Appeal Decision

by [redacted] BSc(Hons) MRICS

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

Valuation Office Agency (DVS)

[redacted]

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

Appeal Ref: [redacted]

Planning Reference: [redacted]

Location: [redacted]

Development: [redacted], **Class O – Change of use from Use Class B1a (office) to Use Class C3 (residential) use to provide** [redacted] **dwellings.**

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] of [redacted] (the Appellant) [redacted] the Collecting Authority (CA), in respect of this matter. In particular, I have considered the information and opinions presented in the following documents:-

   [redacted] Prior Approval Notice ref [redacted] issued by [redacted] on [redacted]

   b. Notice of Chargeable Development issued by the appellant on [redacted].
   c. CIL Liability Notice [redacted] issued by the CA on [redacted] notifying a £[redacted] CIL liability.
   d. The CIL Appeal Form dated [redacted] submitted by the Appellant under Regulation 114, together with documents and correspondence attached thereto.

e. The CA's representations to the Regulation 114 Appeal dated [redacted].
f. Further comments on the CA's representations prepared by the appellant and dated [redacted].

2. Prior approval reference [redacted] for the development was granted and issued by [redacted] Council on [redacted].

3. A CIL Liability Notice reference [redacted] was issued by the CA on [redacted] in the amount of £[redacted] ([redacted]) based on the CA's assessment of Gross Internal Area (GIA) for the proposed development of [redacted] m2. There was no existing building area deducted from this GIA.

4. On [redacted] the appellant submitted a CIL Form 5 Notice of Chargeable Development to the CA under which they assumed liability for the payment of CIL. The form also confirmed that there was [redacted] m2 of GIA floorspace in the existing building.

5. The appellant requested a Regulation 113 Review of the chargeable amount on [redacted].

6. The CA issued the outcome of its review on [redacted] and reconfirmed the CIL charge at the original figure.

7. On [redacted] the Valuation Office Agency received a CIL appeal made under Regulation 114 (chargeable amount) contending that the CIL charge should be [redacted].

8. The grounds of the appeal are that the CA has incorrectly calculated the CIL charge by failing to apply a deduction in relation to the Gross Internal Area (GIA) of the existing building on the site. The factual background is not in dispute.

9. Regulation 40(7) of the CIL Regulations 2010 (as amended) allows for the deduction of floorspace of retained parts of relevant buildings (K) from the gross internal area of the chargeable development (G) to arrive at a net chargeable area (A) upon which the CIL liability is based.

10. To qualify as a deduction as a retained part (K), relevant floor areas must either be:

    (i) retained parts of in-use buildings, and

    (ii) for other relevant buildings, retained parts where the intended use following completion of the chargeable development is a use that is able to be carried on lawfully and permanently without further planning permission in that part on the day before planning permission first permits the chargeable development.

11. Regulation 40(11) defines an 'in use building' as being a building which is:

    (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. The same regulation states that a "relevant building" means a building which is situated on the relevant land on the day planning permission first permits the chargeable development.

13. It is common ground that in order for a deduction to apply there has to have been a 'relevant building' on the site as at [redacted], the date the CIL Form 5 Notice of Charge was received by the CA.

14. It is also common ground that there is no definition given to the word "building" within Regulation 40 of the CIL Regulations, other than it expressly excludes-

    (i) a building into which people do not normally go,
    (ii) a building into which people go only intermittently for the purpose of maintaining or inspecting machinery, or
    (iii) a building for which planning permission was granted for a limited period;

15. It is agreed that there was a 'structure' on the relevant land as at [redacted] and the key issue in this appeal therefore relates to whether the structure is a building within the proper interpretation of that term as it appears in Regulation 40(7) and (11).

16. Both parties refer to CIL Regulation 40. However the CIL Regulations do not define what a "building" is, but do specifically exclude certain types of building. In the absence of any clear guidance from either CIL Regulation 40, the only apparent option available is to refer to the dictionary for a clear definition as to what constitutes a "building", as both parties have done and as other Appointed Persons have done in consideration of other appeals.

17. The appellant has provided a legal opinion on the correct interpretation and scope of the term "building" in the context of the CIL regulations. This legal opinion refers to the Shorter Oxford English Dictionary, 6th Edition (Shorter OED), which provides the definition of "building" as "A thing which is built; a structure; an edifice; a permanent fixed thing built for occupation, as a house, school, factory, stable, church, etc." The legal advisor notes that the definition preferred by the CA, and as mentioned in two other appeal decisions, appears to be derived from the Pocket Oxford English Dictionary (Pocket OED) but he opines that this provides "unusually" truncated meanings. He considers that reference should be made to the unabridged Shorter OED definition and notes that the Shorter OED version was used by the High Court in a taxation case and a recent VOA CIL decision that is yet to be published.

18. The appellant's legal advisor is of the view that the photographic evidence provided to the VOA in this appeal show that 'a thing which is built' and hence a building existed on the site at the relevant date. Since the CA also accepts that there was a structure on the site, and in his view the ordinary meaning of building includes a 'structure', hence it follows that the concrete frame structure can properly satisfy the definition of building in Regulation 40(11).

19. The CA contends that the structure was not a building and in support of its view refers to two redacted decisions issued by Appointed Persons in relation to other CIL appeals. In both decisions the Appointed Person has referred to the dictionary definition of a building as "a structure with walls and a roof". The CA has submitted photographs of what was on the land on [redacted] and contends that it was not a building as it did not have walls or a roof. The CA notes that the appellant has had regard to the "Shorter" OED which is broader in meaning than the definition referred to in the "Pocket" OED but still contends that even applying the broader definition, what was on the land was not a building in the ordinary (i.e. dictionary) sense of the word.

20. The CA furthermore considers that if the structure was decided to be a building it would then fall as one of the exclusions in Regulation 40(11) as "a building into which people do not normally go" and hence no deduction should be made in either event. The CA submits that the assessment whether the building is one "into which people normally go" must be made specifically by reference to the day that planning permission "first permits"

the development (i.e. [redacted]) as the question whether a deduction should be made in respect of an "in-use building" must be made by reference to that date. In the view of the CA the historic use of the building by office workers cannot be considered and the fact that, during construction, construction workers would go into the building, cannot mean that for that reason it is a building into which people would normally go.

21. In further representations the appellant's legal advisor has expanded on this point in a second opinion. He considers that the criteria for consideration of whether the building is one "into which people do not normally go" is not expressly confined or limited to a period exclusively comprising [redacted]. In his view this is inconsistent with the ordinary meaning of "normally". He contends that a building cannot be said to be usually being in a perpetual state of alteration because alterations are usually a one off occurrence and hence this cannot be the usual or the normal use of a building.

22. There appears to be no dispute that the building, prior to the building works, had been in lawful use for the appropriate period of time.

23. I have examined the photographs submitted as evidence. The structure on the site at the time appears to be a steel frame with concrete floor slabs at ground and first floor levels but is largely without a roof covering or walls. Despite the absence of a roof covering in this case there is nevertheless a roof frame structure present. It is also evident that the structure is permanent and built for occupation, albeit not capable of occupation in its current state, as opposed to a pylon for example being a permanent fixed thing which is built but not for occupation.

24. The appellant's view implies that a building would define some form of boundary, but as the legal advisor has noted, having an area within a boundary does not require walls but only a thing, things, or a structure of some kind, that can provide a recognisable form of "boundary". A boundary is not required to be a "wall" as is implied in the Pocket OED. This would seem to be supported by example Diagram D in the RICS Code of Measuring Practice that illustrates how to calculate the GIA of a loading bay by measuring to the internal face of a supporting pillar.

25. Whilst the two Appeal Decisions submitted as evidence refer to the truncated Pocket OED definition of the word 'building', and this appears to have been sufficient in description for the consideration of those appeals, I agree with the appellant that regard can also properly be had to the broader definition in the Shorter OED. However when having regard to the individual descriptors within a broader definition I do not consider that all 'things that are built', or all 'structures' will necessarily comprise buildings. The decision as to whether or not a structure is a 'building' will always depend on the facts of each case. Based on the facts of this case, I consider that it still qualifies as a building under the ordinary sense of the word for the purposes of Regulation 40(11). It clearly originally formed a building and I consider that it could still reasonably be described as a building as it stood at the relevant date.

26. I also agree with the appellant's legal advisor that the criteria for consideration of whether the building is one "into which people do not normally go" should not be expressly confined or limited to a period exclusively comprising the [redacted]. I agree that the ordinary meaning of "normally" should reflect the normal use of the building and not be time restricted or reflect the lack of any functional use at the [redacted]. The time specific criteria for consideration of the use of the building are provided later in regulation 40(11) and require that the relevant building 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. It is not at issue that there was an historic use of part of the building that satisfies the requisite in-use criteria.

27. From all of the above, it is concluded that the structure of Standard House at the relevant date was a "building" for the purposes of Regulation 40(11), and that the GIA thereof can be determined by measuring to the internal face of each supporting pillar.

28. There is a discrepancy between the GIA of the chargeable development, as stated by the CA on the Liability Notice and as stated by the appellant on the CIL Form 5. The appellant considers that this is due to the exclusion of a mezzanine plant room within the area stated on the CIL Form 5. No evidence has been provided as to the presence, absence or size of this mezzanine floor at the relevant date by either party and in the circumstances I have determined that the GIA of the original building included this plant room and a GIA of [redacted] sq m should be off set from the total GIA of the chargeable development to arrive at a Net Chargeable Area of [redacted].

29. I therefore determine that the CIL charge in this case should be [redacted]

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