Appeal Decision

By [redacted] MRICS

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

Central postal address:-
Valuation Office Agency
[redacted]

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

Appeal Ref: [redacted]

Planning Permission Ref: [redacted]

Location: [redacted]

Development: Partial demolition, conversion and extension of [redacted] from [redacted] (Use Class A1) to [redacted] (Use Classes A4 and B1(c)) and ancillary [redacted]; partial demolition, conversion and extension of [redacted] from [redacted] (Sui Generis) to mixed-use development of [redacted] with ancillary [redacted], [redacted] (Use Classes A3, A4,D2 and B1(c)) and ancillary [redacted] garden, including external alterations, creation of [redacted], provision of cycle and refuse/recycling storage, provision of [redacted] and [redacted] seating (Major Application)

Decision

I determine that the Community Infrastructure Levy (CIL) payable in respect of the above development should be £[redacted] ([redacted]).

Reasons

1. I have considered all the submissions made by the appellant's appointed agents, Planning Ventures, on behalf of [redacted] (the appellant) and the Collecting Authority (CA), [redacted] ([redacted]), in respect of this matter. In particular, I have considered the information and opinions presented in the following documents:

a) Planning application dated [redacted].

b) Counsel's opinion sought by appellant dated [redacted].
c) Planning Decision dated [redacted].
d) CIL Liability Notice dated [redacted].
e) Review of CIL Charge issued by the CA on [redacted].
f) CIL Appeal dated [redacted] including Appeal Statement, appendices, attachments, statements, plans, schedules and other various supporting evidence.
g) Representations from the CA dated [redacted], including appendices, viability studies, planning documents and other supporting evidence, including the detailed calculation of areas and the CIL charge.
h) A copy of the CA Charging Schedule that came into force on [redacted].
i) Comments from the appellant's agent dated [redacted] in response to the CA representations.
j) An e-mail string commencing on [redacted] and culminating on [redacted] between the CA and the appellant's agent, concerning the CIL chargeable areas of the development under the above planning consent and the interpretation of the CIL Charging Schedule.
k) The CA's responses (dated [redacted]) to my request for comments upon the relevance of the National Planning Policy Framework and the [redacted] Local Plan contained in a letter dated [redacted].
l) The appellant's response (dated [redacted]) to my request for comments upon the relevance of the National Planning Policy Framework and the [redacted] Local Plan contained in a letter dated [redacted].
m) The CA's further response to l. above dated [redacted] after my exchange of those representations.
n) The appellant's response to k. above date [redacted] after my exchange of those representations.
o) A final e-mail from the appellant dated [redacted] and exchanged with the CA.

2. Planning permission was granted on [redacted] under reference [redacted] for "Partial demolition, conversion and extension of [redacted] from [redacted] (Use Class A1) to [redacted] (Use Classes A4 and B1(c)) and ancillary [redacted]; partial demolition, conversion and extension of [redacted] from [redacted] (Sui Generis) to mixed-use development of [redacted] with ancillary [redacted] (Use Classes A3, A4,D2 and B1(c)) and ancillary [redacted] garden, including external alterations, creation of [redacted], provision of cycle and refuse/recycling storage, provision of [redacted] and [redacted] seating (Major Application)".

3. The CA served a CIL Liability Notice on [redacted] in the sum of £[redacted] calculated on a total chargeable area of [redacted] square metres (sq m). That charge was calculated on the basis of there being 'retail' floorspace of [redacted] sq m at £[redacted] per sq m 'other chargeable development' of [redacted] sq m at £[redacted] per sq m and 'commercial' floorspace of [redacted] sq m at £[redacted] per sq m.

4. The appellant requested that the CA review the CIL Liability Notice dated [redacted] and on [redacted] the CA issued the result of their review.

5. On [redacted], the Valuation Office Agency (VOA) received a CIL appeal made under Regulation 114 (chargeable amount) contending that apart from the 'commercial space' the CIL liability for all the rest of the development should be based on a charge under the Charging Schedule as 'other chargeable development'. In other words the floorspace identified by the CA as 'retail' should be treated as being 'other chargeable development'. No calculation of the charge was submitted by the appellant.

6. The appellant's grounds of appeal can be summarised as follows:

   a) The appellant questions the meaning of 'other chargeable development' within the adopted CIL Charging Schedule.

   b) That the CIL charge was incorrectly calculated as the CA incorrectly contended that A3 (restaurants and cafes) and A4 (drinking establishments) uses under the Town and Country Planning Act Use Classes Order 1987 can be defined as 'retail', the designation within the Charging Schedule, applied to this development within the CIL Liability Notice.

   c) That the A3 and A4 uses within the development do not fall within the 'retail' development type as the Use Classes Order designates A1 use as 'Shops' and that is synonymous with 'retail', defined in The Collins English Dictionary as 'the sale of goods individually or in small quantities to the public'. Thus A3 and A4 uses do not fall into this definition.

   d) That the Charging Schedule had been carefully constructed and that if the CA wished to charge CIL on A3 and A4 uses it should have specified those uses as it had referred to other specific Use Classes within the Charging Schedule. It was also suggested that it would have been helpful for the CA to have provided a definition of 'retail' within the Charging Schedule. Without a definition it was impossible for any developer to determine the meaning of 'retail' within the Charging Schedule. It is stated, by the appellant, that as the CA admit the CIL Charging Schedule is deficient in not defining 'retail', developers cannot be expected to reasonably foresee the CIL charge applied, and in that respect it is fatal to any defence of the charge.

   e) The appellant makes reference to the review of the CIL Liability Notice undertaken by the CA on [redacted], disputing the CA's contention that during the consultative exercise undertaken, before adoption of the Charging Schedule, only one response was received in respect of CIL retail rate from planning agents representing IKEA. The appellant contends that the CIL Examiner was commenting on a far narrower issue of retail warehouse (A1 use) and food supermarkets (A1 use) and not wider uses such as in this case, A3 and A4 uses.

   f) The CA relies on the dictionary definition of 'retail' for its interpretation of the Charging Schedule and in addition, the dictionary definition of 'goods' within the definition of retail. The appellant disagrees with this as the CA do not have regard to the dictionary definitions of 'wine bar', 'café', 'bar', 'public house' or 'restaurant', uses within A3 and A4 uses. The Collins English Dictionary defines these as uses where items are served rather than goods purchased. Therefore A1 use is concerned with retailing goods and A3 and A4 are concerned with delivering a service.

   g) The appellant argues that the CA's contention that 'retail' includes all the different 'A classes' does not take account of A2 (financial and professional services) uses, it is stated that A2 uses deliver service and not goods, so would be excluded from 'retail' by the CA's own dictionary definition.

   h) The CA's contention within the review of the Liability Notice, stating that A3 and A4 uses are found within retail warehouses, is correct but this does not at all indicate that such uses are retail, merely that they exist alongside A1 uses.

7. The CA has submitted representations that can be summarised as follows:

a) That the adopted CIL Charging Schedule intended to charge CIL on the chargeable area of developments comprising retail activity. At no time during the consultation and adoption process of the CIL Charging Schedule was any reference made to retail CIL being applied only to Class A1 of the Use Classes Order, and evidence within the city centre was presented to demonstrate that retail uses within that area were not only in A1 Class Uses.

b) The CA stated that the National Planning Policy Framework (NPPF) does not define retail as a term and neither does the Use Classes Order, so the CA applied the Oxford Dictionary definition, going on to argue that the items sold within A3, A4 and other non-A1 uses are goods under the dictionary definition, using examples of goods being sold in many differing use classes that would be subject to a CIL charge under retail.

c) The CA state that the conditions imposed on the planning consent [redacted], refer to the A3 and A4 uses as retail uses and the appellant never challenged that aspect at the time, despite the consultation on their drafting.

d) Research by the CA shows many A3 and A4 users describe their firms as 'retailers'.

e) The CA state that no mention is made within the CIL Regulations of the Use Classes Order and when compiling the CIL Charging Schedule no reference is made within the BNP Paribas CIL Viability Study (related to the adoption of the CIL Charging Schedule) to Use Classes.

f) The CA contend that the distinction between the sale of goods and provision of services under the dictionary definitions is not relevant as the items have been purchased from the retailer whether an A1 use or not.

g) The CA believe the reference to A2 use is irrelevant to this appeal as it relates to A3 and A4 uses of CIL chargeable development.

8. The appellant responded to the CA's representations on [redacted] and their comments may be summarised as below:-

a) That any reference to the BNP Paribas viability report is irrelevant as the report never stated that A3 and A4 uses were considered as retail within the Charging Schedule.

b) That the CA failed to define retail in the Charging Schedule as including A3 and A4 uses specifically whilst doing so for other Use Classes in the Charging Schedule.

c) The appellant revisited the above argument around the dictionary definitions of 'retail', 'services', 'goods', and 'bar & wine bar'.

d) The appellant states that the lack of comment on the conditions attached to the planning consent were not a tacit acceptance of the terms used therein (retail users) as the retail status was not a focus of the consideration of these conditions.

e) The appellant states that if the CA wanted to charge the retail CIL rate on other retail development types other than A1 use class it should have specified those in

the Charging Schedule, there exists a lack of clarity in respect of retail use therein.

f) The appellant does not agree with the CA's reference to the dictionary definitions of wine bar, café etc, disputing the interpretation of the 'fare' they sell as being goods.

9. The CA and the appellant are in agreement as to the CIL chargeable areas and apportionments of the various uses in respect of the development under appeal. The only matter in dispute is the interpretation of the CIL Charging Schedule and the CIL charge applied in the Liability Notice to the 'Retail' and 'Other Chargeable Uses' categories.

10. The CA state that the Charging Schedule always intended to charge CIL at a higher rate for all retail uses irrespective of the designation under the Use Classes Order and that is the sole reason for the use of the word 'retail' within the Schedule. It is the appellant's contention that such a wide, catch-all, designation is not helpful and the lack of clarity can leave matters open to interpretation.

11. On [redacted], I provided the extracts below from the National Planning Policy Framework (NPPF) and [redacted] Local Plan to the parties and invited their representations in respect of the relevance of both of those documents.

National Planning Policy Framework (2018); extract taken from page 68: -

*"Main town centre uses: **Retail development** (including warehouse clubs and factory outlet centres); **leisure,** entertainment and more intensive sport and **recreation uses (including** cinemas, **restaurants,** drive-through restaurants, bars and pubs, nightclubs, casinos, health and fitness centres, indoor bowling centres and bingo halls); offices; and arts, culture and tourism development (including theatres, museums, galleries and concert halls, hotels and conference facilities)."*

[redacted] Local Plan ([redacted]); extract taken from Core Strategy pages [redacted] and [redacted]: -

Policy [redacted]
"[redacted] role as a regional focus will be promoted and strengthened. Development will include mixed uses for offices, residential, retail, leisure, tourism, entertainment and arts and cultural facilities".

Policy [redacted]
"Retail development, offices, leisure and entertainment uses, arts, culture and tourism uses will be primarily located within or, where appropriate, adjoin the centres in the identified network and hierarchy serving [redacted]".

Para. [redacted]
Retail shop uses referred to in this policy refer to those in Class A1 of the Use Classes Order. Active ground floor uses are generally those falling within Use Classes A1 to A5 but can also include other town centre uses which are visited by large numbers of people".

12. The CA's representations on the above extracts [dated [redacted]] can be summarised as follows:-

a) Neither document defined retail, so the only definitive definition is the dictionary definition and should be considered the default position.
b) The purpose of the NPPF document is not to define retail but to set out the main uses to be expected in a town centre. The NPPF identifies warehouse clubs as being retail and outside of A1 uses, given the appellant's contention that only A1 uses can be retail for CIL purposes. The CA also point out that NPPF makes no mention of CIL at all.
c) The CA reiterate their previously detailed contention that pubs and restaurants are retail business as well as leisure activities (museums and art galleries are not defined as leisure uses under the Use Class Order and that warehouse clubs are classed as sui generis).
d) The CA has set a Charging Schedule for CIL purposes in accordance with guidance and not tied to the Use Classes Order.
e) The CA contend that the extract in Policy [redacted] merely clarifies the uses promoted in the city centre and is not material to this appeal.
f) The CA refer to a Retail Study undertaken by their consultants DTZ and goes on to detail the retail uses defined in the report, stating that DTZ consider retail uses falling into Use Classes A1 to A5 to be retail uses and not confined to A1.
g) Relating to Policy [redacted] the CA contend that the use therein of the word 'shop' as primarily within Class A1 distinguishes it from other forms of retail use. The wording of this policy (using shop) does not therefore limit the use of retail to Class A1.

13. The appellant's representations on the above extracts [dated [redacted]] can be summarised as follows:-

a) The appellant contends that the NPPF clearly identifies retail as a separate use category to leisure and entertainment uses and alludes to further similar references within the document. Therefore the appellant states that one cannot infer that all other town centre uses should be charged under the 'Retail Development' type in the Charging Schedule.
b) The appellant contends that the extracts from the [redacted] Local Plan also confirm that there is a distinction between retail and other uses in the city centre and state that whilst A3 and A4 uses are appropriate active ground floor uses they are not A1 retail development as stated in para [redacted]. The Core Strategy clearly distinguishes between retail development and other uses that are appropriate ground floor uses in the city centre.
c) The appellant also quoted a variety of other published documents distinguishing between retail, leisure and office uses.
d) That the [redacted] Charging Schedule for CIL purposes is inconsistent with the quoted policies and fails to differentiate between any Class A uses and it is imprecise to infer retail development simply covers all A1 to A5 uses.

14. These further representations were exchanged, and further comments made and again exchanged.

15. The CA's further representations on the appellants' representations of [redacted] can be summarised as follows:-

a) The CA states the appellant is incorrect in their contention that para [redacted] of [redacted] Local Plan confirmed that retail development constitutes class A1 use, stating that retail shop uses are so defined.
b) That the CIL Charging Schedule is not related to the Local Plan nor the NPPF and neither of these make any mention of CIL therein. The viability approach to CIL Charging Schedules is totally different to the purposes of Local Plan policies.
c) The CA state that the Use Class Order is set out for the purposes of establishing whether planning permission is required and not predicated on development viability as is the CIL Charging Schedule.

d) That within Use Class A1 are undertakers and hairdressers, neither of which sell goods to the public in small quantities for use or consumption.
e) That the BNP Paribas study supports the CIL Charging Schedule in not limiting retail to Use Class A1 use, and makes no reference to A1 use in that study.
f) The CA contend that major operators with A3 users identify themselves as retailers and that retail park operators similarly identify, along with evidence of users outside A1 who state they consider themselves retailers.
g) That the appellant accepted planning conditions relating to the planning consent that stated that A3 and A4 uses were retail.
h) The CA contend there are uses within the Use Classes Order (A1 and A2) that are not retail.

16. The appellant representations on the CA's further representations of [redacted] can be summarised as follows:-

a) The appellant states that the application of a dictionary definition of retail as relevant, is not the case as the dictionary definitions of wine bar, bar, restaurant etc. all refer to the preparation and/or serving of food/drink to customers on the premises rather than the sale of goods.
b) The CA's contention that the NPPF is not intended to define retail is not accepted, and the appellant states that it does identify uses that are appropriate to town centres and does identify retail as a separate use category. Whilst A3 and A4 uses are appropriate for town centre uses they do not constitute retail development and in the absence of any clarity in the Charging Schedule it cannot be inferred that all town centre uses should fall into retail type development.
c) The appellant challenges the CA's contention that the CIL Charging Schedule and the NPPF are not specifically tied to uses within the Use Classes Order, the fact that the Order is used to identify uses in that Schedule is inconsistent and lacks clarity. Further stating, that aside from the requirements of CIL Regulation 13 and the NPPF, it is not impossible for a developer to determine with any certainty what retail actually means within the CIL Charging Schedule.
d) In respect of the DTZ report commissioned by the CA, the appellant in response, states that the categorisation of uses by this third party within a non- policy document is not material to this appeal.
e) The appellant disputes the CA's contention that the use of the word shop in the context of the [redacted] Local Plan is to distinguish those uses from other retail uses. The Policy [redacted] clearly refers to retail development and leisure and entertainment uses as separate entities.
f) There is no clarity within the Charging Schedule between retail development types and it therefore cannot be inferred that all appropriate town centre uses should be so charged as retail development under the Charging Schedule.

17. A further submission was made by the appellant on [redacted], and subsequently shared with the CA on the same date. This provided documentary evidence of discussions around point 13(g) of the CA responses to the Appellant's representations. The evidence detailed discussions between the appellants and the planning authority around the lack of a challenge to the inclusion of the word Retail within planning conditions attached to the planning consent relating to this appeal.

18. Having fully considered the varied and lengthy representations made by the appellant and the CA, I record my observations regarding the grounds of the appeal in the following paragraphs.

19. I agree that the dictionary definition of 'retail' is a material consideration and a reasonable starting point. The online Oxford Dictionary entry defines 'retail' as *"the sale of goods to the public in relatively small quantities for use or consumption rather than for resale."* I would note that "consumption" could include the consumption of food and drink; though

the dictionary is silent whether this is expected to be onsite, offsite or both. It is my view that it could include both and therefore looking at this definition in isolation it could lead one to conclude that both restaurants and cafes and drinking establishments fall within this definition.

20. However, it is my view that the word 'retail' must be considered in context, within the Charging Schedule setting out the charges applicable to different uses for which planning permission has been granted under the Town and Country Planning Act 1990. I think in this particular context (i.e. a description of use when used in a CIL Charging Schedule) it is relevant to look at planning law and guidance. This is why I asked for the parties views on extracts from the NPPF and the [redacted] Local Plan.

21. The retail development type and residential, commercial, hotels, student accommodation, et al are listed in the CIL Charging Schedule, some of those categories are further defined by Use Classes Order designations, but retail is not so defined. I can find no definition of retail within the Charging Schedule, nor in either [redacted] Local Plan, or the NPPF.

22. I note that within both the above documents retail is mentioned on many occasions as separate from other uses within town centres and in particular as opposed to leisure and entertainment.

23. It follows that any interpretation of the word retail needs to be done in a way which accords with the purpose of the Charging Schedule as established by the CIL Regulations. With this in mind it is the purpose of the Charging Schedule to provide predictability to developers in the amount of CIL chargeable (CIL explanatory Notes p.4). Therefore the Charging Schedule should be read from the point of view of a developer thus giving the context of the interpretation of retail away from the dictionary definition. The intention of the CA in the use of retail is irrelevant unless it accords with understanding of its intended audience. It is reasonable to conclude that a technical definition of retail rather than a dictionary one is to be sought.

24. Schedule 2, Part 3 (changes of use) to the Town and Country Planning (General Permitted Development) (England) Order 2015 lists how *"restaurants, cafes...."* may change use *"....to retail"* (see below extract).

Class A – restaurants, cafes, takeaways or pubs to retail

Permitted development
A. *Development consisting of a change of use of a building from a use falling within Class A3 (Restaurants and cafes), A4 (drinking establishments) or A5 (hot food takeaways) of the Schedule to the Use Classes Order, to a use falling within Class A1 (shops) or Class A2 (Financial and professional services) of that Schedule.*

In my opinion this again reinforces the distinction between 'cafes and restaurants' and 'pubs' and 'retail'.

25. On the evidence before me I conclude that the CIL charge should be calculated as follows:-

The proposed gross new development area is [redacted] sq m, at £[redacted] per sq m (as defined in the CIL Charging Schedule, 'Other Chargeable Development') and [redacted] sq m at £[redacted] per sq m (as defined in the CIL Charging Schedule 'Commercial') plus indexation and calculated in accordance with the statutory formula below at Regulation 40(5) of the CIL Regulations 2010 (as amended).:-

Amount of CIL chargeable at a given relevant rate (R) must be calculated by applying the following formula:-

$$\frac{R \times A \times I_P}{I_C}$$

£[redacted] x [redacted] sq m x [redacted] (index)

[redacted] (index)

£[redacted]

Where:-

A = the deemed net area chargeable at rate R;

I_P = the index figure for the year in which planning permission was

granted;

I_C = the index figure for the year in which the charging schedule containing

rate R took effect.

26. Based on the facts of this case and the evidence before me I conclude that, on balance, the weight of evidence does not support the conclusion that the subject A3 and A4 uses fall within the 'retail' CIL category in the CA's Charging Schedule. Therefore, the CA's CIL charge of £[redacted] is not appropriate in this case. CIL should be payable in respect of the A3 and A4 uses within the subject development on the basis that they fall within the category 'Other Chargeable Development' as defined in the CIL Charging Schedule. The CIL liability in this case should therefore be £[redacted] ([redacted]).

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