

Appeal Decision

by [REDACTED] MRICS

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

Valuation Office Agency



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

Appeal Ref: [REDACTED]

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

Location: [REDACTED]

Development: Change of use – conversion of [REDACTED] buildings from offices to residential use for [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] acting as authorised agent to [REDACTED] (the Appellant) and [REDACTED] as the Collecting Authority (CA), in respect of this matter. In particular, I have considered the information and opinions presented in the following documents:-
 - a. Planning Application Decision Notice ref [REDACTED] issued by the CA on [REDACTED].
 - b. CIL Liability Notice [REDACTED] was issued on [REDACTED] by the CA at £ [REDACTED] CIL Liability.
 - c. CIL Liability Notice [REDACTED] was issued on [REDACTED] by the CA at £ [REDACTED] CIL liability.
 - d. CIL Liability Notice [REDACTED] was issued on [REDACTED] by the CA at £ [REDACTED] CIL Liability.

- e. The CIL Appeal Form dated [REDACTED] submitted by the Appellant under Regulation 114, together with documents and correspondence attached thereto.
- f. The CA's representations to the Regulation 114 Appeal dated [REDACTED].
- g. Further comments on the CA's representations prepared by the appellant and dated [REDACTED].
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2. Planning Consent reference [REDACTED] was granted on [REDACTED] by the CA to amend condition 2 of an earlier application reference [REDACTED].
 3. A CIL Liability Notice reference [REDACTED] was issued on [REDACTED] by the CA at £ [REDACTED] CIL Charge ([REDACTED]) based on the CA's assessment of Gross Internal Area (GIA) for the proposed development at [REDACTED]m2 less existing in use buildings ([REDACTED]) at GIA [REDACTED]m2.
 4. An amended CIL Liability Notice reference [REDACTED] was issued on [REDACTED] by the CA at £ [REDACTED] CIL Charge ([REDACTED]) based on the CA's amended assessment of GIA for the proposed development at [REDACTED]m2 with no deduction of existing in use buildings.
 5. The appellant requested a Regulation 113 Review of the Chargeable Amount on [REDACTED].
 6. Following the Regulation 113 Review the CA wrote to the Appellant [REDACTED] confirming their acceptance of [REDACTED] as having been in continuous lawful use, but rejecting [REDACTED] and [REDACTED] as not having been in continuous lawful use for the required six month period due to "inconsistencies" between the evidence submitted by the Appellant and the CA's own records. A review of the measurements had also been undertaken by the CA, and the total development was calculated at [REDACTED]m2 GIA.
 7. A further amended CIL Liability Notice [REDACTED] was issued by the CA on [REDACTED] at £ [REDACTED] CIL Charge ([REDACTED]) based on the amended GIA of [REDACTED]m2 less existing in use buildings ([REDACTED]) at GIA [REDACTED]m2. It is noted that this CIL Charge has been incorrectly calculated by the CA and should in fact equal £ [REDACTED] CIL Charge ([REDACTED]).
 8. On [REDACTED] the Valuation Office Agency received a CIL appeal made under Regulation 114 (chargeable amount) contending that the CIL charge should be £ [REDACTED] ([REDACTED]) based on a Chargeable Development GIA of [REDACTED]m2 for [REDACTED] only.
 9. With regard to the main grounds of appeal relating to the level of CIL charge proposed by the Appellant, this can be broken down into three parts:-
 - i. Identification of the in use buildings.
 - ii. [REDACTED] and the other buildings constitute one single building
 - iii. The correct level of CIL Liability
 10. i. Identification of the in use buildings – the Appellant contends that [REDACTED], [REDACTED], the [REDACTED] and the [REDACTED] where lawful in use buildings, and their GIAs should thus be offset against the total GIA of the proposed development in calculating the CIL Charge. They further contend that CIL liability should therefore only be based on the GIA of the [REDACTED].

ii. [REDACTED] and the other buildings constitute one single building – the Appellant's view is that the GIA of the [REDACTED] and the [REDACTED] should be deducted (offset) from the total proposed development GIA anyway, as they are joined to [REDACTED] and should all be considered to be one building for CIL purposes.

iii. The correct level of CIL Liability – The Appellant therefore is of the view that CIL Liability should be based on the following calculation (using the CA's GIA for the [REDACTED]):-

GIA of the Granary = [REDACTED] m²

CIL Rate = £ [REDACTED]

Index = [REDACTED]

£ [REDACTED]

Or, should the VOA disagree that lawful use has been proved for [REDACTED], [REDACTED] and [REDACTED], it is alternatively submitted by the Appellant, that the GIA of [REDACTED] and [REDACTED] should be offset on the basis that they should be considered to be one single building. The calculation is then as follows (using the CA's GIA for the [REDACTED] and [REDACTED]):-

GIA of the [REDACTED] and [REDACTED] (the only building remaining on the Site which is not deductible)

[REDACTED] m² + [REDACTED] m² = [REDACTED] m²

CIL Rate = £ [REDACTED]

Index = [REDACTED]

£ [REDACTED]

11. With regard to i. Identification of the in use buildings - Disagreement surrounding the issue of identifying the in use buildings has arisen due to the effect of Regulation 40(7) of the CIL Regulations 2010 (as amended), which provides for the deduction of the GIA of existing in use buildings from the GIA of the total development.
12. 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.
13. Regulation 40(9) states that "where a 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, it may deem it not to be an in use building, and Regulation 40(10) states that where a CA does not have sufficient information, or information of a sufficient quality, to enable it to establish – a) whether part of a building falls within a description in the relevant definition or b) the GIA of any part of a building falling within such a description, "it may deem the GIA of the part in question to be zero".
14. The Appellant believes they have demonstrated (through the evidence provided along with the appeal) that in accordance with Regulation 40(11) [REDACTED], the [REDACTED] and the [REDACTED] where lawful in use buildings, and their GIAs should thus be offset against the total GIA of the proposed development in calculating the CIL Charge.
15. The CA believe that their Non Domestic Rating records and other information available to them contradicts the evidence provided by the Appellant, and that in accordance with Regulation 40(9) they do not have "sufficient information, or information of a sufficient quality" to establish whether or not the buildings were in lawful use, and have in accordance with Regulation 40 deemed "the GIA of the part in question to be zero".

16. The Appellant has provided as part of their appeal submission a lease between [REDACTED] for the period [REDACTED] to [REDACTED] which shows that [REDACTED], the [REDACTED] and the [REDACTED] were leased as offices to [REDACTED]. They have, in addition, provided a statutory declaration from a third party ([REDACTED] of [REDACTED].) that supports their contention that the relevant buildings had been used as offices, along with proof of payment in the form of a [REDACTED] utility bill dated [REDACTED] for the period from [REDACTED] and [REDACTED]. The Appellant believes they have therefore complied with and provided evidence in accordance with the CA's own published list of potential pieces of evidence.
17. On checking with the Non Domestic Rates Team, the CA found that one of their Non Domestic Rates inspectors visited the property on [REDACTED] and noted "Property is [REDACTED] and in the process of being stripped out for change of use to residential".
18. The CA also found records that a request was made to them on [REDACTED] on behalf of [REDACTED] for empty property exemption, confirming the [REDACTED] to be empty from [REDACTED].
19. Both of these items of evidence conflict with the Appellant's contention that the property was in continuous use as offices under a lease running between [REDACTED] to [REDACTED], as shown by the documentation already provided, and supported in the Statutory Declaration confirming occupation at that time by [REDACTED].
20. The CA also received legal advice that the Statutory Declaration submitted by the Appellant did not meet the requirements of the Statutory Declarations Act 1835, as it did not state the place in which the declaration had been made.
21. The Statutory Declaration document is attested with: a signature; name; title (Barrister – Elite Chambers and their bar board membership number) and date. The Commissioners For Oaths Act 1889 requires that the full address of the place where the declaration is administered should also be included, but this was not done on the copy submitted, which the CA contend makes it invalid.
22. The Appellant notes in their counter representations the fact that whilst the CA quotes "sometimes it is necessary for example, to ask an applicant for additional information; information to cover a longer period, to correct an invalid Statutory Declaration, or to address inconsistencies arising through a Statutory Declaration ", the CA did not take any of these steps, and did not ask for additional information or request that the Statutory Declaration be corrected.
23. With regard to the [REDACTED] electricity bill that was submitted, the CA concluded that when the evidence from the Non Domestic Rates Inspector is taken into consideration, the electricity usage may have been incurred by builders working on the site rather than a tenant in occupation, as the Appellant would contend. The Appellant is of the opinion that the electricity bill they have provided is a clear piece of evidence and it is not for the CA to decide who actually used the electricity shown on that bill.
24. The key issue here is whether or not the CA believed they were in possession of "sufficient information, or information of a sufficient quality" to establish whether or not the buildings were in lawful use. Evidence from the CA's own records contradicted the information that the Appellant had submitted, and in accordance with Regulation 40 the CA therefore determined that the buildings concerned were not in lawful use and deemed "the GIA of the part in question to be zero".

25. The Appellant has demonstrated that a lease existed between [REDACTED] to [REDACTED] [REDACTED] for use of the buildings as offices and the Statutory Declaration confirm who the occupier was and the use to which the buildings were put. The [REDACTED] bill also demonstrates that [REDACTED] were the occupier at this time, and their address is marked on the utility bill.
26. The CA have demonstrated that at the time of the visit by one of their staff on [REDACTED] [REDACTED] the property was not in use as offices, but was undergoing extensive works by builders and have provided an email from [REDACTED] of [REDACTED] dated [REDACTED] [REDACTED] advising that "The property has not been occupied by the current ratepayer since they bought the property and the business rates account was opened in their name. Empty rates should therefore be applied from the account opening date, which I believe is [REDACTED]. The property is currently in builders' hands and is being converted to residential use."
27. Whilst it is apparent that the CA did not follow their own correct procedure and failed to ask the Appellant to correct the invalid Statutory Declaration this was only one of a number of items of evidence available to the CA. Even if the CA had not discounted the Statutory Declaration for the reasons they stated, the other information available to them would still lead to their conclusion that the buildings in question had not been in continuous lawful use at the relevant time.
28. The CA were therefore acting within their powers in concluding that Regulation 40 had not been satisfied with regard to proving that the buildings were in continuous use during the qualifying period, and it is determined that the GIA of these buildings must therefore be included in the GIA of the development for CIL liability calculation purposes.
29. With regard to ii. [REDACTED] and the other buildings constitute one single building – The Appellant has submitted that the floor space in the [REDACTED] and the [REDACTED] should be deducted (offset) from the total proposed development GIA, as they are joined to [REDACTED] and should all be considered to be one building for CIL purposes. [REDACTED] is joined to [REDACTED] via an internal walkway at first floor level, and [REDACTED] is joined to [REDACTED] via a fully enclosed ground floor walkway. The Appellant's view is that the "entire" building ([REDACTED] along with [REDACTED] and [REDACTED]) is therefore classed as an in use building for CIL purposes.
30. The CIL Regulations do not define what a "building" is.
31. The RICS Code of Measuring Practice 6th Edition (May 2015) sets out the method of calculating GIA, but it does not give guidance on what has to be measured for CIL purposes.
32. The RICS Code of Measuring Practice defines GIA as the "area of a building measured to the internal face of the perimeter walls at each floor level..." The Code includes a list of building areas to be included in the GIA calculation and a list of areas that should be excluded. This list does include "Internal open-sided balconies, walkways, and the like", with the intention of stating what should be included when measuring a particular building to GIA, but does not give any further detail.
33. Whilst there are physical links between the three buildings in this case, it is considered that they are merely links between separate buildings, and do not mean that three structures become one.
34. It is therefore determined that whilst it is appropriate for [REDACTED] to be treated as an existing in use building for CIL liability calculation purposes, [REDACTED] and [REDACTED] constitute separate buildings/structures from [REDACTED] that are merely linked together.

35. With regard to iii. The correct level of CIL liability – The Appellant and CA are both in agreement as to the GIAs of the buildings and from the amended proposed CIL liability calculation contained in the Appellant's counter representations dated [REDACTED], it is clear the Appellant accepts the CA's calculation of GIA for the buildings as follows:-

[REDACTED] m2
[REDACTED] m2
[REDACTED] m2
[REDACTED] m2
[REDACTED] m2

36. The total GIA of the proposed development therefore equals [REDACTED] m2.

37. The Appellant and CA are both in agreement that [REDACTED] with a GIA of [REDACTED] m2 is an in use building and therefore its GIA should be offset against the total GIA of the proposed development as above.

38. The Appellant and CA are furthermore both in agreement that the [REDACTED] with a GIA of [REDACTED] m2 is not an in use building and therefore its GIA should be included within the total GIA of the proposed development as above.

39. It has been demonstrated above that in accordance with Regulation 40 [REDACTED], the [REDACTED] and the [REDACTED] cannot be considered to have been in continuous use during the qualifying period, and the CA were acting within their powers when they deemed "the GIA of the part in question to be zero".

40. The correct calculation of CIL liability is therefore:-

Total Development [REDACTED] m2
Less Existing Buildings ([REDACTED]) [REDACTED] m2

= Chargeable Area [REDACTED] m2

X £ [REDACTED] /m2 Rate

X Index [REDACTED]

= £ [REDACTED] CIL Charge

41. The Appellant has not made a claim for an award of costs from the CA, and did not submit any details of costs being applied before the VOAs CIL Appeal submission deadline.

42. On the basis of the evidence before me and having considered all the information submitted in respect of this matter, I therefore determine a CIL charge of £ [REDACTED] ([REDACTED]) to be appropriate.

[REDACTED] DipSurv DipCon MRICS
RICS Registered Valuer
Valuation Office Agency
[REDACTED]