

Appeal Decision

by [REDACTED] BA (Hons) MRICS

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

Valuation Office Agency

Email: [REDACTED]@voa.gov.uk

Appeal Ref: [REDACTED]

Planning Permission Ref. [REDACTED] granted by [REDACTED] on [REDACTED]

Location: [REDACTED]

Development: Retrospective application for a two storey building and proposed conversion into a residential development comprising 2 self-contained flats including the creation of side entrance, rear amenity space, cycle storage, 2 car parking spaces, associated soft landscaping; removal of boundary fence.

Decision

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

Reasons

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

- (a) Decision notice relating to planning application [REDACTED]
- (b) Regulation 113 decision issued by CA on [REDACTED]
- (c) Decision notice relating to planning application [REDACTED]
- (d) Liability Notice dated [REDACTED]
- (e) The appellant's appeal form dated [REDACTED]
- (f) Additional supporting documents submitted with the CIL Appeal by the appellant including:
 - (i) The appellant's grounds of appeal document dated [REDACTED]
 - (ii) Block and location plan
 - (iii) Planning Committee report dated [REDACTED]
 - (iv) Evidence of residential occupation labelled Appendix E
 - (v) Photographic evidence showing retained floor areas provided by the appellant labelled Appendix F

- (vi) CIL demand notice dated [REDACTED] stating that the deemed commencement date was [REDACTED]
- (vii) Appendix I showing key stages of lawful use considerations [REDACTED]
- (viii) Planning, design and access statement relating to application [REDACTED]
- (ix) Drawings relating to planning application [REDACTED]
- (x) A timeline provided by the appellant and labelled as Appendix N

(g) The CA's response to appeal letter dated [REDACTED]

(h) The appellant's comments received on [REDACTED]

2. An earlier planning application reference [REDACTED], predating [REDACTED], had been granted on [REDACTED]. It has not been implemented. [REDACTED] permitted demolition of chimney breast and extensions and alternations of existing bungalow to create a two storey dwelling with habitable loft space including front porch, two storey side extension, single storey front extension, side dormer window, two roof lights, side door and associated alterations to windows on the front and side elevations.

3. A Liability Notice had been issued in respect of permission [REDACTED] in the sum of £ [REDACTED]. I have not had sight of this Liability Notice but it is referred to on the appeal form and in the planning committee report. The additional net chargeable area was [REDACTED] square metres (sq m).

4. An enforcement notice was issued by the [REDACTED] on [REDACTED] due to a breach of planning control. The notice was issued because works had been carried out which did not have planning permission. The works were considered to be a deviation from permission [REDACTED] and that permission also did not allow for a new dwelling to be created. The CA explain that the appellant was given the choice of remedial works in order to implement permission [REDACTED] but chose to submit a new retrospective application.

5. This appeal relates to the aforementioned retrospective application [REDACTED] for a two storey building and proposed conversion into a residential development comprising 2 self-contained flats including the creation of side entrance, rear amenity space, cycle storage, 2 car parking spaces, associated soft landscaping; removal of boundary fence. The planning permission was granted on [REDACTED].

6. Liability Notice [REDACTED] was issued on [REDACTED] for the sum of £ [REDACTED], based on a net additional floor space of [REDACTED] sq m.

7. A review request was submitted by the appellant to the CA on [REDACTED]. The CA responded on [REDACTED]. The CIL charge stood as originally issued on Liability Notice [REDACTED].

8. The appellant submitted a CIL Appeal dated [REDACTED] under Regulation 114 (chargeable amount), stating that the chargeable amount should be based on a deemed net chargeable area of [REDACTED] sq m.

9. The grounds of the appeal document provided by the appellant gives comprehensive background in relation to the subject property and both planning applications. In addition to the background information the grounds of appeal are:-

- (a) That the two floors of the original property have been retained rather than demolished. That there have been no changes to the proposed [REDACTED] scheme in

relation to the footprint of the property. Notwithstanding the departures from the [REDACTED] permission, the areas that were demolished were in accordance with [REDACTED].

- (b) That with the exception of a period in [REDACTED] the property has been continuously occupied between [REDACTED] and [REDACTED] by the family of the appellant as a single family house.
- (c) That the report to planning committee on [REDACTED] in respect of application [REDACTED] stated that the development was liable for £[REDACTED] CIL.
- (d) That application [REDACTED] was to remedy the deviation from [REDACTED] rather than being a new planning application.
- (e) The retrospective application process suffered delays outside the appellant's control which have had knock on effects in respect of the lawful use tests.
- (f) That the CA has incorrectly determined the dates relating to 'unlawful use'.
- (g) That the retained floor space of the dwelling should be 'set off' in CIL calculations.

10. The CA submitted representations on [REDACTED]. The CA's representations can be summarised as:-

- (a) That internal records evidence that planning enforcement became aware of a potential breach and opened an enforcement case on [REDACTED]. There are records showing attempts to remedy the matter from [REDACTED] onwards.
- (b) That in accordance with Regulation 68 of the CIL Regulations commencement should be deemed as the date that planning permission for the retrospective application was granted. That as the deemed commencement date for [REDACTED] was [REDACTED] the 3 year period for consideration of the lawful use test is therefore between [REDACTED] and [REDACTED].
- (c) That the 'in use test' is not met.
- (d) That when planning control are involved in investigating a breach, CIL work is often paused pending the outcome of the investigations
- (e) That [REDACTED] was commenced but not implemented. Rather than undertake remedial works to implement [REDACTED] the appellant decided to continue to implement [REDACTED].
- (f) The compliance period for enforcement of 1 [REDACTED] has been extended until [REDACTED].
- (g) That the CIL charge provided in the committee report was for indicative purposes. The CA acknowledge a better illustration could have been provided.
- (h) That the appellant can still implement [REDACTED] rather than [REDACTED] in which case the demand notice could be superseded.

11. The appellant submitted their comments on [REDACTED]. The comments can be summarised as:

- (a) The appellant and his family would face severe social and financial implications if the CIL charge shown on the liability notice remained unchanged.
- (b) The appellant reiterated that the property had only ever been occupied as a single family house and stated that there had been no change of use and that the 'in use dispensation' has been unfairly denied.
- (c) The appellant states that the property has been in residential use for over the required 6 months period preceding [REDACTED].
- (d) That [REDACTED] is close to being implemented.

12. There are some matters raised as part of this appeal that the appointed person is unable to consider. These include the appellant's complaint relating to the CIL charge shown in the planning committee documentation, the personal and financial hardship resulting from any

CIL liability and the delays experienced by the appellant. I must confine my considerations and decision making to matters only relevant to the Regulation 114 appeal, i.e. the calculation of the chargeable amount in accordance with Regulation 40 and Schedule 1 of the CIL Regulations 2010 (as amended).

13. I find the photographic evidence submitted by the appellant showing that the footprint of the original dwelling to be retained as part of [REDACTED] was indeed retained, rather than demolished, persuasive. The CA has provided no evidence to the contrary.

14. However, [REDACTED] is a new permission granted under s.73A of the Town and Country Planning Act 1990. The appellant states that application [REDACTED] was to remedy the deviation from [REDACTED] rather than being a new planning application. I find this incorrect, the permission granted is a distinct and separate planning permission in accordance with the Town and Country Planning Act 1990. It makes no reference to the earlier permission [REDACTED] and cannot be regarded as a variation of conditions attached to the earlier permission. [REDACTED] also permits the conversion of the property into two self-contained flats.

15. This brings me to the crux of the appeal - should any 'set off' for retained in use buildings form part of the calculation in accordance with the formula contained in Schedule 1, Part 1 (6) of the CIL Regulations.

16. Within the formula, KR is said to be equal to (i) *the aggregate of the gross internal areas of 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.*

17. In my view, (ii) in paragraph 16 above does not apply in this case as the property was subject to an enforcement notice the day before planning permission first permitted development, works had been carried out which did not have planning permission and the use of the property as it then existed required further planning permission. The intended use of the property as 2 self-contained flats was a use that would require planning permission.

18. I have therefore considered whether (i) in paragraph 16 above applies, i.e. can a deduction be made for *the aggregate of the gross internal areas of retained parts of in-use buildings.*

19. An 'in use' building is defined in Schedule 1, Part 1, paragraph 1(10) of the CIL Regulations 2010 (as amended). There are two requirements. A relevant building firstly must be *a building which is situated on the relevant land on the day planning permission first permits the chargeable development.* The retained parts of the [REDACTED] are therefore relevant buildings. However, the other requirement is that the property must have 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.* The question is whether the subject property has been in continuous lawful use for a 6 month period between [REDACTED] and [REDACTED].

20. The appellant tells us that the property wasn't occupied for a period between [REDACTED] and [REDACTED] whilst disruptive works were undertaken (Appendix E of the documents submitted with his appeal).

21. In *Hourhope V Shropshire CC (2015)* it was stated that *'If a building has a more active use, such as a factory office or shop, but that use is interrupted for a period, the question whether it thereby ceases to be "in use" must be one of assessment of the length of and*

reasons for the interruption, and the intentions of those who previously used and may in future use the building. No one would say that any of these uses ceased if the factory office or shop was temporarily closed on a non- working day, or for a holiday period. In those circumstances, generally the stock, furniture and any machinery used would remain in situ so that activity could resume after a short period. But it cannot be necessary that it does so in all circumstances- a shop would not cease to be used as a shop if it was closed and all the contents removed for a period of refurbishment for instance, as long as the owner intended to resume use as a shop when the work was complete.

22. In light of the above and the evidence provided by the appellant, I consider that the property was 'in use' throughout the period from [REDACTED] to [REDACTED]. However, the next question is whether that use was a lawful use having regard to the planning history.

23. In the Hourhope case, it was also stated that there was '*no relevant legislative definition of "in lawful use". There is no such definition in the regulations themselves. Although there is a partial definition of "use" in the Planning Act 2008, the definitions in that Act are expressly stated not to apply for the purposes of CIL Regulations. Further, it is agreed that "lawful use" means a use that is lawful for planning purposes. In these circumstances, the question is a normal one of statutory interpretation, starting with the ordinary meaning of the language used, considered in the context of the other provisions of the legislation itself, and the legislative purpose as shown by the terms of the legislation and such external material as it may be permissible for the court to have regard to*'.

24. The Town and County Planning Act 1990 S191 (2) states that '*uses and operations are lawful if no planning enforcement action may be taken against them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason) and they are not in any contravention of any enforcement notice that is in force*'.

25. A contravention notice was issued on [REDACTED] according to the appellant's timeline contained within his Appendix N. The notice was issued in order to establish whether a breach had occurred. It was later determined that a breach/breaches had occurred. It appears that enforcement action could have been taken from [REDACTED] onwards. Having regard to S191(2) above I do not consider it correct that the date of the actual enforcement notice of [REDACTED] (issued) or [REDACTED] (date notice upheld with modification) should be used as the date lawful use ceased. Enforcement action could be taken from the actual date of the breach.

26. I do not know the exact date the breach occurred but on the balance of evidence provided I consider it to be at some time prior to [REDACTED]. According to the CA, it was on or before [REDACTED].

27. The CA state that an enforcement case was opened on [REDACTED] suggesting that the breach/breaches occurred prior to this date. The CA have not submitted evidence supporting the [REDACTED] date but the contravention notice (which the appellant states was issued on [REDACTED]), is strong evidence that a breach had definitely occurred by that date.

28. In light of this, whilst I accept the property may have been in use, I do not consider that the property was *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*. The required 6 month period starting on [REDACTED] is not met.

29. The GIA of the property is not a matter that is disputed by either party.

30. As [REDACTED] is a s.73A permission, CIL should be calculated with reference to Schedule 1, Part 1, of Community Infrastructure Regulations 2010 (as Amended).

31. The chargeable area is therefore [REDACTED] sq m at a rate of £[REDACTED] per sq m and indexation is at lc [REDACTED] and lp [REDACTED]. This gives a charge of £[REDACTED]. The Mayoral CIL Charge at £[REDACTED] per sq m based on lc [REDACTED] and lp of [REDACTED] is £[REDACTED]. The total CIL liability is therefore £[REDACTED].

Conclusion

32. Based on the facts of this case and the evidence submitted, I determine that the Community Infrastructure Levy (CIL) payable in respect of the above development should be £[REDACTED] ([REDACTED]).

[REDACTED] MRICS
RICS Registered Valuer
Valuation Office Agency
[REDACTED]