Appeal Decision

by [redacted] BA Hons, PG Dip Surv, 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: 1828395

Planning Permission Reference: [redacted]

Location: [redacted]

Development: Change of Use from former working mens club (class E(d)) to form 5 no. 1-bed units (class C3) and associated works.

Decision

I determine a CIL charge of £[redacted] ([redacted]).

Reasons

1. I have considered all the submissions made by [redacted] of [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 reference [redacted] dated [redacted].
    b. CIL Liability Notice [redacted] issued by the CA dated [redacted] with CIL Liability calculated at £[redacted].
    c. The CA's Regulation 113 review dated [redacted] further to the Appellant's request.
    d. The CIL Appeal Form dated [redacted] submitted by the Appellant under Regulation 114, together with documents and correspondence attached thereto.
    e. Further plans and areas in respect of permission [redacted], provided to me by the CA on the [redacted], following my request for additional information to the parties on the [redacted].

Background

2. The case before me is a regulation 114 chargeable amount appeal and I am required to determine if the CIL liability of £[redacted] stated in notice [redacted] is correct. The appellant believes the correct liability is £[redacted], whilst the CA maintains £[redacted] is correct.

3. The site in question is a former Working Mens' Club with attached steward's flat. From the information provided, I understand the Club ceased trading on [redacted] and has not operated since.

4. Planning permission was granted on [redacted] under reference [redacted]. This allowed "change of use from former working mens club (Class D2) to form 5no. dwellings (Class C3) and associated works".

5. From the CA's regulation 113 review, I understand that a CIL commencement notice was submitted on [redacted] advising a commencement date of the [redacted]. The CA advise they undertook a site visit on [redacted] and from this inspection they have concluded that planning permission [redacted] has never been implemented and may have expired on [redacted].

6. Planning permission [redacted], which is the subject chargeable development in this appeal, was approved on [redacted] and allowed, "Change of Use from former working mens club (Class E(d) to form 5 no. 1-bed units (class C3) and associated works."

7. The Appellant opines within their submission that the correct sum of CIL in this case is £[redacted]. They advise this is based on a net chargeable area of [redacted] square metres (sq. m). They explain that the existing building comprises of a former working mens club with associated three-bedroom residential flat which they describe as being structured independently. The Appellant states that in their opinion, the gross internal area of the flat which totals [redacted] sq. m, should be offset from the total GIA of the chargeable development. The Appellant's reason for offsetting the GIA of the existing flat is because they deem its current use to fall within Use Class C (residential) and note that it would not require any material changes or planning permission to allow the use granted within permission [redacted].

8. The CA have not made any direct representations in respect of this Regulation 114 appeal and have advised they rely on the content and evidence provided within their regulation 113 chargeable amount review to support their position. From reading this review, I understand the CA maintain the correct CIL liability is £[redacted], having verified the correct application of indexation indices, ensured the correct rates from the charging schedule have been adopted and that the gross internal area (GIA) of the chargeable development is correct. The CA then explain why they do not agree that the floor area of the existing flat can be offset.

9. The CA explain that the CIL legislation only allows existing retained floor space to be offset under two circumstances; i) KR (i) retained parts of in-use buildings or ii) KR (ii) for other relevant buildings retained parts where the 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."

10. Both parties agree that no part of the existing property was in use at the relevant date and consequently that KR (i) would not apply here.

11. The CA opine that KR (ii) also does not apply, stating that; "from a planning perspective the only lawful use that exists at the site is the Class E use." The CA does not agree with the Appellant that the existing steward's flat has C3 planning permission. They explain the flat accommodation is ancillary to the primary Class E use and cite case *R (oao Hourhope Ltd) v Shropshire Council [2015] EWHC518* to support their position.

12. The CA have also cited the case of *Giordano Ltd., R (On the Application of) V London Borough of Camden Council [2019] EWCA Civ 1544* (Giordano case). The CA argue that the Giordano decision does not apply in this instance because permission [redacted] which granted change of use to C3 back in [redacted], has never been implemented and expired on [redacted]. They therefore conclude, *"there is no credible evidence that the planning permission [redacted] has been lawfully commenced, thus not allowing the automatic deduction by default under a live and implementable existing full permission in this case."*

13. The Appellant has not specifically mentioned KR (ii) or earlier planning permission [redacted], but their submission requests the offsetting of the existing steward's flat because it would not require any planning or changes for it to qualify as a Use Class C property showing an awareness of the principles of KR (ii).

Decision

14. Schedule 1 of the CIL Regulations 2010 (as amended), sets out when a KR reduction can be applied:-

    (i) 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;

15. A "relevant building" is defined in Schedule 1, Part 1, paragraph 1(10) as "*a building which is situated on the relevant land on the day planning permission first permits the chargeable development*". There is no doubt that the subject fulfils the criteria of a relevant building and both parties agree the building was not an "in-use" building. We are therefore left to consider whether the intended use following the completion of the chargeable development (C3 residential) is one that could be carried on lawfully and permanently without further planning permission on the day before planning permission first permits the chargeable development ([redacted]).

16. In the Giordano case, it was found that on the relevant date, as a result of an earlier planning permission, the building could already be lawfully used for the same purpose as that permitted by the new development. The Court of Appeal commented "*The ability to carry on the use in question – or for it "to be carried on" – rests on the lawfulness of doing so, without any further planning permission having to be granted either for the use itself or for any necessary operational*

development. It does not depend upon the building being actually occupied in that use on the relevant day, or upon its having already been physically adapted for the use. It entails the possibility of the use being lawfully and permanently carried on. The right to carry it on need not have been exercised yet. An extant and implementable planning permission will suffice."

17. Earlier planning permission [redacted] granted change of use from Class D2 to C3 on the [redacted]. This permission had not lapsed on the day before the subject planning permission was granted, even though works did not commence until the [redacted]. Therefore, on the [redacted], C3 use could have been lawfully and permanently carried out without further planning permission.

18. I note the CA's view that the works need to have commenced for the Giordano principle to apply but I consider them mistaken in this belief. It was necessary for the works to have commenced in the Giordano case as the original permission was granted in 2011 and the permission for the chargeable development in 2017. If the works had not commenced in the Giordano case, the original permission would have lapsed, and the proposed use could not have been carried out lawfully without a further permission. The words of Lindblom LJ are very clear, "*An extant and implementable permission will suffice."* which, permission [redacted] was on [redacted].

19. The Community Infrastructure Levy (CIL) (Amendment) (England) (No. 2) Regulations 2019 (the '2019 Regulations') came into force in England on 1 September 2019. The new Regulation 40 requires the CA to calculate the amount of CIL payable ("chargeable amount") in respect of a chargeable development in accordance with the provisions of Schedule 1 as detailed below.

(4) The amount of CIL chargeable at a given relevant rate (R) must be calculated by applying the following formula—

$$\frac{R \times A \times I_P}{I_C}$$

where—
A = the deemed net area chargeable at rate R, calculated in accordance with subparagraph (6);
IP = the index figure for the calendar year in which planning permission was granted;
and
IC = the index figure for the calendar year in which the charging schedule containing rate R took effect.

(6) The value of A must be calculated by applying the following formula—

$$G_R - K_R - \left(\frac{G_R \times E}{G} \right)$$

where—
G = the gross internal area of the chargeable development;
GR = the gross internal area of the part of the chargeable development chargeable at rate R;
KR = the aggregate of the gross internal areas of the following—
(i) 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;
E = the aggregate of the following—
(i) the gross internal areas of parts of in-use buildings that are to be demolished before completion of the chargeable development; and
(ii) for the second and subsequent phases of a phased planning permission, the value Ex (as determined under sub-paragraph (7)), unless Ex is negative, provided that no part of any building may be taken into account under both of paragraphs (i) and (ii) above.

20. The areas and floor plans provided by the CA show the GIA of the existing building to be [redacted] sq. m. The GIA of the existing buildings to be retained under original permission [redacted] was [redacted] sq. m, with [redacted] sq. m to be demolished. Therefore, in accordance with KR (ii) only the [redacted] sq. m of existing buildings with permission for conversion to residential use can be off set against the GIA of the chargeable development at [redacted] sq. m.

    In this case;
    G = [redacted] sq. m
    GR = [redacted] sq. m
    KR = [redacted] sq. m
    A = [redacted] sq. m
    R = £[redacted]
    IP = [redacted]
    IC = [redacted]

21. After applying the above values to the formulas within Schedule 1, I determine the CIL charge in this case to be £[redacted] ([redacted]).

[redacted] [redacted] BA Hons, PG Dip Surv, MRICS
RICS Registered Valuer
Valuation Office Agency
12 October 2023