

Appeal Decision

by [REDACTED] MRICS VR

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: 1800911

Address: [REDACTED]

Proposed Development: Demolition of existing buildings and re-development of the site with part 4-storey, part 6-storey buildings containing 98 flats (4 x 3-bed, 35 x 2-bed and 59 x 1-bed) with ground floor retail and gym units, associated parking and cycle/refuse storage (affects a right of way).

Planning Permission details: Granted by [REDACTED] on [REDACTED], under reference [REDACTED].

Decision

I confirm that the Community Infrastructure Levy (CIL) payable in this case should be £[REDACTED] ([REDACTED]) and hereby dismiss this appeal.

Reasons

Background

1. I have considered all the submissions made by [REDACTED] [REDACTED] of [REDACTED] [REDACTED] (acting on behalf of the appellant, [REDACTED]) and the submissions made by the Collecting Authority (CA), [REDACTED].

In particular, I have considered the information and opinions presented in the following documents:-

- a) CIL Appeal form dated [REDACTED].
- b) CIL Appeal e-mail from Appellant with 26 attached documents, received on [REDACTED].
- c) Grant of Conditional Planning Permission [REDACTED], dated [REDACTED].
- d) The CIL Liability Notice (ref: CIL – [REDACTED]) dated [REDACTED].
- e) The CIL Liability Notice (ref: CIL – [REDACTED]) dated [REDACTED] - a second Liability Notice with a similar amount and calculation as previous, but sent to the Appellant's Architects.

- f) CA's Regulation 113 Review dated [REDACTED], stating that it was of the view that it does not have sufficient information or information of sufficient quality to demonstrate actual use of the building.
- g) CA's Additional Statement of Case document, dated [REDACTED].
- h) Appellant's comments on the CA's Statement of Case document, which is dated [REDACTED] and where the Appellant considers that the CIL liability is £[REDACTED].
- i) CA's additional statement received on [REDACTED].

Grounds of Appeal

1. Planning permission was granted for the development on [REDACTED], under reference [REDACTED].
2. On [REDACTED], the CA issued a Liability Notice (CIL – [REDACTED]) for a sum of £[REDACTED]. This was based on component chargeable areas and chargeable rates as follows:-

Use	GIA of Development m2	Net Increase in GIA m2	Chargeable Area m2	Rate per m2	Index of Inflation	Total CIL Amount
Residential	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Retail	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Gym	[REDACTED]	[REDACTED]	[REDACTED]	0	[REDACTED]	[REDACTED]

3. The Appellant's architect requested a review of this charge within the 28 day review period, under Regulation 113 of the CIL Regulations 2010 (as amended). The CA responded on [REDACTED], stating that it was of opinion that the building has not been in continuous lawful use and that the CIL amount of £[REDACTED] is correct.
4. On [REDACTED], the Valuation Office Agency received a CIL Appeal made under Regulation 114 (chargeable amount) from the Appellant, contending that the CA's calculation is incorrect. The Appellant was of the opinion that the property should have a lower CIL charge of £[REDACTED] as the existing GIA was in qualifying use and can be off-set (the Appellant subsequently revised their opinion to £[REDACTED] in a later document, dated [REDACTED]).
5. The Appellant's appeal can be summarised to two core points:-

Firstly, the Appellant considers that the development comprise two buildings:-

- I. One single building comprising [REDACTED].
- II. The remainder of the site as a single building, spanning [REDACTED] and rear of [REDACTED].

Secondly, the single contended building of [REDACTED] and rear of [REDACTED] can be considered wholly in-use by virtue of Schedule 1 Part 1 1(10) of the 2019 Regulations.

The CA considers that there are four separate buildings:-

- I. [REDACTED].
- II. [REDACTED].
- III. [REDACTED].
- IV. Rear of [REDACTED].

The CA considers that the lawful use test must be met for each individual building in order for its floor area to be used as deductible floor area in the calculation of the CIL chargeable amount.

- 6. The Appellant's primary contention is that the CIL calculation should reflect 'in-use' floorspace of the retained buildings (in other words, the existing area floor space, which the appellant considers is an eligible deduction, which can be offset against the chargeable area).
- 7. It appears that there is no dispute between the parties in respect of the applied Chargeable Rates or to the indexation.

Decision

- 8. The CIL Regulations Part 5 Chargeable Amount, Schedule 1 defines how to calculate the net chargeable area. This states that the "retained parts of in-use buildings" can be deducted from "the gross internal area of the chargeable development."

Furthermore, Schedule 1 of the 2019 Regulations allows for the deduction of floorspace of certain existing buildings from the gross internal area of the chargeable development, to arrive at a net chargeable area upon which the CIL liability is based. Deductible floorspace of buildings that are to be retained includes;

- a. retained parts of 'in-use buildings', and
 - b. 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.
- 9. Under Schedule 1 Part 1 1(10) of the 2019 Regulations, to qualify as an 'in-use building' the building must contain 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.
 - 10. Under Schedule 1 Part 1 1(8) of the 2019 Regulations, where the CA does not consider that it has sufficient information, or information of sufficient quality, to enable it to establish that any of the existing buildings qualify as an 'in-use buildings' it may deem the gross internal area of those buildings to be zero. Whether a building is in use, is a matter of fact and degree, based upon the evidence.
 - 11. At the heart of the matter is the continuous use of the accommodation (the existing building floorspace) which the Appellant considers is an eligible deduction, which can be offset in the CIL calculation. Whilst there was original disagreement/confusion between the parties on the date of grant, both parties have now agreed that in calculating any offset, the three year lawful in-use period runs from [REDACTED] and [REDACTED]. Accordingly, I am required to determine if the Appellant has provided sufficient evidence that lawful use has been carried on within the subject building, for at least a continuous period of six months within this period.

Determination if 2 or 4 buildings?

12. The Appellant contends that there are two buildings (not four) citing the front of the site, which encompasses the buildings known as [REDACTED] and those rear of [REDACTED] are the first building and [REDACTED] is the second building. Specifically, the Appellant contends that the submitted drawings clearly shows [REDACTED] being clearly linked throughout the basement and ground floors to the [REDACTED]. In addition, the Appellant cites the Land Registry Title deed, under entry 3 of the Title - *“the owners or occupiers for the time being and all those authorised by it of the property known as [REDACTED] [REDACTED] the rights in fee simple to pass and re-pass over the lobby at mezzanine level at rear of [REDACTED] to provide access to the lavatories situated on the mezzanine thereof and the right to use the said lavatories.”* and again *“the owners or occupiers for the time being and all those authorised by it of the property known[sic] as [REDACTED] the right of way in fee simple over the staircase leading to the first floor offices at the rear of [REDACTED] aforesaid and the lobby on the first floor thereof which for the purposes of identification only is shown edged in red on the attached plan in order to fit a fire door (in the position shown by a X on the said plan) and to use the said staircase as a fire escape route.”*

13. Of note, there is no definition of a ‘building’ within the CIL regulations. Whilst the extent of the land and rights stipulated within a Land Registry Title provides a reliable record of information about ownership of and interests affecting land and property, I am wholly unpersuaded to accept the Appellant’s view that there are two buildings for CIL purposes; I clarify as follows:-

- I. In the CIL: Additional Information Form signed by the Appellant dated [REDACTED] for Question 7 (Existing Buildings) - *How many existing buildings on the site will be retained, demolished or partially demolished as part of the development proposed?* The appellant’s stated response was three.
- II. In the Appellant’s Planning Statement (dated [REDACTED]) submitted with the planning application, page 4 of the document cites that there are three separate properties for the proposed development site.
- III. It is clear to me that the component buildings have four separate addresses noted on the Ordnance Survey plan and have a history of being separate buildings. The component buildings have some architectural differences; although they are linked in terms of Title, in my view the link falls short to consider them as unified buildings and I am of opinion that they have their own identity for CIL purposes. Whilst I concede that there is some ambiguity in determining between three or four buildings, the evidence clearly points to more than two buildings.

14. In conclusion, I determine that for CIL purposes, I agree with the CA that there are four buildings and each building element must satisfy the lawful ‘in-use’ test. My decisions on the lawful ‘in-use’ test of each of the four buildings are as follows:-

[REDACTED]

15. The Appellant has provided the following evidence as part of the appeal:-

A lease dated [REDACTED] between [REDACTED] and [REDACTED]. Whilst the lease appears not to have been signed by [REDACTED].

A letter dated [REDACTED] from [REDACTED] terminating (with 3 months’ notice) the [REDACTED] lease.

A Business Rates bill dated [REDACTED] to [REDACTED] for £[REDACTED].

A statutory declaration dated [REDACTED], citing the lessee’s use for his business as ancillary storage and offices, between [REDACTED] to [REDACTED].

16. Whilst I accept that [REDACTED] remained legal leaseholders in possession for approximately 30% of the requisite three year period, beyond the rates bill and the Statutory Declaration, I have not been offered any factual evidence that Fussell Developments were *actually using* the property. However, this is a moot point given the overriding position of the planning use of the building - the established planning use of the building is clearly as a Snooker Hall and Premises. The CA has evidenced that planning permission for the snooker hall use was granted in [REDACTED] (First floor, ref [REDACTED]) and [REDACTED] (Ground floor, ref [REDACTED]). In addition, the Appellant's Business Rates Bill also indicates it is a Snooker Hall and it is recorded as such on the VOA website. A snooker hall is Use Class E in planning law (formerly D2 Use Class as at [REDACTED], when the planning application was submitted to the CA). D2 Use is not Office use (previously Use Class B1) which is the contended use of the building by the Appellant. I have not been provided with any evidence from the Appellant of a subsequent change of planning use from a Snooker Hall to Office/warehouse use and I agree with the CA that the suggested office use of the building was not lawful for the period stated. Accordingly, I conclude that the building does not qualify as an 'in-use building' for CIL purposes.

[REDACTED]
17. The Appellant has provided the following evidence as part of the appeal:-

Licences to occupy [REDACTED] made between [REDACTED] and [REDACTED] between the following dates:-

between [REDACTED] - [REDACTED] (licence dated [REDACTED]);
between [REDACTED] - [REDACTED] (licence dated [REDACTED]);
between [REDACTED] - [REDACTED] (licence dated [REDACTED]).

In addition, to photographic evidence, I have also been provided with several invoices and copies of bank transactions showing payments made from [REDACTED] to [REDACTED] during the Licence to occupy periods.

However, the CA cites the [REDACTED] website, which states:-

All cars are checked in and parked at our secure compound which is less than 3 miles from all cruise terminals. Our compound has CCTV recording 24/7 and is secured by steel entry barriers, and also features security lighting and perimeter fencing.

We NEVER store vehicles anywhere other than our secure car park, and unlike some competitors, will under no circumstances park your car on a street.

The CA also cites that the Valuation Office Agency (VOA) website has the Rating List entry of [REDACTED] recorded as 'Building in disrepair', with a rent rateable value of £0, which has been in effect since [REDACTED]. Given the above, the CA considers that the Appellant has not demonstrated that the building has been in continuous lawful use during the relevant 'in use' period.

Of note, on page 5 of the Appellant's Design and Access Statement (dated [REDACTED]), which was submitted with the planning application, it was stated that the building is a '*former office building, which has been vacant for a number of years*'. In addition, a repeated statement that the building is '*a vacant former office building...*' is on page 30 of the Appellant's Design and Access Statement.

Whilst I have considered the submitted evidence on this disputed item, which includes photographic evidence of cars being stored by the licensee during the requisite period, in my view, the overriding position of the planning use of the building is of primary import. The Appellant claims the building was lawfully used for cruise passenger car parking; however, in planning law, the historic and hence lawful use of

the building appears to be for office use, which is clearly contrary to cruise passenger car parking. Accordingly, I conclude that the building does not qualify as an 'in-use building' for CIL purposes.

18. As part of the Appellant's appeal, the same licences to occupy and rent payments have been supplied for this property as [REDACTED]. The dispute and argument between the parties is similar to that of [REDACTED] above.

Having considered the submitted evidence on this disputed item, I have come to a similar conclusion as per my decision on [REDACTED] above - the Appellant claims the building was lawfully used for cruise passenger car parking; however, in planning law, the lawful use of the building appears to be office use, which is clearly contrary to cruise passenger car parking. Accordingly, I conclude that the building does not qualify as an 'in-use building' for CIL purposes.

19. I have not been provided with any factual evidence of any occupation of this building. Furthermore, the CA's Business Rates team opines that this building has been vacant since [REDACTED].

The Appellant appears to be relying on the contention that it is considered to be part of [REDACTED] and thus the accommodation can be off-set under Schedule 1 Part 1 1(10) of the 2019 Regulations. As I have determined it is separate building and have not been provided with any factual evidence of its occupation, it is clear to me that the building does not qualify as an 'in-use building'.

Final Appeal Decision

20. Having considered the facts of the case, I determine that none of the four building elements satisfy the lawful 'in-use' test and consequently the accommodation cannot be offset.
21. In conclusion, having considered the facts of the case and all the evidence put forward to me, I therefore confirm the CIL charge of £[REDACTED] ([REDACTED]) as stated in the Liability Notice dated [REDACTED] and hereby dismiss this appeal.

[REDACTED] MRICS VR
Principal Surveyor
RICS Registered Valuer
Valuation Office Agency
11th November 2022