

# Appeal Decision

by [REDACTED] MRICS

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

Valuation Office Agency - DVS



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Appeal Ref: [REDACTED]

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

Location: [REDACTED]

Development: The “erection of a four storey building containing... 9 self-contained residential units...following demolition of existing buildings on site.”

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## 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 and on behalf of [REDACTED] (the Appellant) and the [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. Planning Application Decision Notice ref [REDACTED] issued by the CA on [REDACTED].
  - d. CIL Liability Notice [REDACTED] 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 received on [REDACTED].

- g. Further comments on the CA's representations prepared by the appellant and dated [REDACTED].
  - h. Further comments on the Appellant's comments of [REDACTED] prepared by the CA and received on [REDACTED].
  - i. Further comments on the CA's comments of [REDACTED] prepared by the Appellant and dated [REDACTED].
2. On [REDACTED] the CA granted planning permission reference [REDACTED] for demolition of the "existing single and two storey side extensions and two storey rear extensions; construction to two storey side and rear extensions; alterations..."
  3. On [REDACTED] the CA granted further planning permission reference [REDACTED] for demolition of the "rear elevation, existing mansard roof, single and two storey side/rear extensions; reconstruction of rear elevation, mansard roof and erection of two storey side and rear extensions; alterations..."
  4. The property had been in continuous residential use for a number of decades, let by the Appellant as 10 self-contained flats up until [REDACTED], when the last tenant vacated.
  5. Development work commenced in [REDACTED] under planning permission [REDACTED], but the front wall was also largely demolished, which was in breach of planning control and occurred unknown to the Appellant. This matter was dealt with via the Magistrates Court.
  6. A new planning application was then submitted on [REDACTED] and planning permission [REDACTED] granted on [REDACTED] for the "erection of a four storey building containing... nine self-contained residential units...following demolition of existing buildings on site." Subsequently the remaining ground floor structure was demolished during [REDACTED] and [REDACTED].
  7. A CIL Liability Notice reference [REDACTED] was issued by the CA on [REDACTED] at £ [REDACTED] CIL liability ([REDACTED]) based on a chargeable area of [REDACTED] m2 Gross Internal Area (GIA) with no deduction of existing in use buildings.
  8. This CIL liability was calculated by the CA as follows:-

Chargeable area [REDACTED] m2 GIA  
 X £ [REDACTED] /m2 MCIL2 Residential  
 X index [REDACTED]  
 = £ [REDACTED] for [REDACTED] CIL

Plus

Chargeable area [REDACTED] m2 GIA  
 X £ [REDACTED] /m2 Residential Area B  
 X Index [REDACTED]  
 = £ [REDACTED] for [REDACTED] CIL

Total CIL Liability = £ [REDACTED]

9. The appellant requested a Regulation 113 Review of the Chargeable Amount on [REDACTED].
10. Following the Regulation 113 Review the CA response dated [REDACTED] upheld the CIL Liability at £[REDACTED] but accepted that the relevant date should be [REDACTED], when the Appellant first became aware of the Notice.
11. On [REDACTED] the Valuation Office Agency received a CIL appeal dated [REDACTED] made under Regulation 114 (chargeable amount).
12. With regard to the appeal relating to the level of CIL charge proposed by the CA, the Appellant makes this on two main grounds:-
- 1 - Appeal Ground 1: The Appellant argues that the GIA of the existing remaining ground floor should have been off set against the chargeable area GIA for CIL calculation purposes.
- 2 - Appeal Ground 2: The GIA of the side and rear extensions and the third floor should have been off set against the total GIA of the development.
13. Appeal Ground 1: The GIA of the remaining ground floor still in place at [REDACTED] should have been off-set against the total GIA of the development. The Appellant therefore argues that the GIA of the remaining ground floor of [REDACTED] m2 should have been deducted from the chargeable area for CIL calculation purposes.
14. The Appellant contends that the property contained a part that had been in lawful use for a continuous period of at least 6 months between [REDACTED] and [REDACTED]. The remaining ground floor was a “part” of that “in use building” which was to be demolished before completion of the development, and the Appellant therefore argues that the GIA of the remaining ground floor of [REDACTED] m2 should have been deducted from the chargeable area for CIL calculation purposes.
15. Appeal Ground 2: The GIA of the side and rear extensions and the third floor should have been off set against the total GIA of the development, as these areas fell within “parts of in use buildings” on the day that the previous planning permission [REDACTED] was granted for the development [REDACTED]. These were demolished in [REDACTED] (side and rear extensions) and [REDACTED] (third floor), and it is the Appellant’s view that the GIA of the side and rear extensions of [REDACTED] m2 and the third floor of [REDACTED] m2 should have been off set against the total GIA of the development, and should thus not have attracted a CIL liability.
16. It is the Appellant’s view that the CA calculated the chargeable development GIA for CIL incorrectly, and should have calculated it as follows:-

*Total GIA of the development* [REDACTED] m2  
*Less GIA of in use buildings* [REDACTED] m2 \*  
 = *chargeable development* [REDACTED] m2

\*[remaining ground floor [REDACTED] m2 + side and rear extensions ground and first floors [REDACTED] m2 + third floor [REDACTED] m2 = [REDACTED] m2 in use buildings]

17. The [REDACTED] charging schedule for CIL was approved on [REDACTED] and came into effect on [REDACTED], and applied to any CIL liable developments granted planning permission on or after [REDACTED]. This charging schedule was therefore in place at the time each of the previous planning applications reference [REDACTED] and [REDACTED] were made by the Appellant.
18. In [REDACTED] the CA adopted a new CIL charging schedule ([REDACTED]) that came into effect on [REDACTED], so was therefore in place when the most recent planning application [REDACTED] decision was issued.
19. The CA advise that planning permissions [REDACTED] and [REDACTED] did not raise any CIL liability as no new floor space was created, thus no Liability Notices were served on those occasions, but that “there were various pre-commencement [of the works] conditions...in the Council’s Decision Notice issued on [REDACTED] upon granting of planning approval....one of [which]... explicitly mentioned that the development was liable for ...CIL. Further to this the planning permission was accompanied by a Note relating to the CIL liability of the development containing details on the calculation and the process of charging the levy.”
20. The CA confirm that the chargeable development for the purposes of CIL relates only to [REDACTED] granted in [REDACTED], and as stated in the Prosecution Letter by the CA’s Enforcement Team sent to the Appellant “with regard to re-commencing of the project and re-building of the properties, a new planning application is required.” They confirm that as the Appellant proceeded with submitting a new planning application and acquiring permission under reference [REDACTED], for the purposes of CIL they have to consider what was present on site on the day planning permission under this application was granted on [REDACTED].
21. The CA further state that in accordance with Regulation 40, off-set of the existing floor space can only be applied for “relevant buildings”, and any already demolished floor space cannot be off-set against the GIA of the development.
22. The Appellant contends that the property contained a part that had been in lawful use for a continuous period of at least 6 months between [REDACTED] and [REDACTED]. The remaining ground floor was a “part” of that “in use building” which was to be demolished.
23. The Appellant also contends that the *CIL Note* that accompanied the [REDACTED] Planning Permission documentation states that CIL will only be chargeable if new floor space is proposed; that the CA has yet to determine whether CIL is chargeable, and refers to the issuing of a Liability Notice if CIL has been triggered. The Appellant comments that in those circumstances they could not be taken to have known about the existence or extent of any CIL Liability.
24. The CA is of the view that the structure standing on site on [REDACTED] was not a “building”, and could not therefore be considered “existing floor space” for CIL calculation purposes, and what remained on site at that time does not fall within the definition of a “building”.
25. The CA have referred to the RICS *Code of Measuring Practice* ([REDACTED]) as being the guidance used for calculating the floor space to Gross Internal Area (GIA) for CIL purposes. Their view is that the remaining structure on the site is not a permanent enclosed construction, and since it lacks an internal area is cannot constitute a building or floor level. They further state that a part of a floor level does not constitute a complete

floor level due to the lack of enclosure and internal floor space that a roof would provide. The CA state that they are therefore unable to calculate any deductible GIA on the basis that they cannot calculate such an area following the RICS Code.

26. The Appellant contests the CAs comment that only “a part of a floor level” was left standing, and clarifies that their (the Appellant’s) reference to “most of the ground floor – the remaining ground floor” within their representations simply sought to exclude the side and rear extensions from the point they were making.
27. The Appellant feels the CA have misconstrued the meaning of “building” and refers to *The Planning Act 2008* as defining a “building” as: “includes any structure or erection, and any part of a building, as so defined”, and question the reliance of the CA on the RICS *Code of Measuring Practice* on the basis that it is guidance, cannot be relevant to the definition of a term in legislation itself defined by relevant legislation, and does not purport to define what a “building” is, but simply attempts to assist with measurement practice.
28. The Appellant further suggests that the exclusion or off-set of the floor space in question is consistent with the general policy of the CIL Regulations that CIL should only be payable on new floor space, and the area of the remaining ground floor will not give rise to new floor space and is to be re-used for the new development.
29. The CA refer to an un-referenced previous decision on a CIL appeal discussing the definition of a building: “not all things that are built or all structures are necessarily buildings”, and that the Appointed Person (the VOA in that case) decided that in order to define a building at least a clear roof frame structure and a clear boundary defined by supporting pillars were needed, and that the structure should be permanent and fit for occupation to be considered a “building”.
30. The CA state that in the subject case, as shown by the photographs they have supplied, any structure standing on site on the day that planning permission first permitted the chargeable development was not a building, a roof frame structure was absent and the partly collapsed walls could not possibly support a roof. They contend that the structure cannot be described as permanent or fit for occupation due to the extent of deterioration and lack of structural integrity, as at least a few of the supporting pillars were missing and partly collapsed walls were not adjoining each other continuously, the structure lacked a clear boundary for the CA to measure to the internal face of the GIA as per the *Code of Measuring Practice*.
31. Both of the Appellant’s two grounds of appeal relate to shared issues:-
  - a. The identification of in use buildings.
  - b. The definition of the term “building”.
  - c. The GIA of in use buildings.
32. With regards to a. The identification of 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 or off-set of the GIA of existing in use buildings from the GIA of the total development in calculating the CIL charge.
33. 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.

34. Regulation 40(11) also provides that “relevant building” means a building which is situated on the relevant land on the day planning permission first permits the chargeable development.
35. With regards to b. The definition of the term “building”: 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. The Appellant’s point is accepted that this *Code* does not purport to define what a “building” is, but simply attempts to assist with measurement practice.
36. GIA is defined within the *Code* as the “area of a building measured to the internal face of the perimeter walls at each floor level...” The *Code* includes an example that illustrates how to calculate the GIA of a loading bay by measuring to the internal face of a supporting pillar. This loading bay has walls to three sides, however, and is only open sided to the front. This example does indicate that it is possible to measure GIA to the inside face of a supporting pillar rather than a wall.
37. The CIL Regulations do not define what a “building” is.
38. The Appellant has made reference to *The Planning Act 2008*, which itself defines “building” as “having the meaning given by section 336(1) of the *Town and Country Planning Act 1990*, which defines “building” as: “includes any structure or erection, and any part of a building, as so defined”. This definition remains too vague for the purpose of defining “building” required in the present instance however.
39. In the absence of any clear guidance from either CIL Regulation 40, The RICS *Code of Measuring Practice* or the *Town and Country Planning Act 1990* as to what a “building” is, the only obvious option available is to refer to the dictionary for a clear definition as to what constitutes a “building”.
40. The *Shorter Oxford English Dictionary*, 6th Edition (*SOED*), provides the following 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.”
41. The *SOED* further defines “built” as “Constructed or constituted, especially in a specified way; having a specified build; composed of separately prepared parts.”, “other” as “That remains from a specified or implied group of two or (later) more.” and “structure” as “A thing which is built or constructed; a building, an edifice. More widely, any framework or fabric of assembled material parts.” This would generally seem to accord and expand upon the definition of “building” as contained in the *Town and Country Planning Act 1990*.
42. As already demonstrated, however, the area of remaining ground floor in question had been a “part” of an “in use building” which had been earlier partially demolished.
43. Regulation 40(11) provides that a building is “in use” if “a part” of that building has been in 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. Whether part of a building is “in use” is a question of fact and degree.
44. It might also be implied that a building would define some form of boundary, but 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”. This would seem to be supported in the RICS *Code of Measuring Practice* example that illustrates how to calculate the GIA of a loading bay by measuring to the internal face of a supporting pillar.

45. Considering photographs taken by the CA dated [REDACTED] and attached to the CA's statement of Case as *Appendix C*, it would appear that substantial demolition works had been undertaken, and that there was no structure for the Appellant to occupy at the time these photographs were taken. This was the only structure in place at the time planning application [REDACTED] was made on [REDACTED], and also when planning permission under this reference was granted on [REDACTED].
46. From the above, the structure remaining as at the relevant date of [REDACTED] can be taken to be a "relevant building" insofar as it "is situated on the relevant land on the day planning permission first permits the chargeable development", which was [REDACTED] as per grant of planning permission [REDACTED].
47. The structure can be taken to be a "building" in accordance with the broad definition contained in section 336(1) of the *Town and Country Planning Act 1990* as a "structure or erection, and any part of a building, as so defined", and more specifically defined in the *Shorter Oxford English Dictionary*, 6th Edition as "A thing which is built; a structure; an edifice; a permanent fixed thing" and "More widely, any framework or fabric of assembled material parts."
48. Having established that it is a "building", it remains to determine whether the remaining ground floor can be defined as an "in use building" in accordance with Regulation 40(11) insofar as it 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, which is [REDACTED].
49. The building, of which the remaining ground floor was a part, ceased occupation in [REDACTED] with the departure of the final tenant. It was therefore an "in use building" within three years of the grant of planning permission on [REDACTED] and had been continuously for a period of six months ending during [REDACTED] which would have to have been from [REDACTED] to accord with the requirement of Regulation 40(11) for "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", which it was.
50. With regards to c. The GIA of in use buildings: As shown by the photographs dated [REDACTED] supplied by the CA, they note that a roof frame structure was absent and the partly collapsed walls could not possibly support a roof and at least a few of the supporting pillars were missing and partly collapsed walls were not adjoining each other continuously, and comment that the structure lacked a clear boundary.
51. It has already been established, however, that 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". This would seem to be supported in the RICS *Code of Measuring Practice* example that illustrates how to calculate the GIA of a loading bay by measuring to the internal face of a supporting pillar. It is therefore possible to establish the GIA of the remaining ground floor by reference to taking measurements from a combination of the internal face of the perimeter walls/supporting pillars or building boundary as defined in some other way as above, and therefore the GIA of the existing "in use building" is established and deducted from the GIA of the total development to arrive at the GIA of the CIL Chargeable Area as follows:-

Total Development [REDACTED] m2 GIA  
 Less Existing Buildings [REDACTED] m2\* GIA

= Chargeable Area [REDACTED] m2 GIA

\*[remaining ground floor [REDACTED] m2 + side and rear extensions ground and first floors [REDACTED] m2 + third floor [REDACTED] m2 = [REDACTED] m2 in use buildings]

52. CIL is therefore correctly calculated as follows:-

Chargeable area [REDACTED] m2  
X £ [REDACTED] /m2 [REDACTED] Residential  
X index [REDACTED]  
= £ [REDACTED] for [REDACTED] CIL

Plus

Chargeable area [REDACTED] m2  
X £ [REDACTED] /m2 Residential Area B  
X Index [REDACTED]  
= £ [REDACTED] for [REDACTED] CIL

Total CIL Liability = £ [REDACTED]

53. 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]