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: 1833347

Planning Permission Reference: [redacted]

Location: [redacted]

Development: Change of use and conversion of existing buildings to residential, change of use of land to domestic curtilage with new boundary walls, associated parking, opening a new pedestrian access onto [redacted] and associated works to wall fronting highway. Alterations to the public house including: demolish an area of flat roofing and associated walls, demolition of a northern ground floor bay, the replacement of the dilapidated orangery, extension to the terrace, the relocation of the patron entrance to the public house. Provision of a new pedestrian exit onto [redacted].

Decision

I consider that a CIL charge of £[redacted] ([redacted]) is not excessive and I therefore dismiss this appeal.

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 reference [redacted] decided on [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 of the [redacted].

d. The CIL Appeal Form dated [redacted] submitted by the appellant under Regulation 114, together with documents and correspondence attached thereto.

e. The CA's representations in respect of this appeal dated [redacted].

f. The Appellant's counter representations in respect of the CA's comments dated [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 there should not be any liability payable in this case, whilst the CA maintains £[redacted] is correct.

3. The CA have recently advised me that development has commenced on site and if this is so, this appeal would lapse in accordance with regulation 114(4); "*An appeal under this regulation will lapse if it was made before the relevant development was commenced and the relevant development is commenced before the appointed person has notified the appellant of the decision on the appeal."* However, as I have not received any evidence in this regard, I have preceded in issuing my decision.

4. The site in question is a public house with ancillary buildings. From the information provided I understand the pub ceased trading in [redacted] and has not been re-opened since.

5. Planning permission was granted on [redacted] for alterations to the pub which would allow a smaller more viable public house to be retained as well as allowing the conversion of two ancillary outbuildings to residential dwellings.

6. The CA has calculated the CIL liability in respect of this chargeable development as follows:

> [redacted] square metres (sq. m) of C3 dwellings chargeable at £[redacted] per sq. m equals £[redacted]. Multiplied by BCIS TPI at date of decision ([redacted]) divided by BCIS TIP at schedule ([redacted]) equals £[redacted].

7. The appellant requested a regulation 113 review on [redacted]. I have not been provided with the attachment to the email request, but from the email chain provided, I understand the appellant opined the CIL liability should be £0 and that despite being closed, the pub remained in lawful use having a live in caretaker on site in anticipation of the pub reopening. The appellant stresses within their correspondence to the CA their intention to reopen the pub.

8. The CA provided their regulation 113 decision on the [redacted] which confirmed the CIL liability at £[redacted]. The CA explained in their opinion, the pub and ancillary buildings were not in-use for the purposes of CIL, highlighting an important characteristic of a pub is to be open to serve drink and food. The CA state the pub hasn't fulfilled the function of serving drink and food for period of 6 months within the three year period and whilst the caretaker occupies the premises there is no fixed or definable date for reopening therefore, they conclude that pub ceased to be in use when the trading ended.

9. Following the outcome of the regulation 113 review, the appellant submitted a regulation 114 chargeable amount appeal for my consideration. Within the submission the appellant opines that the pub and its outbuildings were in use for at least 6 months of the preceding 36 months. The appellant acknowledges the pub was not open but; "points to the clear intention to reopen the pub" and maintains the CIL liability should be zero.

10. In support of their opinion, the appellant cites "the 2015 Judgement" (*R (Hourhope Ltd) v Shropshire Council [2015] EWHC 518 Admin*) (the Hourhope case). The appellant points to paragraph 10 of this case where it sets out "in use" means in lawful use. The appellant states the subject pub was closed because; in its previous format it was unviable, it was subject to a failed ACV bid, the global pandemic happened but despite all of this it remained in its lawful use. The appellant opines; "*that in planning, having a permitted and/or lawful use places no compulsion on the beneficiary to undertake the use*." The appellant is of the view the owner of a business can choose to open and close the business with a high degree of flexibility without losing the use and refers to planning permission and lawful use as; "a benefit , not a compulsion."

11. The appellant highlights that in the Hourhope case the judgement states; "*Turning to the facts to the present case, in my judgement the council made no such error. It was entitled to conclude that the use as a public house ended when the pub closed for business with no fixed or definable date for reopening. The highest the evidence goes as to intention to reopen is that* [redacted] *on behalf of the former owner hoped that matters could be sorted out with the mortgagee in a way that would enable his company to reopen the pub, but there is no evidence that there was any substance or reality to that hope."*

12. The appellant is of the view the circumstances in the subject case differ because there were a number of commercial factors that meant the pub was closed including the global pandemic. Most importantly, the appellant stresses there was a clear intention by the new owner to reopen the pub as soon as the necessary investments could be made and the requisite permissions being granted.

13. Given the extraneous circumstances beyond the control of the appellant and his clear intentions to enliven the use, the appellant believes the CA should have exercised discretion and determined the buildings to be in-use which would allow them to be offset under regulation 40.

14. The CA have responded to the appellant's representations explaining why they do not consider the buildings qualify as "in-use" for CIL purposes. The CA also cite the Hourhope case in support of their position. They quote paragraph 23 of the

judgement; "*The second subparagraph deals with circumstances in which a buildings, or part of a building, already has a use which is lawful in planning terms prior to the grant of the permission that triggers a CIL liability. Furthermore, that lawful use must continue to be available (i.e. it cannot have been abandoned) on the day prior to the grant of the operative planning permission. However, it must be the case that the mere existence of such a lawful use is not sufficient to constitute that building an "in-use building", since otherwise it would fall with in subparagraph (i). It must follow in my view, that for the purposes of this provision, actual use is required in order that the building can be said to be "in use".* The CA state this supports their view that the public house was required to be in actual use to qualify as an "in-use building."

15. The CA also point to paragraph 18 of the Hourhope judgement; "*The words employed ("in lawful use" and "in-use building") clearly suggest that something more is required that that a building has a use to which it theoretically may be put, i.e. that the building is actually used for that purpose*."

16. The CA explain that they do not consider that a caretaker living on site since May 2022 means that the [redacted] and its ancillary buildings were in lawful use. They point to the fact that the general public have not been able to purchase food and drink from the site since late [redacted]. Again the Hourhope judgement is used to support this position, "*The most important characteristic of use as a pub is plainly the opening of the premises to the public for sale of drink and food. It was open to the council to conclude that the use as a pub ceased when such trading came to an end, in the absence of circumstances indicating that this was only a temporary expedient such as a holiday."*

17. The CA has addressed the point of intention to re-open raised by the appellant. The CA advise there is currently a further planning application under consideration for the subject site. The CA also note that even when Covid restrictions were eased the previous owner did not reopen the [redacted] nor take advantage of initiatives such as Eat Out to Help Out. The CA also advise the new owner from [redacted] would have been able to re-open the pub as there were no restrictions in place but has chosen not to do so. Furthermore, the CA advise that they have considered the intention to reopen but are of the view that as the pub has been closed for four years, its closure cannot be seen as in interruption in trading and its closure cannot be considered temporary.

18. Given the reasons above the CA maintain that the CIL charge of £[redacted] based upon a chargeable area of [redacted] sq. m is correct and request the appeal is dismissed.

19. The appellant has responded to the CA's comments asserting that they have not addressed the issue of intent. The appellant highlights that the current owner intends to reopen the pub once the necessary works are undertaken to make it a viable proposition. The appellant states the subject appeal differs from the Hourhope case and the VOA 2021 appeal they have referenced, as in these cases there was no intention to reopen as both pubs were to be demolished. The appellant concludes that the intention to reopen is key to this appeal and consequently the appeal should be allowed.

Decision

20. I understand there is no dispute about the chargeable area of [redacted] sq. m, the chargeable rate adopted, nor the indices applied in reaching the CIL liability of £[redacted]. The dispute centres around whether the existing buildings can be offset from the area of the chargeable development.

21. 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;

22. "In-use building" is defined in the regulations as a relevant building that 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.

23. Considering the information and views provided by both parties, it is clear to me that the [redacted] pub and its ancillary buildings were not "in-use" for a continuous period at least six months within the three year period ending on the day planning permission first permitted the chargeable development. However, the appellant's view is that as there was intent re-open the public house, this means the "in-use" status of the buildings was maintained.

24. There is nothing within the CIL legislation that deals specifically with intent although case law has provided guidance on this point. Both parties have referred to the Hourhope case in their representations and I find this judgement helpful. The case explains that temporary closures for holidays or re-fitting does not mean that a building's use ceases, and the appellant highlights the subject permission shows the intent to reopen post the works being completed. However the Hourhope case goes on to explain; "*The position might be different if the shop was closed and emptied for refitting with the intention of sale when empty."* In this case HHJ David Cooke states; "*The most important characteristic of use as a pub is plainly the opening of the premises to the public for sale of drink and food. It was open to the council to conclude that the use as a pub ceased when such trading came to an end, in the absence of circumstances indicating this was only a temporary expedient such as holiday."*

25. I concur with the CA here, given the length of the closure of the pub since [redacted] and its sale when closed, despite the subject planning permission seeking to reopen the public house albeit on a smaller scale, it was reasonable for the CA to conclude the buildings were not "in-use". The presence of a live in caretaker does not go far enough to demonstrate the buildings were "in-use".

26. I therefore dismiss this appeal and confirm the CIL liability at £[redacted] ([redacted]).

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