Appeal Decision

by BSc(Hons) MRICS

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

Valuation Office Agency (DVS)

Email: @voa.gov.uk

Appeal Ref:

Planning Permission Ref. granted by

Location:

Development: Erection of local centre, car parking, landscaping, and associated works

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Decision

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

Reasons

1. I have considered all the submissions made on behalf of the appellant, , and the Collecting Authority (CA), ( ) in respect of this matter. In particular, I have considered the information and opinions presented in the following documents:

a. The Planning Decision issued by on .
b. The CIL Liability Notice issued by the CA on .
c. The appellant's request for a Regulation 113 review dated .
d. The CIL Appeal form submitted by the appellant as a Regulation 114 Chargeable Amount Appeal dated , together with documents and correspondence attached thereto and with particular reference to the Community Infrastructure Levy Charging Schedule dated referred to therein.
e. The email from the CA dated in response to the Regulation 114 Appeal.
f. Comments on the CA's representations; sent on behalf of the appellant in correspondence dated

2. Planning permission for the above development was granted by on . On the CA issued a Liability Notice in the sum of £ . This was based on a chargeable area of square metres for 'retail out of town' development charged at £ per square metre (sq m); plus application of an indexation factor stated to be .

3. On [redacted] the appellant requested a review of the calculation of the chargeable amount under Regulation 113. The CA did not issue a formal decision on the review and hence the appellant submitted a CIL Appeal under Regulation 114 (chargeable amount) on [redacted] contending that the chargeable amount should be £[redacted] based on a gross internal area of [redacted] sq m in relation to Unit 3 only.

4. The appellant, with their appeal papers, provided the following documentary evidence in support of their view:

a) Planning Permission Grant Notice
b) Site Plan
c) Liability Notice (CA ref: [redacted])
d) Copy of original planning application documents
e) Copies of all documentation sent to the CA during the application process
f) Copies of correspondence between the appellant and the CA relating to the CIL charge
g) Redacted CIL appeal decision (dated [redacted])

5. The appellant explains that the planning permission grant notice was in respect of a parade of three units that form a local centre, the submitted and approved mix of uses were as follows:

• Unit 1 – Class A3 (restaurants and cafes) – [redacted] sq m (GIA);
• Unit 2 – Class A5 (hot food takeaways) – [redacted] sq m (GIA); and
• Unit 3 – Class A1 (shops) – [redacted] sq m (GIA).

6. The grounds of the appeal are that the CA is requesting CIL payments for non-retail uses which should have a zero charge according to the CA's Charging Schedule.

7. The appellant's case is focused upon the definition of 'retail' and the interpretation of the CA's Charging Schedule. It is the appellant's view that in the absence of a definition of 'retail' in the Charging Schedule, a normal and reasonable interpretation of 'retail' utilised by planners and property professionals should mean Class A1 is included and not other 'A' class uses.

8. The appellant considers that in the absence of a definition of retail within the Charging Schedule the interpretation should take account of local and national planning policy and hence the appellant considers that Unit 3 (Class A1) should be considered as 'out of town retail' and be liable to CIL but Unit 1 (Class A3) and Unit 2 (Class A5) should be classed as 'all other uses' and be subject to a zero charge.

9. The local planning policy referenced by the appellant is the [redacted] Local Plan 2013-33, in particular Policy EC7 (Primary Shopping Frontages) which sets out that:

"To maintain the central function of core retail areas within town centres, development will not be permitted which would:
a) lead to less than 70% of ground floor units of a street within a defined primary shopping frontage being in A1 retail use;
b) create three or more adjoining ground floor units in uses other than A1 retail; or
c) lead to the change of an existing active ground floor frontage to a non active use."

The appellant notes that this policy seeks to preserve Class A1 (retail) presence in town centres and protect centres from non-retail (i.e non Class A1 uses). Within the local plan itself, the appellant is of the view that Class A3 and A5 uses do not fall within the CA's own retail definition.

10. Secondly the appellant refers to [redacted]'s interpretation of Policy EC6 (Large Scale Retail Development) and EC10 (Local Shops) while assessing the application and Condition 13 and 14 of the decision notice. Condition 13 restricts the *"A1 retail premises (Unit 3 on the approved plans)"* to a maximum net sales area of 280 sq m. The reason for imposing Condition 14 is to: "*ensure the level of A1 retail provision is kept to less than 280sqm net sales area in the interests of the viability of Newton Abbot Town Centre."* The appellant notes that net sales area of Unit 3 (Class A1) is [redacted] sq m. It is the appellant's view that when assessing the proposal and imposing this condition, [redacted] has concluded that Unit 1 and Unit 2 are non-retail uses. If these were defined as 'retail' uses, the appellant notes that the total 'net sales area' would already be above the [redacted] sq m threshold set out within the reason for imposing Condition 14.

11. With reference to national policy and the interpretation of 'retail', the appellant notes the National Planning Policy Framework (*"NPPF"*) at its glossary defines retail development, distinguishing it from leisure uses (including restaurants, bars and pubs):

"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)."

12. The appellant also notes that the definition of retail is further clarified within Schedule 2, Part 3 (Change of Use) of The Town and Country Planning (General Permitted Development) (England) Order 2015. Class A is described as follows:

"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."*

13. In the opinion of the appellant this serves to illustrate that there is a specific distinction between café or restaurant (Class A3), hot food takeaway (Class A5) and retail (Class A1) use.

14. The appellant also refers to a previous CIL appeal decision that was issued [redacted] where the definition of 'retail' in the application of CIL was considered. As the decision is redacted, the exact development proposal is not clear but the decision states that the CA considered 'retail' to be all 'A' class uses and it does mention that cafes and restaurants are not normally regarded as a 'retail' use.

15. The CA submitted representations on [redacted] which can be summarised as: The CIL Charging Schedule states that 'Out of town Retail development' has a CIL liability of £[redacted] per sq m. The rates per square metre adopted were based on the findings of the commissioned CIL viability appraisal which referred to all types of retail as being similar in viability and did not differentiate between A1 and other 'A' uses.

16. The relevant paragraphs of the viability assessment that are referenced by the CA are:

5.2.10 Town centre – we have tested town centre retail in the main centre of [redacted] as this is the focus for future growth. In terms of what constitutes 'town centre', the retail study identifies a town centre area with useful boundaries in functional terms. We also consider that on a strategic level in [redacted] there is little difference between A1-A5 units and whilst convenience units may attract higher values, in practical terms it will be difficult to set different CIL rates for just these types of uses as the evidence is limited to support such a distinction. The residual analysis shows that town centre retail is not currently able to support a CIL charge.

6.3.2 As described there is clear evidence to support a charge on out of town centre retail development. Whilst the evidence suggests that this levy could be varied further to reflect the different types of retail uses, it is not considered that there is sufficient information on transactions in [redacted] to provide clear evidence at this stage. Therefore a single charge for all out of town centre retail should be set. For all other types of non-residential development we recommended that the council considers a zero charge.

17. The appellant submitted comments on the CA's representations dated [redacted] which can be summarised as follows:

a) The reader of a CIL schedule document should be able to read the document on its face, in a manner that a reasonable reader could understand and without reference to any extrinsic material.

b) Paragraph 2 of the CIL Charging Schedule states that: "This Charging Schedule should be read alongside the regulatory requirements set out in the CIL Regulations 2010 (as amended)". There is no evidence that the viability evidence should be read alongside the adopted charging schedule.

c) The viability evidence is a document prepared by a third party to inform the Council on how it might want to set its CIL. It does not hold any status beyond that of a background paper to the Council's consideration of how it might progress with CIL. It was entirely open to the Council, against the evidence base, to set a scope or rate of CIL different to that covered by the viability evidence.

d) The CIL regime is prepared within the context of the planning system and to apply an arbitrary definition of the CIL Charging Schedule by reference to a non-statutory background paper would be unreasonable.

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

19. The CIL Charging Schedule for [redacted] sets a rate of £[redacted] per sq m in relation to 'retail development' outside of town centres. It also allows for CIL payments in relation to residential development but for 'any other development or use' a rate of zero CIL is applicable.

20. 'Retail development' is not defined in the document and it is therefore important to consider the context of the term 'retail' and what the definition should be taken to mean in the context of its use in a CIL 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. It follows that any interpretation of the word retail needs to be done in a transparent and fair way which accords with the purpose of the Charging Schedule as established by the CIL Regulations. Whilst the Charging Schedule does refer to a viability

assessment, stating that the CIL rates have been determined by one, it does not reference a particular document or refer the reader to definitions used therein and 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 general planning law and guidance.

21. The appellant has referenced the NPPF, the Local Plan and Schedule 2, Part 3 (Change of use) of The Town and Country Planning (General Permitted Development) (England) Order 2015. The CA themselves reference the Local Plan within their Charging Schedule and, in the absence of more material evidence to the contrary, these additional sources cannot in my view be ignored.

22. In reference to Policy EC7 quoted by the appellant I note that the Local Plan in paragraph 3.11 explains that the town centres of , and have defined primary shopping frontages. The paragraph notes that "*While, taken as a whole, town centres need to provide a range of complementary uses as part of their 'offer', there are certain key streets which need to stay as part of the core retail area. These streets, defined as primary shopping frontages, will be protected from too many uses which would dilute their central role. Such dilution occurs when more than 30% of the ground floor is non-retail, and in places where 3 or more consecutive units are not retail".*

23. In my view, the extracts from the NPPF, the Local Plan and the Town and Country Planning (GPD) Order 2015 referred to in paragraph 9 - 12 above, lead the reader to the conclusion that takeaways, cafes and restaurants are not normally regarded as a 'retail' use.

24. 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 A3 and A5 uses applicable to Units 1 and 2 fall within the 'retail' CIL category in the CA's Charging Schedule. Therefore, the CA's calculated CIL charge shown in the Liability Notice is not appropriate in this case.

25. There does not appear to be any dispute in respect of the gross internal area of Unit 3, nor the rate adopted or the indexation and therefore I decide a calculate a CIL charge in accordance with the appellant's calculation as follows:

sq m x £ per sq m x = £

26. I therefore determine a CIL charge of £ ().

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RICS Registered Valuer
Valuation Office Agency