and 'Results'. In the 'Introduction' section, the author discusses the importance of the accurate diagnosis of tuberculosis of the lungs, and the difficulties which have hitherto attended this task. He then describes the new type of X-ray tube, and the reasons for its use in the present study. In the 'Material and Methods' section, the author details the 100 cases which were examined, and the methods which were employed for the diagnosis of the disease. In the 'Results' section, the author presents the findings of his study, and discusses the implications of these findings for the diagnosis of tuberculosis of the lungs.

5. The fifth part of the document is the conclusion of the paper, in which the author states that the new type of X-ray tube has a marked effect on the diagnosis of tuberculosis of the lungs, and that it is a valuable addition to the diagnostic armamentarium of the radiologist. He concludes that the use of the new type of X-ray tube should be encouraged, and that it should be made available to all radiologists who are concerned with the diagnosis of tuberculosis of the lungs.

6. The sixth part of the document is the reference list, which contains the following references: Green, J. H. (1949) 'The Effect of the New Type of X-ray Tube on the Diagnosis of Tuberculosis', *Journal of the Royal Society of Medicine*, **43**, 1-4. Green, J. H. (1948) 'The Effect of the New Type of X-ray Tube on the Diagnosis of Tuberculosis', *Journal of the Royal Society of Medicine*, **41**, 1-4. Green, J. H. (1947) 'The Effect of the New Type of X-ray Tube on the Diagnosis of Tuberculosis', *Journal of the Royal Society of Medicine*, **40**, 1-4.

7. The seventh part of the document is the author's address, which is given as Dr. J. H. Green, 1, St. James's Place, London, W. 1. The author's telephone number is 2345.

8. The eighth part of the document is the author's acknowledgments, in which he thanks the editor of the Journal for his prompt attention to the manuscript, and the Royal Society of Medicine for their generous grant towards the cost of the paper.