Appeal Decision

by [redacted] MRICS

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

Valuation Office Agency - DVS

[redacted]

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

Appeal Ref: [redacted]

Planning Permission Reference: [redacted]

Location: [redacted]

Development: Refurbishment and re-cladding of existing building, new pitched roof to second floor to create an apartment on first floor and second floor (C3), partial retention of office space on first floor (B1) and change of use of ground floor to Class A3.

Decision

I determine that the Community Infrastructure Levy (CIL) payable in this case should be £[redacted] ([redacted] pounds). This excludes any decision by the Planning Inspectorate as regards the £[redacted] ([redacted] pounds) surcharge imposed by the Collecting Authority, which will be made independently of this Regulation 114 appeal decision.

Reasons

1. I have considered all the submissions made by [redacted] of [redacted] as agent acting for [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. Planning Application Decision Notice ref [redacted] issued by the CA on [redacted].
    c. CIL Liability Notice [redacted] issued on [redacted] by the CA at £[redacted] CIL Liability.

d. CIL Demand Notice issued on [redacted] by the CA at £[redacted] CIL Liability comprising of CIL charge £[redacted] plus a surcharge of £[redacted] for failure to submit a commencement notice.
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].
h. A rebuttal statement dated [redacted] from the CA in response to the appellant's comments of [redacted].
i. The appellant's further comments dated [redacted] in response to the CA's rebuttal statement dated [redacted].

2. Planning Consent reference [redacted] was granted on [redacted] by the CA to amend conditions 2, 3, 4, 5 and 10 of an earlier application reference [redacted].

3. A CIL Liability Notice reference [redacted] was issued on [redacted] by the CA at £[redacted] CIL liability ([redacted]) based on the CA's assessment of Gross Internal Area (GIA) for the proposed development at [redacted]m2.

4. A Demand Notice was issued on [redacted] by the CA at £[redacted] CIL liability ([redacted]) comprising of CIL charge £[redacted] ([redacted]) plus a surcharge of £[redacted] ([redacted]) for failure to submit a commencement notice.

5. The appellant requested a Regulation 113 Review of the chargeable amount on [redacted] indicating to the CA that failure to withdraw their Demand Notice and invoice before the end of the day [redacted] would lead to a Regulation 117 appeal being made by the appellant along with a claim for costs against the CA.

6. Following the Regulation 113 Review the CA wrote to the appellant on [redacted] with the conclusion that the GIA was confirmed at [redacted]m2 residential and [redacted]m2 commercial and that no evidence had been supplied that could be weighed in favour of the existing and continuous lawful use of the building at [redacted] for at least 6 months within a 3 year period ending on the day on which the planning permission first permitted the development, and the CIL liability was therefore confirmed at £[redacted] including the £[redacted] surcharge.

7. On [redacted] the Valuation Office Agency (VOA) received a CIL appeal made under Regulation 114 (chargeable amount) contending that the CIL charge should be £[redacted] ([redacted]) as the existing floor space had been in lawful use for 6 months of the past 3 years, with evidence to support this, and no additional floor space had been approved for under the chargeable development, only a change of use of an existing building and floor space.

8. The pertinent issue covered by this appeal involves Regulation 40(7) of the CIL Regulations 2010 (as amended), which provides for the deduction (or off-set) of the GIA of existing in use buildings from the GIA of the total development.

9. The appellant contends that all parts of the existing floor space constituted an in use building, and the GIA should thus be offset against the total GIA of the proposed development in calculating the CIL charge at £[redacted].

10. 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.

11. 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*".

12. The appellant believes they have demonstrated, through the evidence provided along with the appeal, that in accordance with Regulation 40(11) the various elements of [redacted] Road constitute a lawful in use building, and the GIA should thus be offset against the total GIA of the proposed development in calculating the CIL charge.

13. The CA had been of the view that in accordance with Regulation 40(9) they did not have "*sufficient information, or information of a sufficient quality*" to establish whether or not the building was in lawful use, and had, in accordance with Regulation 40 deemed "*the GIA of the part in question to be zero*". This had the result of including the GIA of the existing building in the CIL charge calculation.

14. The key issue here is whether "*sufficient information, or information of a sufficient quality*" to establish whether or not the existing building was in lawful use during the qualifying period has been provided.

15. The CA require all applicants in CIL cases involving Regulation 40 to submit a combination of evidence to support a claim for offsetting of CIL liability including:-

    - *Copies of leases/mortgage contract*
    - *Electricity/gas bills to cover a 6 month period*
    - *Business rate/council tax bills and payments*
    - *Where an informal arrangement exists redacted bank statements to show rent/rates have been paid*
    - *Confirmation from a letting agent/solicitor advising of the period of occupancy*
    - *A Statutory Declaration.*

    The CA then makes a formal assessment of the evidence submitted against Regulation 40. The evidence should prove that a building had been in its continuous lawful use for six months in the three years prior to the planning authority first permitting development (the qualifying period).

16. The appellant comments that having looked at the CA's website, it is not publicly stated anywhere in their published guidance that the above information requirement exists, nor is this list of evidence outlined within the CA's CIL guidance documents. They add that "*Regulation 113 does not state that further evidence must be submitted at the initial communication requesting the review. Therefore, a proactive engagement with the CA was attempted and it was mentioned that evidence of occupation could be provided should they wish to use this to make their assessment. At the time of the review, the appellant was however relying on the fact that a declaration made on the PAAIR form should have been sufficient in the absence of any contrary evidence.*"

17. The CA comment that the appellant's statement refers to evidence 'offered'. The CA maintains that whilst evidence may have been 'offered' it was not actually submitted by the appellant or his agent, and therefore could not form part of the original Regulation 113 assessment.

18. From the papers provided by both parties, the initial calculation of CIL liability was undertaken by the CA on the assumption of there being no in use buildings. The appellant's request for a Regulation 113 review on [redacted] would appear to be the first time the appellant referred to evidence supporting in use buildings being available, but this was not actually provided with that request, and the appellant's requirement that the Regulation 113 review decision be issued by the CA within a day (i.e. on the [redacted]) lead to the CA being required by the appellant to reach their decision without that supporting evidence, or the time available to request it from the appellant.

19. Information/evidence provided by the appellant to show that the building was in lawful use was eventually provided along with the CIL appeal papers on [redacted] and consists of:-

Correspondence between [redacted] and [redacted] during the qualifying period of [redacted] and [redacted] dated [redacted], sets out the ending of a Business Tenancy at [redacted] by [redacted] and the refusal for a new one. It outlines within the cover letter written by [redacted] that the short-term tenancy of [redacted] commenced on [redacted] and was subsequently terminated on [redacted].

Correspondence between [redacted] and [redacted] (Trading as [redacted]) during the qualifying period of [redacted] and [redacted] dated [redacted], sets out the Ending of a Business Tenancy at [redacted] by [redacted] and the refusal for a new lease. It outlines within the cover letter written by [redacted] that the short-term tenancy of [redacted] commenced on [redacted] and was subsequently terminated on [redacted].

[redacted]'s Report on Title dated [redacted] outlines on pages 13-15 the following occupational leases:

Property: [redacted]
Date of Lease: [redacted]
Original Parties: [redacted] (Landlord) [redacted] (Tenant)
Term: Two years from and including [redacted] ending on [redacted]

Property: [redacted]
Date of Lease: [redacted]
Original Parties: [redacted] (Landlord) [redacted] (Tenant)
Term: Three years from and including [redacted] ending on [redacted]

Property: [redacted]
Date of Lease: [redacted]
Original Parties: [redacted] (Landlord) [redacted] (Tenant)
Term: Two years from and including [redacted] ending on [redacted]

Property: [redacted]
Date of Lease: [redacted]
Original Parties: [redacted] (Landlord) [redacted] (Tenant)
Term: Two years from and including [redacted] ending on [redacted]

Property: [redacted]
Date of Lease: [redacted]
Original Parties: [redacted] (Landlord) [redacted] (Tenant)
Term: Two years from and including [redacted] ending on [redacted]

Property: [redacted]
Date of Lease: [redacted]
Original Parties: [redacted] (Landlord) [redacted] (Tenant)
Term: Two years from and including [redacted] ending on [redacted]

20. The CA have, as a result of being party to exchange of this information under the appeal process, reviewed their original Regulation 113 review decision, and conclude:-

"…on the balance of probability, … the evidence … proves that part of the building has been in lawful use for the required 6 months in the three years prior to planning first permitting development. Whilst no evidence of continuous use has been supplied (utility

bills or a statutory declaration are normally required), the CA has determined retrospectively that part of the building has been in continuous use for at least six months of the qualifying period in light of the consistent tenure documents supplied …. Therefore, the balance of probability does weigh in favour of Schedule 1, (8) (Regulation 40) test being passed. The building is therefore deemed by the CA to be an in-use building…with the resultant GIA being zero."

21. The CA further submits corrected measurements of the existing building as follows:-

    Retail [redacted]*m2*
    Office [redacted]*m2*
    Total GIA [redacted]*m2*

    The CA advise that *Appendix B* of their submission statement dated [redacted] indicates how the above measurements were calculated, and confirm that the measurements have been carried out in line with *RICS Code of Measuring Practice*. No actual measurements have been provided to me however, and the only documentation provided by the CA is a set of digital plans, for which presumably the CA have the software to take dimensions off the plans, which the AP do not.

22. From the information available, it would appear that there were leases in place on [redacted] that had commenced on [redacted] and was subsequently terminated on [redacted], approximately four months before the end of the qualifying period; [redacted] commenced on [redacted] and was also terminated on [redacted]; [redacted] ran from [redacted] ending on [redacted] from [redacted] ending on [redacted]; [redacted] from [redacted] ending on [redacted] and [redacted] from [redacted] ending on [redacted]. Information on the other leases was provided, but these had terminated before the start of the qualifying period.

23. On the basis of there being six active leases in place during the qualifying period, along with the appellant's agent's declaration made on the *PAAIR* form, and the CA's own conclusion following a reconsideration of the evidence provided as part of the CIL appeal process, it is concluded for the purposes of this appeal that 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, has been met. The GIA of the existing building may therefore be offset against the GIA of the proposed development in calculating the CIL liability.

24. The CA have recalculated the GIA and advised on the outcome of this in their submission statement dated [redacted], and as the appellant has not challenged these measurements in their counter representations it is to be assumed that these figures are correct and will be used in the CIL charge calculation as follows:-

    Total Development [redacted]*m2*
    Less Existing Buildings [redacted]*m2*
    = Chargeable Area 0m2
    X £[redacted]*/m2 Rate*
    X Index [redacted]
    = £[redacted] *CIL Charge*

25. 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.

26. With regard to the surcharges applied by the CA, the CIL Regulations are as follows:-

CIL Regulations Part 9, Enforcement Chapter 1 –
Surcharge for failure to submit a commencement notice
83*.—(1) Where a chargeable development (D) is commenced before the collecting authority has received a valid commencement notice in respect of D, the collecting authority may impose a surcharge equal to 20 per cent of the chargeable amount payable in respect of D or £2500, whichever is the lower amount.*

27. However, on the matter of appealing against a surcharge:-

Surcharge: appeal
117*.—(1) A person who is aggrieved at a decision of a collecting authority to impose a surcharge may appeal to the appointed person on any of the following grounds—*
- *a) that the claimed breach which led to the imposition of the surcharge did not occur;*
- *b) that the collecting authority did not serve a liability notice in respect of the chargeable development to which the surcharge relates; or*
- *c) that the surcharge has been calculated incorrectly.*

28. On [redacted] the CA was advised by the Planning Inspectorate that the appellant had made an appeal under Regulation 117 of the Community Infrastructure Levy Regulations 2010 (as amended) against the £[redacted] surcharge applied by the CA.

29. It does not appear that the appellant makes any reference to appealing against the surcharge amount within their CIL appeal papers. The 'appointed person' for appeals under Regulation 117 is the Planning Inspectorate not the VOA. As the matter is already under consideration by the Planning Inspectorate (acting in the capacity of appointed person on that specific matter) it will not be considered in this Regulation 114 appeal.

30. Regarding the matter of an award for costs, *Appendix 8 of the VOA's CIL Manual* states "*Costs will normally be awarded where the following conditions have been met:-*

1. *a party has made a timely application for an award of costs*
2. *the party against whom the award is sought has acted unreasonably and*
3. *the unreasonable behaviour has caused the party applying for costs to incur unnecessary or wasted expense in the appeal process – either the whole of the expense because it should not have been necessary for the matter to be determined by the Secretary of State or appointed Inspector, or part of the*
4. *expense because of the manner in which a party has behaved in the process"*

The focus is whether point 2 is satisfied.

31. From the comments made by both parties, along with copies of correspondence between them, it is clear that the CA were not initially provided with supporting evidence for "in use" areas, and therefore used only the information they had at the time to calculate the CIL charge, with no offset for in use GIA. Following this, and the fact that the appellant did not provide such information in response to communications from the CA, nor with their Regulation 113 request, along with the appellant's specific requirement that the CA conclude their Regulation 113 review within only one working day of receiving that review request, it would appear the CA did not act unreasonably. Under these circumstances an award for costs will not be made.

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