Appeal Decision

by [redacted] BSc (Hons) MRICS

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

Valuation Office Agency
Wycliffe House
Green Lane
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e-mail: [redacted]@voa.gov.uk

Appeal Ref: 1822405

Planning Permission Ref. [redacted]

Proposal: Conversion of first and second floors and part of ground floor to provide [redacted] flats ([redacted]) [redacted], new shop front [redacted]

Location: [redacted]

Decision

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

Reasons

1. I have considered all of the submissions made by [redacted] (the Appellant) and by [redacted], 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 decision ref [redacted] dated [redacted], including approved planning consent drawings, as referenced in planning decision notice;

    b) Planning decision ref [redacted] dated [redacted], including approved planning consent drawings, as referenced in planning decision notice;

    c) CIL Liability Notice dated [redacted];

    d) CIL Appeal form dated [redacted], including appendices;

    e) Representations from CA dated [redacted]; and

    f) Appellant comments on CA representations, dated [redacted].

2. Planning permission was granted under application no [redacted] on [redacted] for 'Conversion of first and second floors and part of ground floor to provide [redacted] flats [redacted], new shop front [redacted].'

3. The CA issued a CIL liability notice on [redacted] in the sum of £[redacted]. This was calculated on a chargeable area of [redacted]m² at the Residential rate of £[redacted] /m² plus indexation.

4. The Appellant requested a review under Regulation 113 on [redacted]. The CA responded on [redacted], confirming that the CIL charge was correct.

5. On [redacted], the Valuation Office Agency received a CIL appeal made under Regulation 114 (chargeable amount). The appeal form states that the CIL charge should be £[redacted]. This is assumed to be an error as this is the figure contained within the liability notice.

6. The Appellant's grounds of appeal can be summarised as follows:

    a) The property historically had consent for storage use. In 2013, permission was granted for a change of use to mixed uses including a café/patisserie, restaurant and D1/D2 uses. This consent was not lawfully implemented and therefore the lawful use during the relevant period was as storage.

    b) The property was in lawful use as storage during the relevant period and therefore the existing building should be deducted from the chargeable area.

7. The CA has submitted representations that can be summarised as follows:

    a) The 2013 consent was lawfully implemented and therefore the lawful use was in line with the mixed use consent and not as storage.

    b) If lawful use is determined to be as storage, there is insufficient evidence to support that the storage use was continuous for at least six months during the relevant period.

Lawful use

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" or "the gross internal areas of parts of in-use buildings that are to be demolished before completion of the chargeable development" can be deducted from "the gross internal area of the chargeable development."

9. Regulation 9(1) defines the chargeable development as the development for which planning permission is granted. The CA have adopted a GIA of [redacted] m² which has not been disputed by the Appellant and therefore I assume it is agreed.

10. "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.

11. The lawful use of the building is in dispute. The CA state that the lawful use was the use permitted by planning consent [redacted]. The appellant maintains that this consent was not lawfully implemented and therefore the lawful use is storage (B8) as per the previous consent.

12. Planning permission [redacted] (hereafter referred to as the 2013 consent) grants consent for "Change of use from a warehouse to mixed uses including a café/patisserie to the ground floor, restaurant with associated bar including [redacted]

13. The appellant states three reasons why they consider that B8 was the lawful use:

    1. The second floor is not part of the 2013 consent and therefore the lawful use has always been B8.
    2. The implementation of the 2013 consent was not in accordance with the approved plans.
    3. There is no indication that the pre-commencement conditions were ever discharged and therefore the consent was not lawfully implemented.

14. I will address each of these points in turn.

Permitted use of the Second Floor

15. The CA state the 2013 consent pertains to the whole building. The appellant states that the second floor did not form part of the consent and therefore retained a storage use.

16. The CA state the second floor is in fact the floor labelled as first/upper floors. They state the upper floor was renamed as a second floor following the construction of a larger mezzanine floor, which became the new first floor.

17. The approved plans for the 2013 consent ([redacted]) show an existing basement, ground floor and first/upper floors. The proposed plans shows these same floors. There is no second floor marked on either floor plan but the section plans show that the top floor is labelled as "upper floor" on the existing plans and "second floor" on the proposed plans.

18. I am of the opinion that the second floor is in fact the first/upper floor as shown on the existing and proposed plans of the 2013 consent. I consider that this floor does form part of the 2013 consent and therefore was granted permission for D1 or D2 use.

Implementation of consent in accordance with approved plans

19. The appellant states “The implementation of the planning permission was not in accordance with approved plans. For example, the provision of car parking on the ground floor of unit [redacted] and the removal of the café in unit [redacted] and the works to the front elevation and rear elevations of [redacted]. This is in breach of condition 11 – Approved Plans.” The appellant also states that the mezzanine floor shown in the Instagram photos provided by the CA was not in the approved plans.

20. The relevant condition is as follows:

    11. Approval condition – Approved Plans
    The development hereby permitted shall be carried out in accordance with the approved plans listed in the schedule attached below, unless otherwise agreed in writing with the Local Planning Authority.

21. The schedule lists the proposed plans as Drawing Numbers [redacted] (Proposed Plans), [redacted] (Sections) and [redacted] Existing plans. These are the same plans as I have referred to above.

22. The appellant refers to the provision of car parking on the ground floor as one way that the approved plans were not met. They have provided no additional information to suggest how this was not met.

23. The appellant mentions the removal of the café in Unit [redacted]. The CA have provided evidence that the café was formerly occupied by [redacted] from at least [redacted] and the Appellant accepts that the café use was implemented. It would therefore appear that their reference to the café being “removed” refers to an occurrence that happened at a later date and in my opinion would not determine whether the 2013 consent had been initially implemented according to the plans.

24. The appellant also refer to works to the front and rear elevations at [redacted] but again provide no details of how any works were contrary to the plans.

25. Finally, the appellants refer to the mezzanine floor shown in the Instragram post provided by the CA. They state that this mezzanine floor was not included within the approved plans and was therefore not lawful. However, the Instagram post was dated [redacted] and suggests that the mezzanine was a new addition. This ties in with a building regulations application ref [redacted] for a mezzanine and associated works. As the mezzanine was not in place initially, I do not consider that it impacts on whether the 2013 consent was lawfully implemented.

26. In summary I do not consider that there is sufficient evidence to confirm that the change of use permission was not undertaken in accordance with the approved plans.

Discharge of pre-approval conditions

27. The appellant maintains that there were four conditions of the 2013 consent that were not discharged prior to the work being undertaken. These conditions were:

    03. Approval condition – Extract Ventilation – [redacted]

    07. Approval condition – Details of external materials and finishes [redacted]

    09. Approval condition – Archaeological investigation [pre-commencement condition] [redacted]

    10. Approval Condition – Refuse & Recycling [Pre-commencement Condition] [redacted]

28. The appellant states that as work commenced before these conditions were discharged, then the permission is invalid.

29. The Appellants refer to the Court of Appeal decision in Greyfort Properties Ltd v SSCLG [2011]. The Greyfort case applied both the Hart Aggregates judgement (R (Hart Aggregates Ltd) v Hartlepool BC) and the Whitley principles and specifically endorsed the need for the conditions to go to the "heart of the matter" to be a true condition precedent. In the Greyfort case, the judge found that a condition requiring that the ground floor levels of the building be agreed before any work commenced did go to the heart of the matter.

30. The Apellant also refer to Meisels and Anor v Secretary of State for Housing, Communities and Local Government [2019] which concerned planning permission for an extension to a synagogue to provide residential accommodation and further space for the synagogue. The inspector had decided that condition 2 "*Full details, with samples, of the materials to be used on the external surfaces of the buildings, including glazing, shall be submitted to and approved by the Local Planning Authority in writing before any work on the site is commenced. This development shall not be carried out other than in accordance with the details thus approved"* was a condition precedent. The judge commented that condition 2 "*clearly fundamentally controls the final appearance of the building and its relationship to its surroundings"* and should be considered as going to the heart of the permission.

31. The Appellant argue that conditions 3, 7 and 9 of the 2013 consent do go to the heart of the permission. They specifically refer to comments from the Historic Environment Team where they state *"Require more details of the façade treatment to Nos* [redacted]*, particularly the new windows and the new shopfront, including details of the new lattice shutter and railings. Details of ventilation equipment are also required to ensure that it will not intrude on the setting of the Listed Building."*

32. The CA maintain that these undischarged conditions do not go to the heart of the planning permission. The change of use had a limited impact on the appearance of the building. Building Control records don't indicate that any new below ground services were installed that would impact on archaeology and the other conditions are concerned with protecting amenity and highway safety which could be impacted if the valet or D1/D2 use were implemented. The CA consider that the 2013 consent was implemented through the change of use to the café/restaurant/bar/patisserie and that this is sufficient to constitute a lawful and extant planning permission relating to the whole building.

33. The CA maintain that the Meisels case does not draw direct parallels with this CIL case as it involves operational development, i.e. new built form, that had not been carried out in accordance with the plans approved under the planning permission and the conditions attached to it, which in turn has an impact on the surrounding area. This CIL case relates

to a change of use for an existing building and not operational development and therefore the Meisels judgement is not considered to be directly applicable.

34. Approval Condition 3 relates to ventilation and Condition 10 relates to refuse and recycling, both require details of schemes/facilities to be submitted in writing and agreed by the local authority prior to uses/works commencing. I consider these to have similarities to the Hart Aggregates case referred to above, regarding a planning consent for extraction of minerals granted in 1971. In this case, condition 10 stated that worked out areas should be progressively backfilled to a level agreed by the LPA before extraction commenced. Although no restoration plan was ever approved, the mineral extraction use continued for over 30 years. The judge found that the condition did not go to the heart of the matter, so that failure to comply with it would not mean that the entire development should be considered unlawful.

35. In my opinion, Conditions 3 and 10 do not go to the heart of the matter and therefore non-compliance with these conditions would not render the entire development unlawful.

36. Approval Condition 7 relates to the details of external and material finishes. Although the condition itself is similar to that in the Meisels case, I consider there to be a fundamental difference in that the Meisels case related to new development whereas this case refers only to a change of use. As such, the external alterations appear to be relatively minor such as signage and shop frontage. The judge in the Meisels case noted that the starting point has to be applied in the context of the statutory regime as a whole, which draws a clear distinction in s.171A(1) of the 1990 Act between (a) carrying out development without planning permission and (b) failing to comply with a condition subject to which planning permission was granted. He said that it follows that not every breach of condition can have the result that the development has been carried out without planning permission.

37. In my opinion, Condition 7 does not go to the heart of the matter and therefore non-compliance with this condition would not render the entire development unlawful.

38. Approval Condition 9 relates to archaeological investigation. There has been no evidence provided of any new service runs or excavation and therefore I have no evidence that this condition has been breached.

39. In my opinion, the 2013 consent was lawfully implemented through the change of use to the café/patisserie. I consider this to be sufficient to constitute a lawful and extant planning permission relating to the whole building.

40. In the relevant period of three years prior to when the 2023 consent was granted, the property was in use as storage. I do not consider this to be a lawful use and therefore no “in-use credit” can be applied.

<u>Conclusion</u>

41. On the basis of the evidence before me, I confirm that the Community Infrastructure Levy (CIL) payable in this case should be [redacted] ([redacted]).

[redacted] BSc (Hons) MRICS
Valuation Office Agency
16 August 2023