Appeal Decision

by [redacted] MRICS

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

Valuation Office Agency - DVS
Wycliffe House
Green Lane
Durham
DH1 3UW

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

Appeal Ref: 1786738

Planning Permission Reference: [redacted]

Location: [redacted]

Development: Change of use from HMO to residential (use class C3).

Decision

I determine that the Community Infrastructure Levy (CIL) payable in this case is £0 (zero pounds).

Reasons

1. I have considered all the submissions made by [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 permission [redacted] granted on [redacted] for "*Change of use from HMO to residential (use class C3).*"
   b. The CIL Liability Notice [redacted] issued by the CA on [redacted] for the sum of £[redacted].
   c. Letters dated [redacted] from the CA titled "CIL Liable Development" stating that "*a change of use from HMO to residential creates a dwelling for CIL purposes*." and "CIL Regulation 40 in-Lawful Use Evidence" advising the Appellant that the "*CA has not received sufficient and satisfactory evidence to prove that the existing buildings on site … meet the in lawful use test*" and *"…CIL Liability Notice* [redacted] *does not take into account the floor space for any existing buildings on the site*."
   d. The CA's decision dated [redacted] on its Regulation 113 review stating "*The chargeable amount review is declined. A replacement liability notice containing the same chargeable amount is however being issued alongside this decision to correct the property ownership information and match that provided under the land registry title deeds, as the information supplied on the application form by the planning agent was clearly incorrect.*"

e. Planning permission [redacted] dated [redacted] and permission [redacted] dated [redacted] regarding the original change of use for the property from C3 residential to a House under Multiple Occupation (HMO).
f. The CIL Liability Notice [redacted] reissued by the CA on [redacted] with CIL Liability calculated as £[redacted].
g. The CIL Appeal Form dated [redacted] submitted by the Appellant under Regulation 114, together with documents and correspondence attached thereto dated [redacted] and [redacted] and [redacted].
h. The CA's representations to the Regulation 114 Appeal dated [redacted] together with the Appellant's response dated [redacted].

Background

2. Planning permission [redacted] was granted on [redacted] for "*Change of use from HMO to residential (use class C3).*"

3. A CIL Liability Notice [redacted] in respect of planning permission [redacted] was issued by the CA on [redacted] with the CIL Liability calculated as £[redacted] along with a separate letter of the same date from the CA titled "CIL Liable Development" stating that "*a change of use from HMO to residential creates a dwelling for CIL purposes.*" A separate letter also dated [redacted] titled "CIL Regulation 40 in-Lawful Use Evidence" issued by the CA advised the Appellant that the "*CA has not received sufficient and satisfactory evidence to prove that the existing buildings on site … meet the in lawful use test*" and "…*CIL Liability Notice* [redacted] *does not take into account the floor space for any existing buildings on the site.*"

4. The Appellant requested a Regulation 113 review on [redacted].

5. On [redacted] the CA issued the outcome of its Regulation 113 review stating "*The chargeable amount review is declined. A replacement liability notice containing the same chargeable amount is however being issued alongside this decision to correct the property ownership information and match that provided under the land registry title deeds, as the information supplied on the application form by the planning agent was clearly incorrect."*

6. The CIL Liability Notice [redacted] in respect of planning permission [redacted] was reissued by the CA on [redacted] with CIL Liability calculated as:-

   Residential Zone 2
   Proposed GIA [redacted] *m2*
   Chargeable GIA [redacted] *m2*
   X £[redacted] */me CIL Rate indexed at* [redacted]
   = £[redacted] */m2*
   = £[redacted] *CIL Liability*

   The only amendment was the name change from "[redacted]" on the earlier version of the CIL Liability Notice to "[redacted]" on the later reissued notice.

7. An appeal under Regulation 114 against the chargeable amount dated [redacted] was submitted to the VOA on the same date.

Appeal Grounds

8. The appeal is made on two grounds:-

1) *The CIL liability should be £0 as the existing floorspace should be deducted from the chargeable amount calculation under lawful use provision.*

2) *The CIL liability should be £0 as the existing floorspace should be deducted from the chargeable amount because the permitted use was a small HMO for less than 6 persons, so should have been automatically deducted from the CIL chargeable amount calculation regardless of continuous lawful use.*

9. I have considered the respective arguments made by the CA and the Appellant, along with the information provided by both parties.

Consideration of Appeal Ground 1 - Lawful in use off-set

10. The Appellant argues that the property was lawfully in use for 6 months in the three year period up to [redacted] (ie from [redacted]) as evidenced by:-

- *A statement by [redacted] confirming he was resident at the property continuously between [redacted] and [redacted].*

- *A statement from [redacted] confirming that he managed the property as a HMO on behalf of his family from [redacted] until it was placed on the market for sale in [redacted] the property was let as a HMO for more than 6 months during the three year period [redacted] to [redacted], during which time it never had more than six residents, the last of whom left in [redacted].*

- *Thames Water invoice undated but issued in advance covering the period [redacted] to [redacted] for the sum £[redacted] including arrears of £[redacted] from the previous unpaid invoice dated [redacted].*

11. The CA state the relevant period is actually three years dating back from [redacted] as the date planning permission first permitted the development. For this reason, the Appellant would need to supply sufficient information and information of sufficient quality that a lawful use had been operating continuously for a minimum of 6 months between [redacted] and [redacted].

12. The CA contend that the last 15 months of the relevant period up to [redacted] can be ignored as the property was marketed for sale in [redacted] with vacant possession, and they conclude that the property was vacant between [redacted] and the completion of sale on [redacted]. When they conducted their Regulation 113 review the CA noted there was no current public registration of the property as a registered HMO, which they feel suggests the HMO use had not operated since the [redacted] purchase by the Appellant. They argue this would suggest the premises were either vacant between [redacted] and [redacted], or in use as a dwelling without the benefit of a planning permission until such time as planning permission [redacted] was granted on [redacted]. The CA argue it is unclear what the situation actually was, but the Council Tax Certificate indicates the property was vacant and that the Council Tax Bill shows it has been charged as a dwelling since purchase in [redacted]

13. The CA argue that if a C3 dwelling was the lawful use, such use for 6 months cannot be demonstrated as the premises were vacant on [redacted] when the sale completed, and 6 months C3 use had not occurred by the time they carried out the Regulation 113 review on [redacted].

14. The CA note the following information:-

- *Gas Bill – showing opening of account [redacted] to [redacted] addressed to [redacted] in the name of the Appellant* - they argue this doesn't prove occupancy, but only identifies the person being billed.

- *Council Tax Bill: Issue Date* [redacted] *- in the name of* [redacted] – they note this shows empty property discount of 3 months was applied from [redacted] to [redacted] which then automatically ended regardless of whether the property was occupied or not.

15. Whilst a Gas Bill and Council Tax Bill had been submitted in the name of the Appellant, this information led the CA to conclude that the property was not in use until at least [redacted]

16. The CA comment that whilst the [redacted] Utility Bill submitted by the Appellant covers a period of more than 6 months from [redacted] to [redacted] (which is within the lawful use timeframe) this simply demonstrates that water rates were being charged for the property but doesn't help to confirm the use of the property during that time.

17. The Appellant argues that when a property is not in use [redacted] do not issue any invoices or charge for services, and this was the case at the property when it was unoccupied. They therefore argue that the production of the water bill reflects a period of actual use for the property.

18. The Appellant also comments that the statement from [redacted] states that he lived there between [redacted] and [redacted], which is backed by evidence from the electoral register [redacted] that shows him listed as an occupant somewhere in the combined address of [redacted]. This suggests he was still resident in [redacted], although his own statement confirms that he left the property when it ceased trading as a HMO in [redacted]. The Appellant argues that [redacted] is still listed on the electoral register as resident at [redacted] until [redacted] as he moved next door to 113 but never changed his correspondence address. They argue that the photographs provided of Thorsten's post confirm he was a resident at the address.

19. The Appellant notes that the signed statement from [redacted] confirms the following:

- *The property was managed by him from* [redacted] *on behalf of the family.*
- *It was used and occupied as an HMO until it was put to market for sale in* [redacted] *following the deaths of his relatives.*
- *The Property was a small HMO and never housed more than 6 residents.*
- *The connecting door was sealed in* [redacted] *by his sister.*
- *The last resident left* [redacted]*.*
- *The property was in lawful use between* [redacted] *and* [redacted]*.*

20. The CA note that the additional evidence submitted by the Appellant as part of this appeal is helpful, as it narrows the lawful use timeframe to [redacted] to some point in [redacted] when the last resident left - effectively an 8 month window within the three years, and confirms that the premises were vacant following this time up to the point when planning permission was granted for the change in use to a dwelling, and further provides additional information on how the premises might have been operating as a small HMO.

21. The CA believe this additional evidence appears to reflect some evidence of both occupancy for a minimum of 6 months and use of the premises as a small HMO. They do not, however, consider either of these in their own right or combined to be sufficiently robust to confirm that either:

a) The lawful use in planning permission was a small HMO and thus that the floorspace can be automatically deducted – the fact this property is listed as a combined address in the Electoral Register confuses the matter further.
b) That there was continuous lawful use under a sui-generis HMO use because the use remains in dispute.

22. The CA does accept, however, that the evidence indicates a minimum of 6 months continual occupancy of some form of HMO use.

Decision on Appeal Ground 1

23. This appeal ground arises from disagreement surrounding the issue of identifying the lawful in-use buildings as a result of Schedule 1 of the CIL Regulations 2010 (as amended), which provides for the deduction or off-set of the GIA of retained parts of in-use buildings from the GIA of the total development in calculating the CIL charge (a KR (i) deduction).

24. Schedule 1 of the CIL Regulations 2010 (as amended) Part 1 – standard cases – 1 (10) 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 6 months within the period of three years ending on the day planning permission first permits the chargeable development.

25. The Appellant's contention is that the building was in lawful in use for 6 months as a small HMO during the relevant three-year period [redacted] to [redacted], when planning permission [redacted] first permitted the change of use.

26. The Appellant has provided a range of documentation regarding the use of the property during this time including:-

- *A statement by* [redacted].
- *A statement from* [redacted].
- *A* [redacted] *Water invoice.*

27. The evidence submitted indicates that the premises were occupied as a HMO from [redacted] up to [redacted] when the last tenant vacated, as evidenced by [redacted]'s statement. This is further supported by photographs taken approximately 15 months later, when marketing particulars were prepared for the property around [redacted] (as included within the CA's submission) showing the property to have been marketed for sale as a 5 bedroom dwelling. There were no floorplans published with the sales particulars, but the premises appear to be vacant at the time the photographs were taken.

28. [redacted]'s statement confirms that he was resident at the property between [redacted] and [redacted] and information from the Appellant indicates that he resided at 113 for some time thereafter, but undated photographs provided by the Appellant show that he was receiving post addressed to [redacted]. The Appellant has also submitted evidence from the electoral register [redacted] that shows [redacted] listed as an occupant somewhere in the combined address of [redacted].

29. The evidence indicates that lawful use as a HMO occurred up to [redacted] – a period of 7 months within the relevant three year period [redacted] to [redacted]. The undated [redacted] Water invoice issued in advance covering [redacted] to [redacted] includes arrears from the previous unpaid invoice dated [redacted]. Taken in isolation, this might indicate that no one was collecting mail at the property between early [redacted] and [redacted], but the statements from [redacted] and [redacted] contradict this to some degree.

30. Later evidence submitted to the CA by the Appellant comprises a gas bill showing the opening of an account in the name of the Appellant for the period [redacted] to [redacted] addressed to [redacted], but this would only show their occupation for just under 4 months from [redacted] to [redacted]. Similarly, a Council Tax Bill was issued on [redacted] in the name of [redacted], and this shows empty property discount of 3 months was applied from [redacted] to [redacted]. Once again, this only shows the Appellant (which I assume to be incorrectly identified as [redacted]) was responsible for the property for a period of just under 4 months from [redacted] to [redacted].

31. The CA note that "*the evidence does reflect a minimum of 6 months continual occupancy of some form of HMO use*", and evidence submitted by the Appellant confirms this. The matter to consider is whether this use was lawful.

32. Whilst the HMO might at one time have operated as two combined houses [redacted] and [redacted], the [redacted] planning permission [redacted] only permits "*change of use of* [redacted] *from residential to house in multiple occupation*" and places no limit on the number of occupants. The later variation permission [redacted] dated [redacted] permits "*construction of internal connecting door*" (between the dining rooms of [redacted] and [redacted]) and *condition 2* states: "*This permission shall ensure for the benefit of* [redacted] *&* [redacted] *only and the connecting doorway…shall be closed permanently within one month of the date* [redacted] *&* [redacted] *cease to reside at nos* [redacted] *and* [redacted]". This implies that the doorway was created merely to enable the owners to move between separate houses without going outside, which is confirmed by the statement from their grandson [redacted], and that each property was operated as a separate HMO.

33. The sales particulars dated [redacted] prepared by [redacted] Estate Agents show the connecting doorway within the dining room of [redacted] as being still present, and we are advised in [redacted]'s statement that his sister later sealed the doorway in [redacted]. [redacted] has confirmed that he operated the business for his Grandparents until they passed away, when the property was sold. The Appellant advises us "*Both properties were operated as HMO's and owned by the same family. In* [redacted] *the owners of the property passed away and the family members who inherited the property closed the HMO operation and sold the property*". The last tenant [redacted] moved from [redacted] to [redacted] in [redacted] following the death of [redacted], which is when the minimum 6 months of lawful use at 111 ended. It would appear from the electoral role information provided by the Appellant that [redacted] continued in occupation at [redacted], which indicates that property continued in operation as a separate HMO when such use at [redacted] had ended and the property lay vacant. This further supports the view that both properties were operated as separate HMOs, and the interconnecting door was only ever intended for the convenience of the elderly owners.

34. Planning permission [redacted] refers only to [redacted] changing use to a HMO in [redacted] and places no restriction on the number of occupants. Whilst there was a later personal variation permission with a restrictive condition pertaining to an interconnecting doorway and action should have been taken to comply with this condition within 1 month of when [redacted] ceased to reside at the property, *condition 2* only required the door to be closed permanently, it did not require it to be removed. In my opinion there is no evidence to suggest that this condition was not complied with. The departure of the last resident in [redacted] after [redacted]' death indicates that lawful use of 11[redacted] 1 as a separate HMO had occurred for a period of at least 6 months within the relevant three-year period [redacted] to [redacted].

35. It is my opinion that from all the information provided it can be shown that the property was lawfully "in-use" as a HMO in compliance with planning permission [redacted] for a period of at least 6 months within three years of the grant of planning permission on [redacted], and the "lawful use" requirement of Schedule 1 of the CIL Regulations 2010 (as amended) is therefore met.

36. The GIA of the existing building must therefore be off-set as a KR (i) deduction against the GIA of the development for the purposes of calculating the CIL charge.

Consideration of Appeal Ground 2 –the property was a HMO for less than 6 persons, therefore an automatic deduction from CIL should apply

37. The Appellant argues that whilst planning permission was granted for change of use from HMO to C3, there was a lack of information regarding the previous classification. They argue that permission should have been allowed through permitted development, but as it was assumed by the CA that the HMO was large (when in fact it was occupied by six or less people) and the CA have assumed that it was operating as a *sui generis* HMO. [redacted] confirms that the property never had more than six residents, the last of whom left in [redacted].

38. The CA contend that the proposed works permitted are for a change of use to a C3 dwelling, which they argue falls under the definition of dwelling as set out in clause 2: Interpretation of the CIL regulations 2010 (as amended) ' "*dwelling" means a building or part of a building occupied or intended to be occupied as a separate dwelling (other than for the purposes of Part 7)*'.

39. The CA also argue that under the Planning Act 2008 the definition of development for CIL purposes is any works done to a building. This includes change of use.

40. They also contend that in relation to commencement, the relevant definition of commencement under CIL Reg. 7 relates to the earliest date on which a "*material operation*" is begun. This has the same meaning as Section 54(4) of the T&CPA 1990 (as amended) (time when development begun). Section 54(4) of the T&CPA 1990 - ' "*material operation*" means—

    (a)any work of construction in the course of the erection of a building;
    (aa)any work of demolition of a building;
    (b)the digging of a trench which is to contain the foundations, or part of the foundations, of a building;
    (c)the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b);
    (d)any operation in the course of laying out or constructing a road or part of a road;
    (e)any change in the use of any land which constitutes material development.'

41. In this instance based on the permitted works the CA argue that clause (e) above would apply, and on the basis of the above assessment:

    i) The proposed works fall under the definition of development for CIL purposes
    ii) The works are automatically chargeable as they are creating a dwelling for CIL purposes.

42. The CA therefore conclude that the change of use is not outside the meaning of development for CIL purposes and thus is CIL liable and requires a CIL chargeable amount calculation to be undertaken.

43. The CA contend that if the property had been de-listed with Environmental Health Residential Services as an active HMO prior to being put to market for sale that would not automatically change its use in planning terms to a C3 dwelling, especially if the HMO permission was for a *sui generis* use. They state that whilst the Appellant has stated that the lawful use was what is now known as a C4 HMO, the evidence available from the planning history cannot substantiate this, nor substantiate that the planning permission has been complied with in terms of its restrictive conditions. Having been put up for sale as a single dwelling the CA can only assume that the internal door in the dining room had been permanently closed.

44. The CA state that this inconsistency and lack of clarity leads them to conclude that the probable use was a *sui generis* HMO, and for that reason it would not have benefited from automatic permitted development rights under the Town & Country Planning General Permitted Development Order (2015) (GDPO) for use as a C3 dwelling without

the benefit of planning permission. For this reason, the existing floorspace cannot be automatically deducted from the chargeable amount calculation as it doesn't comply with the requirements of Schedule 1 of the CIL Regulations 2010 (as amended) as a K(ii) deduction for retained parts.

Decision on Appeal Ground 2

45. This appeal ground revolves around the issue that the property was formerly a house in multiple occupation (HMO), which then changed to a Use Class C3 dwelling house and therefore if it qualifies for a K(ii) deduction for 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.

46. The Appellant contends that under the Town & Country Planning General Permitted Development Order (2015) - Class L – small HMOs changed to dwelling houses and vice versa are enabled under "Permitted development":

    L. Development consisting of a change of use of a building—

    (a)from a use falling within Class C4 (houses in multiple occupation) of the Schedule to the Use Classes Order, to a use falling within Class C3 (dwelling houses) of that Schedule;

    (b)from a use falling within Class C3 (dwelling houses) of the Schedule to the Use Classes Order, to a use falling within Class C4 (houses in multiple occupation) of that Schedule.

47. The GPDO also states under "Development not permitted":

    L.1 Development is not permitted by Class L if it would result in the use—

    (a)as two or more separate dwelling houses falling within Class C3 (dwelling houses) of the Schedule to the Use Classes Order of any building previously used as a single dwelling house falling within Class C4 (houses in multiple occupation) of that Schedule; or

    (b)as two or more separate dwelling houses falling within Class C4 (houses in multiple occupation) of that Schedule of any building previously used as a single dwelling house falling within Class C3 (dwelling houses) of that Schedule.

48. Strictly, this issue does not now need to be considered, as my decision in respect of appeal ground 1 is that K(i) off-set of the existing GIA against the development GIA should be given in accordance with Schedule 1 of the CIL Regulations 2010 (as amended). However for completeness I have considered the matter below.

49. CIL Regulation 9 (1) is clear on the point that the "*chargeable development is the development for which planning permission is granted*". It is clear from the CIL Liability Notice issued by the CA that the development permitted under [redacted] was the basis for the CA's CIL calculation and is described as "*Change of use from HMO to residential (use class C3).*"

50. It is noted that there was no restriction within the [redacted] planning permission [redacted] to less than seven occupants and that [redacted] next door which appears to be similar in size and style was specifically granted separate planning permission in [redacted] as a *sui generis* large HMO. Given the size of [redacted] and the fact that some of the rooms could have been occupied as doubles, notwithstanding the evidence from the previous operator

and tenant that there were never more than 6 occupants, there is not sufficient evidence to confirm that the property was a small HMO under Use Class C4. In consideration of this and the fact that planning permission [redacted] was required for a change of use I do not consider that the retained parts should qualified for a KR(ii) deduction in accordance with Schedule 1 – Part 1 – of the CIL Regulations pertaining to Standard Cases.

Calculation of CIL Liability

51. The CIL Liability is therefore to be calculated using rates and indices at [redacted] relevant at the date of planning permission [redacted].

52. The property is located in the CA's adopted charging schedule ([redacted]) Residential Rate Zone 2, which is £[redacted] /m2 and subject to indexation. The rate to be applied is not in dispute between the parties.

53. The relevant indexation values within the Part 1 formula are:
Ip = [redacted]
Ic = [redacted]

This produces an indexation factor of [redacted]

54. The CA calculated the GIA by scaling from the approved plan drawing number [redacted]. No scale floorplans were provided for the garage(s), so the block plan was used to measure these. The total chargeable GIA is measured thus:-

Ground Floor [redacted] *m2*
First Floor [redacted] *m2*
Second Floor [redacted] *7m2*
Garages [redacted] *m2*
TOTAL [redacted] *m2 GIA*

55. The total areas marked for each floor on this plan are larger for the ground and first floors, but slightly smaller for the second floor/loft. The total difference between the two total floor areas for the house (excluding the garages) is:-

Appellent's total [redacted] *m2 less CA's total* [redacted] *m2 =* [redacted] *m2*

56. The plans do not specify whether the marked areas are GIA or some other basis of measurement, and for this reason it would seem reasonable to utilise the CA's smaller total GIA for the purposes of calculating CIL.

57. The CIL liability is thus calculated as:-

Residential Zone 2
Proposed GIA [redacted] *m2*
Less
Existing GIA [redacted] *m2*
Chargeable GIA 0 m2
Therefore CIL Liability is £0 (zero)

Decision on CIL Liability

58. 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 £0 (zero pounds).

[redacted] DipSurv DipCon MRICS
RICS Registered Valuer
Valuation Office Agency
14 March 2022