

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: Application no. [REDACTED] granted by [REDACTED] on [REDACTED]

Location: [REDACTED]

Development: Variation of Condition 29 (List of approved plans and drawings) of planning permission [REDACTED] (which was for change of use [REDACTED] from offices (use class B1(a) to residential (use class C3) ([REDACTED] units) along with external alterations and retained offices /use class B1(a)) accommodation of [REDACTED] sq m. Extension of commercial unit in [REDACTED] (use classes A1, A2, A3, D1) of [REDACTED] sq m. Construction of new residential blocks (use class C3) ([REDACTED] units) and associated landscaped and car parking to the rear of [REDACTED]. Construction of new residential accommodation (use class C3) ([REDACTED]) and ground floor commercial units (use classes A1, A2, A3, D1) of [REDACTED] sq m on land at [REDACTED]. Alterations to public realm along [REDACTED] and [REDACTED]. Alterations to public realm along [REDACTED] and [REDACTED]). Application to include provision of a phasing plan expressly allowing for the phased redevelopment of the site and other amendments proposed to phase 1.

Decision

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

Phase 1: £ [REDACTED] ([REDACTED])

Phase 2: £ [REDACTED] ([REDACTED])

Phase 3: £ [redacted] ([redacted])
 Phase 4: £ [redacted] ([redacted])
 Phase 5: £ [redacted] ([redacted]).

Reasons

1. I have considered all the submissions made by [redacted] of [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 Decision Notice issued by [redacted] on [redacted].
- b. The 5no. CIL Liability Notices issued by the CA on [redacted].
- c. The request for review made to the CA by the appellant on [redacted].
- d. The review decision issued by the CA on [redacted].
- e. The CIL Appeal form received by the VOA on [redacted] and submitted by the appellant under Regulation 114, together with documents attached thereto.
- f. The CA's representations to the Regulation 114 Appeal dated [redacted].
- g. Further comments on the CA's response made by the appellant on [redacted] and [redacted].

Background

2. The planning consent to which this appeal related ([redacted]) resulted from a Section 73 application. It is not disputed by either party that it is considered to be a CIL Chargeable Development, as per Regulation 9(7) of the CIL Regulations. It expressly allows for the development to be carried out in phases.

3. CIL Liability Notices were issued by the CA for each of the 5 phases of the development on [redacted] in the following amounts:

Phase	CIL Liability
Phase 1	£ [redacted]
Phase 2	£ [redacted]
Phase 3	£ [redacted]
Phase 4	£ [redacted]
Phase 5	£ [redacted]

4. Following a request the CA undertook a review of the CIL liability, the results of which were issued on [redacted]. There was no change to the CIL liability. The appellant then lodged an appeal with the VOA under Regulation 114 (chargeable amount appeal) on [redacted].

5. The grounds of the appeal can be summarised as:

- The CIL liability should be based on the aggregate Net Sales Area (NSA) of the development and not the Core Definition of Gross Internal Area (GIA) as set out in the RICS Code of Measuring Practice; and
- The floorspace of the covered residential parking area should not be included in the CIL calculation.

- The formula set out in Regulation 40 of the CIL Regulations (2010) as amended has not been applied correctly and the deduction of relevant, in-use buildings is not fully reflected.

6. The appellant has calculated that the CIL Liability for each phase of the development should be as follows:

Phase	CIL Liability
Phase 1	£
Phase 2	£
Phase 3	£
Phase 4	£
Phase 5	£

7. There is no dispute in respect of the extent of in use buildings to be considered as deductions within the calculations.

8. Regulation 40 requires that calculations of CIL are based on the "gross internal area" (GIA) of the chargeable development. The appellant notes that the CIL Regulations do not define or reference a definition of 'gross internal area' but both parties 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 provided within the Code is 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.*

9. The appellant is of the opinion that different modified versions of GIA defined within the Code are applicable to different property types and a definition known as Net Sales Area (NSA) is the correct application of the RICS guidance in relation to the CIL chargeable amount calculation for residential development. This is set out in Appendix 8 and Appendix 21 of the Code and the definition for Appendix 8 is as follows:

'App 8 New Homes Valuation – modified version of GIA is an accepted basis of measurement for the valuation and marketing of residential dwellings, particularly in new developments (see NSA of page 30).'

Net Sales Area (NSA) is later defined as follows:

Net Sales Area is the GIA of a new or existing residential dwelling, subject to the following conditions

Including

- *Basements*
- *Mezzanines*
- *Galleries*
- *Hallways*

Excluding

- *Areas with headroom less than 1.5m where the dwelling does not have usable space vertically above*
- *Garages*
- *Conservatories (state separately)*
- *External open-sided balconies*
- *Greenhouses, garden stores, fuel stores and the like in residential property*
- *Terraces*

10. The appellant has calculated the chargeable area based on the aggregate of the NSA's of the individual residential units and the net internal area (NIA) of the offices and retail areas. The CA has measured the GIA of entire buildings for all property types which means that the CA are including the area of internal dividing walls between units, communal space and internal parking within their calculation whereas the appellant has excluded them.

11. The appellant considers that NSA, which he refers to as the 'Residential Version of GIA', is the only 'version' of GIA in the Code that applies to residential property. He considers it remains consistent with the provisions of the CIL Regulations and is the correct application of RICS guidance.

12. The CA disputes this interpretation. The CA states that in both APP8 and APP21 the Code clearly sets out that these approaches are to be used '*in the valuation and marketing of residential dwellings, particularly in new developments*'. In the opinion of the CA the calculation of CIL liabilities is completely different to the valuation and marketing of

residential dwellings. The GIA for the purposes of CIL calculations should be based on how much floorspace the chargeable development comprises rather than the 'sellable area' of each dwelling that the appellant's approach is based upon. The CA notes that the appellant's approach is contrary to guidance provided on the Planning Portal in relation to CIL and published legal advice from a barrister specialising in CIL matters. Similarly it notes that it is contrary to the basis of CIL calculations detailed in numerous CIL appeal decisions.

13. Another area of disagreement is in the inclusion of undercroft parking within the chargeable area. The undercroft parking comprises [REDACTED] sq m of residential parking on the ground floor under the podium on which three new build blocks are located and is accessed through another new build block. The appellant notes that neither the core version of GIA or NSA make any reference to undercroft parking and it is their opinion that this area should be excluded as it has no floor and does not fall under the definition of a garage. He refers to the Oxford English Dictionary definition of a floor and a garage and to diagrams I and J in the RICS Code in support of this. The appellant also refers to the definition of gross external area (GEA) in support of this opinion. GEA excludes 'open vehicle parking areas, roof terraces, and the like' which the appellant considers to include undercroft parking. Hence in their view it would be illogical for undercroft parking to be included in GIA.

14. The appellant has also made reference to definitions of GIA contained within VOA guidance for non domestic rating purposes and an RICS Financial Viability in Planning paper. Both of these specify that 'open vehicle parking areas' are to be excluded from GIA. Both are prepared for specific purposes not related to the application of the CIL Regulations.

15. The CA consider that it is inconceivable for the parking area to not have a floor, albeit they recognise that it might not have a floor covering akin to that which would be expected within certain types of buildings. They also note that the parking area is enclosed by the podium above and side walls and is not considered to be an open parking area. The CA considers that the parking area falls to be included within the definition of GIA and the CIL calculation made under Regulation 40.

16. In support of their approach on this issue the appellant has given considerable detail in relation to the Council's published Viability Study dated [REDACTED], the Council's response to the CIL Draft Charging Schedule dated [REDACTED] and the report on the Inspector's examination of the Draft CIL Charging Schedule. The appellant notes that the viability study assumed a gross to net ratio for floor space of flats of 85% which does not reflect garaging or undercroft parking. He also notes that the Council's response to the Draft Charging Schedule included an example where the CA does not include undercroft parking within the calculation of CIL that would be liable for a development as proposed under the draft. Again in relation to the Inspector's reports the appellant notes the Inspector's reliance on gross to net ratios of 85% which does not reflect undercroft parking. The appellant summarises that in calculating the chargeable amount for the areas and property types as defined within the Charging Schedule, the CA should be consistent with the assumptions made in the process of adopting their Charging Schedule.

17. CIL viability testing is different to the calculation of a CIL charge under Regulation 40. For instance a net to gross ratio of 85% might be appropriate within the costings element of a viability appraisal in order to 'gross up' the area to account for common parts that need to be built and are a cost to developers. This is because the sales values/gross development value will be derived from the values of individual units. This does not mean that the CA has adopted NSA within its CIL testing. Similarly for developments with undercroft parking a gross to net ratio of 85% within a viability appraisal might still be appropriate but the undercroft parking is likely to be costed separately and not reflected in the gross to net ratio (having a different cost to the general building rate adopted for the rest of the building). Nevertheless, I note the appellant's analysis of Riverview House, which was used as an example to justify a CIL rate by the CA in response to representations to the CIL Draft Charging Schedule. This does appear to suggest that the CA have not included the

undercroft parking in a comparison of a developer's liability under CIL compared to s.106. However, this is a single example and the Viability Study has tested numerous scenarios and incorporated a significant viability buffer in deciding the CIL rate for its Outer Zone.

18. Whilst I note the appellant's references to the CA's CIL testing reports, I must have regard to the provisions of the CIL Regulations 2010 (as amended) in relation to this appeal and cannot consider viability issues. I must make my decision in accordance with the CIL Regulations 2010 (as amended) which specifies that the gross internal area of the chargeable development is to be used for the purposes of calculating CIL. The RICS Code of Measuring Practice (6th Edition) does not contain any reference to the measurement of properties for CIL but it does provide a clear definition of GIA that is of general application except when the Code provides for some variation or a different basis for a particular specified purpose. Having reviewed the evidence and opinion provided by both parties in respect of the measurement of the chargeable development I am of the opinion that it is appropriate, for CIL purposes, to calculate the gross internal area based upon the core definition of GIA as defined in the RICS Code of Measuring Practice (6th Edition). The CIL Regulations refer to 'gross internal area' and not any modifications to it that are contained within the RICS Code of Measurement Practice as applications for specific property types or purposes. NSA is a modification to GIA used for valuation and marketing of new build residential properties, it is defined as being 'NSA' not GIA and I do not consider it applicable for CIL purposes. Furthermore, it is not correct to suggest that NSA is the only application applicable for residential measurement. It is clear that the core definition of GIA can be used for residential measurement as residential properties are specifically mentioned in the final exclusion (*for greenhouses, fuel stores and the like in residential properties*). There would be no point in having this exclusion if GIA was not to be used for residential measurement for certain purposes.

19. As already mentioned, the RICS Code of Measuring Practice sets out the method of calculating GIA but it does not give guidance on what has to be measured for CIL purposes. However, Regulation 40 of the CIL Regulations 2010 (as amended) requires the calculation of the GIA of the 'chargeable development' and also parts of certain 'in use buildings' and 'relevant buildings'. 'Chargeable development' is defined in Regulation 9 as 'the development for which planning is granted' (which may of course comprise one or more buildings). There is no definition of 'building' in the CIL Regulations but the Oxford English Dictionary definition is 'a structure with walls and a roof'. (The appellant has made reference to the definition of 'building' contained in s.336(1) of the TCPA 1990 but s.235 of the Planning Act 2008 specifically provides that this definition does not apply for CIL purposes.). The CIL Regulations do not refer to separate units or flats within buildings. In my opinion it is appropriate for CIL purposes to calculate the GIA of the whole development, treating blocks of units as one building, and thus including communal areas and treating party walls as an internal partition, to be measured through for GIA purposes. It is therefore also incorrect to measure the offices and retail units to NIA for CIL purposes. This approach of measuring each 'building' clearly has to be applied consistently to both the chargeable development and the 'in use buildings' and I am satisfied that the CA have done so in this case.

20. In relation to the undercroft parking. This is found at ground floor level beneath 4 to 6 floors of residential development. Plans also show that it is largely surrounded by perimeter walls, although there are some elevations that do not have walls along the full width and some are not full height. This is not therefore an open parking area as referred to in the RICS Code of Measuring Practice as an exclusion to gross external area (GEA) or by the VOA in its definition for rating purposes as an exclusion to GIA. Open car parking will not be covered, hence I believe this particular exclusion has been affiliated for GEA purposes with '*roof terraces and the like*' which are also open.

21. The definition of GIA requires measurement to the internal face of the perimeter walls of the building at each floor level. The inclusions within the RICS GIA 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' and loading bays. In this case the parking area has perimeter walls and a ceiling and should in my view clearly be included within the calculation of the GIA of the building. It forms part of the ground floor notwithstanding the floor surface may be tarmac or concrete. The same floor construction/covering may be true of a warehouse but it would still have a GIA. Diagrams I and J referred to by the appellant in support of their assertion that the parking does not have a floor are irrelevant. They are schematic drawings to assist the reader of the Code of Measuring Practice with the measurement of the height of buildings and in no way indicate that a floor that may be solid and with a tarmac or concrete covering is not a floor. The existing car parking spaces have not been included in the GIA of the in use buildings because they comprise an open parking area, not part of a building enclosed by walls and a roof.

22. In relation to the third ground the CA has conceded that there was an arithmetical error in its calculations for the deduction of an in-use building. It now agrees with the appellant that an additional [REDACTED] sq m of retail floorspace needs to be offset in the calculation for Phase 1 which reduces the liability to £[REDACTED] based on the CA's areas.

23. The appellant, in support of their contentions regarding the calculation of GIA, has also made reference to the decisions in R (Orbital Shopping Park Swindon Ltd) v Swindon [2016], Vestey v IRC [1980] and Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948]. I do not consider that any of these cases are relevant to the circumstances of this appeal and the basis on which GIA should be calculated for the purposes of CIL. The CIL Regulations 2010 (as amended), at regulation 40(7), clearly provide for a CIL charge based on the GIA of the chargeable development less the GIA of certain existing buildings. In my view the issue is simply a question of how the GIAs of the proposed and existing buildings should be calculated. I consider that it is appropriate for me to determine how the GIAs of the particular buildings in this case should be calculated and the basis that I have adopted is not unreasonable.

24. My decision therefore aligns with the CA's approach to the calculation of the GIA. The CA has adopted the GIA areas provided by the appellant and included the undercroft parking area and there would therefore appear to be no dispute as to the areas, the disagreement is purely the basis of measurement.

25. 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 consider the areas used within the CA's calculation to be correct and determine a CIL charge for each phase of the development as follows:

Phase	CIL Liability
Phase 1	£ [REDACTED]
Phase 2	£ [REDACTED]
Phase 3	£ [REDACTED]
Phase 4	£ [REDACTED]
Phase 5	£ [REDACTED]

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