

# Appeal Decision

by [REDACTED] MRICS

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

Valuation Office Agency - DVS

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Appeal Ref: [REDACTED]

Planning Permission Reference: [REDACTED]

Location: [REDACTED]

Development: change of use of part of ground floor from Retail (Class A1) to Residential (Class C3) to provide to 2nos. 1 bedroom flats with installation of associated doors and windows

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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 [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. Change of Use Enquiry Form reference [REDACTED] dated [REDACTED].
  - b. [REDACTED] notice from the CA that prior approval was not required under reference [REDACTED].
  - c. CIL Liability Notice [REDACTED] was issued on [REDACTED] by the CA at £ [REDACTED] CIL liability.
  - d. The Appellant's request dated [REDACTED] for a Regulation 113 review and the CA's response of the same date.
  - 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].

2. On [REDACTED] the CA issued notice that prior approval was not required under reference [REDACTED] for “change of use of part of ground floor from Retail (Class A1) to Residential (Class C3) to provide to 2nos. 1 bedroom flats with installation of associated doors and windows”.
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 chargeable development at [REDACTED] m2.
4. The appellant requested a Regulation 113 Review of the Chargeable Amount on [REDACTED]
5. Following the Regulation 113 Review the CA wrote to the Appellant on [REDACTED] confirming their CIL calculation as per their previous CIL Liability Notice with the comment “There was insufficient evidence to show that the building at [REDACTED] was 'in use' as an A1 shop for the requisite period. The result is that the chargeable amount should remain unchanged.”
6. 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]).
7. Disagreement surrounding the issue of identifying whether the premises constitute an in-use building 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 an existing in-use building from the GIA of the total development.
8. 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.
9. 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 [REDACTED]”.
10. The Appellant believes they have demonstrated, through the evidence provided along with the appeal, that in accordance with Regulation 40(11) the property did 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.
11. The CA believe their investigations and own information 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 building was in lawful use, and have, in accordance with Regulation 40 deemed “the GIA of the part in question to be zero”.
12. The CA have also referred to a High Court case: R (oao Hourhope Ltd) v Shropshire Council [2015] EWHC 518 (Admin) in respect of a public house in support of their views, but the circumstances of that case do not accord with the circumstances found with this current CIL case.
13. From the information available, the building would appear to have been in occupation of some form or other during the relevant period [REDACTED] to [REDACTED], but it is noted that

whilst for planning purposes it was classified as Use Class A1, the actual use appears to have shifted towards storage/workshop after the Appellant purchased it in late [REDACTED]. Also, for a period of time up to the original owner's death in [REDACTED] the premises were on the market for sale, as demonstrated by the sign clearly visible in the photographs submitted by the CA dated [REDACTED] and [REDACTED], which was within the relevant period for Regulation 40. Whilst the property was on the market at this time however, it is perfectly possible for it to have remained "in-use" insofar as it was occupied. Whilst the photographs submitted by both parties show stock or stored goods to be situated inside the front ground floor shop, it is obvious from those submitted by the CA that these had been moved around somewhat during the intervening period (shown in slight differences between the photographs) – whether or not the shop was openly trading at this time is not clear, but the premises were obviously in active occupation as indicated by the fact that someone was gaining access to move stock, which is also supported by the comments submitted by the Appellant's agent about their visits to the premises on two separate occasions, and also the comment made to one of the CA's officers by another shop keeper on the street, who had observed that occasional visits were made to the subject premises.

14. Evidence submitted by the CA in the form of sales particulars for a property auction dated [REDACTED] clearly indicate that the property at that later time was vacant. It is not clear how long the premises had not been actively occupied for at this point, and Regulation 40 merely requires them to be in lawful use for a minimum continuous period of 6 months during the 3 year relevant period of time.
15. The CA's Business Rates team had expressed doubts that [REDACTED] (a property management company) were in occupation. "Whilst we have had no choice but to show [the premises] as occupied, we were not convinced he was actually in occupation". Business Rates liability was transferred to [REDACTED] on [REDACTED]. Prior to that liability had been to the deceased previous owner (who died [REDACTED]) since [REDACTED]. Since [REDACTED] no Business Rates have been paid, and the CA have commented that the premises appear to benefit from Small Business Rate Relief.
16. The following comment was included in an email sent to the CA's Business Rates team and has been included with consent of the applicant: "The property was being used for storage and as a workshop for my clients various other projects. I specifically remember there being a whole load of pallet boards being stored and worked on to create nice feature walls." and "We have no photographs, we don't have wifi at the premises and as the premises was being used solely for a store and workshop we would not have advertised this on our website or Facebook page."
17. From all the evidence available, it would appear that the property was occupied as a shop operating on sporadic opening hours during the [REDACTED] to [REDACTED] period, and that after the death of the previous owner in [REDACTED] the premises appear to have been empty until they were taken into use for storage/workshop purposes after their purchase in late [REDACTED]. The premises had, indeed, been marketed as "vacant" in [REDACTED] after some clearance and refurbishment works (to the first floor accommodation) had been undertaken, and then acquired by the Appellant in late [REDACTED], who submitted their "change in use enquiry" to the CA a few months after in [REDACTED].
18. From this information, during the relevant period [REDACTED] to [REDACTED] it is determined that on the balance of probability the premises were in-use for at least 6 months at the earlier part of the period, but nevertheless in accordance with the requirements 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".

19. Regulation 40(7) of the CIL Regulations 2010 (as amended) therefore provides for the deduction or off-set of the GIA of the existing in-use building from the GIA of the total development in the case of each planning proposal.

20. The existing floor space was [REDACTED] m2 including a reduced area retained for shop use of [REDACTED] m2, the remainder being allocated for the new flats. As this [REDACTED] m2 GIA was already existing prior to the development, the whole GIA is to be off-set against the GIA of the development.

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

*Total development GIA* [REDACTED] m2  
*Less Existing in-use GIA* [REDACTED] m2  
= £ [REDACTED] ([REDACTED]) *CIL Liability*

22. 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]