

# Appeal Decision

by [REDACTED] BSc FRICS

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

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**VOA Appeal Ref:** 1825974

**Planning Application:** [REDACTED]

**Proposal:** Change of use of the Public House (Sui Generis) into 5 self-contained flats (Use Class C3), [REDACTED]

**Address:** [REDACTED]

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## Decision

Appeal dismissed.

## Reasons

1. I have considered all of the relevant submissions made by [REDACTED] (the Appellant) and by the [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 in respect of Application No: [REDACTED], dated [REDACTED].
  - b) CIL Liability Notice ([REDACTED]), dated [REDACTED].
  - c) CIL Appeal form dated [REDACTED], along with supporting documents referred to as attached.
  - d) Representations from the Appellant.
  - e) Representations from the CA.
2. Planning permission was granted as detailed within the Decision Notice for Application reference [REDACTED], dated [REDACTED], for Change of use of the Public House (Sui Generis) into 5 self-contained flats (Use Class C3), [REDACTED]

3. The CA issued a CIL Liability Notice (██████), dated ██████ for £██████ stating this was levied under the Mayor ██████ CIL charging schedule, based on a proposed net area chargeable of ██████ sqm.
4. On ██████ the Appellant's ██████ emailed the CA to advise of their appointment and also that the Appellant had intended to implement the consent and serve a Building Regulations Notice to commence ██████, however, for financial reasons, commencement of the development was on hold.
5. A Regulation 113 Review was undertaken between ██████ and ██████ in respect of Liability Notice Ref: ██████. The CA's Review found that the CIL Liability Notice was correct and that the CIL payment should be £██████ as stated. The Appellant did not accept this outcome.
6. On ██████, the Valuation Office Agency received a CIL appeal from the Appellant made under Regulation 114 (Chargeable Amount Appeal) confirming the Appellant disagrees with the CA's Regulation 113 Review decision on the basis that the chargeable amount has been calculated incorrectly, with supporting documents attached.
7. The Appellant's grounds of appeal can be summarised as follows:
  - a) The Appellant does not agree with the CA's calculation of net chargeable area.
  - b) The Appellant submits that the ██████ property consists of one single planning unit which until the new consent ██████ is implemented, is a Public House (Sui Generis) with ancillary residential accommodation.
  - c) A previous Owner of the ██████ was ██████ which had arranged for Security Guards to live-in the residential accommodation which forms part of the ██████. The Appellant references payment of Non Domestic Rates Bills in support of their contention that the lawful use of the property was preserved by the occupation by ██████ because it is not possible to occupy the residential accommodation separately from the public house due to the configuration of the property.
  - d) The Appellant submits the premises were in use by ██████'s security company until ██████ and therefore the existing floorspace to be retained was in lawful use for a continuous period of six months out of the three years prior to the grant of planning permission on ██████.
8. The CA has submitted representations that I have summarised as follows:
  - a) The CA confirms the net chargeable area used to calculate the CIL is ██████sqm of GIA floorspace arising from the conversion of the former pub into 5 self-contained residential units, including retention of at least ██████sqm of existing floorspace and ██████sqm of new-build or replacement floorspace and that there is no dispute on the GIA measurements used to calculate the CIL liability.
  - b) The CA highlights that the copy "guardianship agreement" submitted as proof by the Appellant does not mean the property was actually occupied for the qualifying period of six continuous months within the three years prior to the grant of Planning Permission. The CA submits that the document is a fee proposal signed in ██████, authorising a spend up to £██████.
  - c) Beyond the CA's query over the robustness of proof of ██████'s Security Company occupying the property, the CA submits occupation by security guards of a vacant development site does not meet the threshold of demonstrating that the property was lawfully in use to qualify for the retained floor space credit.

- d) Additionally, the CA refers to the copy Non Domestic Rates Bills that the Appellant submitted as proof, highlighting that these Bills refer to the property being empty, therefore the CA submits that this does not demonstrate that the property was in use.
  - e) The CA references the High Court judgment for R (Hourhope Ltd) v Shropshire Council [2015] EWHC 518 Admin [the Hourhope case] and that the ruling stated that: "*Whether a property is 'in use' at any time requires an assessment of all the circumstances and evidence as to what activities take place on it and what are the intentions of the persons who may be said to be using the building.*"
  - f) Based on the above reference to the Hourhope' case, the CA's view is that neither the existence of the "guardianship agreement" or the occupation by a previous owner's security company meets the threshold of the building being in use for CIL calculating purposes.
  - g) The CA included a copy of the [REDACTED] CIL Charging Schedule [REDACTED]. This document states that CIL liability is calculated on the net chargeable gross internal area (GIA) floorspace and that CIL will be calculated on the basis set out in Part 5 of the Community Infrastructure Levy Regulations 2010 (as amended) and refers to the CIL Regulations 2010 (as amended).
  - h) The CA concludes that the retained floorspace credit cannot be applied under the CIL Regulations 2010 as amended and that the CIL Liability Notice dated [REDACTED] issued for [REDACTED] for a total chargeable amount of £[REDACTED] is correct.
9. The Appellant submitted comments on the CA's representations which I summarise as follows:
- a) The Appellant restated the facility ceased operating [REDACTED] and that [REDACTED] were still in lawful occupation through their security company and [REDACTED] until [REDACTED] \*\* [\*\*understood from evidence submitted by the Appellant to be the date of sale to the Appellant].
  - b) The Appellant submitted a copy email exchange between [REDACTED]. Essentially this covers the Appellant's Solicitors requests for copies of the Utility Bills in respect of the premises and payment of same. Within the email from [REDACTED]'s Solicitor to the Appellant's [REDACTED] it is confirmed that utility bills for [REDACTED]'s closed pubs are dealt with as part of a group account and that individual invoices are not available, however, it is confirmed that utility bills were paid on [REDACTED]'s behalf up until the property was sold [REDACTED].
10. Having fully considered the representations made by the Appellant and the CA, I make the following observations regarding the grounds of the appeal:
- a) In this case, the Appellant does not agree with the CA's stated net chargeable area used in the calculation of CIL. The Appellant submits the existing GIA should be excluded from the calculation of the net chargeable area for CIL because the property was occupied by security guards, that Business Rates and Utility Bills were paid proves the property was in use for the qualifying period of time between [REDACTED] [date the [REDACTED] ceased trading] and [REDACTED] [the date Planning Permission was granted].

- b) I note that the Business Rates Bills for [redacted] [date of issue [redacted], for the liability period [redacted] to [redacted]], Business Rates Bill [redacted] [date of issue [redacted], for the liability period [redacted]] and Business Rates Bill [redacted] [date of issue [redacted], for the liability period [redacted]] all include within the Calculation Details sections the reference “Empty Property Relief” or “Empty Property” which contributes to evidence that the use of the property as a public house had ceased throughout the respective liability periods.

### **In-use buildings / Lawful use**

- c) The CIL Regulations Part 5 Chargeable Amount, 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.”
- d) “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.
- e) Schedule 1 (9) states that where the collecting authority does not have sufficient information, or information of sufficient quality, to enable it to establish whether any area of a building falls within the definition of “in-use building” then it can deem the GIA of this part to be zero.
- f) The Appellant’s contention is that the property was occupied by security guards for the requisite time period and therefore the criteria for being in lawful use was met because the residential accommodation within the property cannot be accessed separately from the parts of property previously used as a public house.
- g) The evidence in relation to use of the property during the period in question is inconclusive in my opinion and arguably insufficient evidence has been provided to demonstrate actual use. The rates bill suggests that the property was empty, the guardianship agreement appears to be merely a fee proposal and it has not been possible to demonstrate utility usage at the property in question.
- h) Nevertheless, I acknowledge the Appellant’s point that to occupy part of the [redacted] property is to occupy the whole. However, I am guided by the High Court judgement of R (OAO Hourhope Ltd) v Shropshire Council [hereinafter referred to as “the Hourhope case” for ease].
- i) There are similarities between the subject Appeal and the Hourhope case in that both concern a public house property and the contention in both is a matter of what constitutes lawful use. Specifically, the Hourhope case judgement clarifies that the intention of the “in use” or “in lawful use” criteria is whether a property was actively being used for its lawful use or not. In both cases, consideration of what constitutes lawful use as a public house is more relevant than an ancillary use like storage, which was a contention in the Hourhope case, or residential as an ancillary use in the subject case.
- j) The Hourhope judgement provides further clarification that the principal activity of a public house is being open to the public for the sale of drink and other services which could include food and / or use of function space if applicable, drawing comparison with other property types where the use is an active one like factory, office or shop and that it is appropriate to consider the degree of activity reasonably expected for each use.

- k) In the subject case, the declared date of cessation of trade and lawful use was [REDACTED]. Hourhope makes it clear that where an ancillary use, such as storage or residential, continues after the primary use of a public house ceases, that might be treated as a continuation of the lawful use if there was evidence that the cessation of the primary use was temporary and there was an intention to continue the primary use. No submission or proof has been submitted to explain there was ever any plan or intention to re-open the [REDACTED] for trade. The subject premises were marketed for sale. The categorisation of the subject property as "Empty" for the purpose of Business Rates, in my opinion, also supports the view that the subject premises were not in lawful use, per the intention of the exemption criteria.
- l) I do not agree with the Appellant's statement within their submission "*The Appellant need only demonstrate that the premises were lawfully occupied.*" because this conflates the separate issues of lawful use, which the Hourhope case judgement provides clarification on, and occupation whereas it is the former, lawful use, upon which the exemption criteria is assessed.
- m) I am therefore of the opinion the Appellant is claiming retrospectively that the subject property was in lawful use based on the technicality that the residential accommodation could not be occupied separately to the public house, rather than demonstrating lawful use of the subject premises as being open and trading as a public house for a qualifying period as decided in the Hourhope judgement. As a result the qualification of lawful use has not been established and the existing floorspace cannot be deducted from the chargeable area.

There appears to be no dispute in relation to the rates adopted or indexation. In summary, I am of the opinion that the net chargeable area has been calculated correctly by the Collecting Authority and I therefore dismiss this appeal.

[REDACTED] BSc FRICS  
Valuation Office Agency  
1 September 2023