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: 1824641

***Address**:* [redacted]

Proposed Development: Change of Use of the warehouse at Plot L1 from its approved use as a former data centre (Class B8) to a food processing, storage and distribution factory (Class B2) [redacted]

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

Decision

I determine that no Community Infrastructure Levy (CIL) should be payable in this case.

Reasons

Background

1. I have considered all the submissions made by the appellant, [redacted] of [redacted], acting on behalf of [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) Grant of Full Planning Permission [redacted], dated [redacted].
   c) The CIL Liability Notice (ref: [redacted]) dated [redacted].
   d) The CA's Regulation 113 Review, dated [redacted].
   e) The Appellant's Statement of Case document dated [redacted].
   f) The CA's Statement of Case e-mail document dated [redacted].
   g) Appellant's comments on the CA's Statement of Case and Appellant's Rebuttal Statement, dated [redacted].

Grounds of Appeal

2. Planning permission was granted for the development on [redacted], under reference [redacted].

3. On [redacted], the CA issued a Liability Notice (Reference: [redacted]) for a sum of £[redacted]. This was based on a net chargeable area of [redacted] m² and a Charging Schedule rate of £[redacted] per m², and indexation at [redacted] ([redacted]).

4. The Appellant 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 the view that its original decision was correct and should be upheld.

5. 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.

6. The Appellant's appeal can be summarised to two core points:-

   Firstly, the Appellant contends that the lawful use of the building is Use Class B8.

   Secondly, the Appellant disputes the floorspace of the chargeable area in the CIL calculation, contending that it 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 off-set against the chargeable area). The Appellant contends that the entirety of the building can be off-set and that no CIL is payable.

   It would appear that there is no dispute between the parties in respect of the applied Chargeable Rate of £[redacted] per m², or the applied indexation.

7. The CA disagrees, contending that the operational use of the building as a data centre ceased in [redacted] and the building was not an 'in use building'. In addition, the CA contends that Use Class B8 is not the lawful use of the building and the lawful use of the building is Use Class B1.

Decision

8. The dispute between the parties relates to a former data centre building, which is set in a plot of approximately [redacted] hectares in size. The appeal documentation cites the address of the property as [redacted]; however, the address shown on the Grant of Planning Permission dated [redacted] (ref: [redacted]) is that of [redacted].

9. 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.

10. 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."

11. 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.

12. "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.

13. "Relevant building" means a building which is situated on the "relevant land" on the day planning permission first permits the chargeable development. "Relevant land" is "the land to which the planning permission relates" or where planning permission is granted which expressly permits development to be implemented in phases, the land to which the phase relates.

14. The Appellant contends that there should be no CIL charge on the grounds that the relevant building has been in lawful use as B8 distribution and storage floorspace for a period of more than six months within the three years preceding the issue of the relevant decision notice, i.e. [redacted]. However, the CA disagrees, citing:-

    Planning permission was granted [redacted], under reference [redacted] for the *"[redacted]"* and was subject to a restrictive condition (number 12) which states:-

    "*The premises shall only be used for the use applied for and hereby permitted and for no other purpose (including any other purpose in Class B1 of the Schedule to the Town and Country Planning (Use Classes) Order 1987, or in any provision equivalent to that Class in any Statutory Instrument revoking or re-enacting that Order with or without modification).*"

    The Appellant opines that the building has been in operational use as a data centre for a continuous period in excess of 10 years prior to [redacted] – the date the CA suggests the data centre use ceased. Accordingly, the Appellant further opines that the lawful use of the site is now Use Class B8 by benefit of its use for a continuing uninterrupted period of more than 10 years as a data centre (a B8 use). In support of the contended B8 use, the Appellant cites Case Law on this point - *Thurrock Borough Council v Secretary of State for the Environment, Transport and the Regions and Holding* [2002].

15. The Appellant has submitted photographic evidence in support of the 'in-use' nature of the building.

16. The Appellant contends that a Planning Appeal ([redacted]) is relevant; the Planning Appeal concerns whether or not a builder's building had remained in storage use following its original purchase in [redacted] until the cessation of the business in the early [redacted]s. The Appellant contends that the tests suggested in this Planning Appeal support that the storage of equipment as in the case of the subject building, supports B8 use. The four tests suggested by this planning appeal are:-

    - The physical condition of the building.
    - The length of time that the building has been unused
    - Use of the building for alternative purposes
    - The intentions of the owner

17. The Appellant cites the case of *R (oao Hourhope Ltd) v Shropshire Council* [2015] EWHC518. The *Hourhope* case related to a disputed CIL liability due on a planning permission to demolish a public house, erect residential units and the resultant application of the demolition deductions that are set out in the CIL Regulations 2010 (as amended). This case provided guidance on 'in-use buildings' in that 'in-use buildings' demolished during the development or retained on completion will be determined not by whether there is available a permitted use for the building, but by the actual use of the building.

    As held by *Hourhope* - *"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.*" It follows therefore, to consider not only the actual use, but the degree of activity of the actual use and the *intentions* of the Appellant.

18. The CA contends that the use of the building ceased in [redacted] and that the building was subsequently vacant. Accordingly, the CA opines it is not an 'in use building' and as such the existing floorspace cannot be off-set.

    The Appellant confirms that the data centre staff vacated the site on [redacted]; however, the Appellant further evidences that the site was then retained by [redacted] as a data centre, with a view to its sale to a third party as a data centre. As part of this, the [redacted] of the site and a limited number of other staff remained on site to ensure that the site could remain operational as a data centre and could be demonstrated as such to prospective purchasers. In further support, the Appellant cites the Rating assessment of the building over the last three year period, which confirms its use (and current use) as a computer centre. In addition, the Appellant cites that at no point has any submission been made for empty building rates.

19. In following the guidance laid down by *Hourhope*, I find the Appellant's submitted evidence persuasive, especially in respect of the evidence in respect of the Appellant's *intentions* for its reactivation/future use as a Data Centre. In my weighting of the submitted evidence, I agree with the Appellant that at least part of the building was an 'in-use building' for a period of at least six months in the three years preceding the requisite date of [redacted].

20. The Appellant points to the fact that the CA's contention of the B1 (Office) use of the building is contrary to the CA's own determination of the planning application, which clearly held a B8 (Storage or Distribution) use. As the Appointed Person, I find this to be a key aspect of this case and the CA has explained its rationale in arriving at this contention, thus:-

    The CA states that the subject Grant of Full Planning Permission [redacted], which triggered the CIL liability, used the description title provided by the applicant (which referred to the existing use as B8). However, the CA opines that the determination of the application considered the suitability of the proposed use in that location and does not grant or establish a previous use (i.e. whether it is B8). The CA further opines that whilst it refers to the previous use as B8, the determination of a planning permission does not involve an in depth review of the lawful use of the site nor establish the previous use as B8.

    In its explanation of its contention of the B1 use of the building versus its own determination of the development description, I find the CA's explanation ambiguous. Local Planning Authorities (LPAs) have the power (in consultation with the applicant or their agent) to revise any wording of the description of any proposed development. Indeed, planning policy issued by Department for Levelling Up, Housing & Communities states:-

Before publicising and consulting on an application, the local planning authority should be satisfied that the description of development provided by the applicant is accurate. [redacted]

21. Given the evidence submitted to me, in respect of its determination of the description of the subject development, I have concluded that the CA has erred in its application of planning guidance. Furthermore, I disagree with the CA's contention of B1 use given that this use class was revoked as at the issue date of the Grant – Use Class B1 was revoked by The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 ([redacted]) which came into force on [redacted] and B1 use is now subsumed in Class E.

22. It is very clear to me that the description contained in the triggering planning consent underpins any CIL liability and the "the land to which the planning permission relates". In this instance, it is clearly a factual matter that the description of the subject development was …*from its approved use as a former data centre (Class B8)*… which, in my view, for the purposes of the CIL Regulations, overrides all other evidence. The factual content of the Grant of Permission is paramount in my view. In conclusion, for CIL purposes, I cannot accept the CA's contentions that the lawful use of the building is Use Class B1 and agree with the Appellant that the lawful use of the building is Use Class B8.

23. Following consideration of all of the evidence, I am satisfied that the building was in lawful use as per Schedule 1 Part 1 1(10) and was an 'in-use building' thereby allowing the area of the building to be netted off the area of the chargeable development. This results in the area of the chargeable development being a nil sum (zero m^2).

24. In conclusion, having considered all the evidence put forward to me, I consider that the CIL payable in this case is to be a nil (zero) sum.

[redacted] MRICS VR
Principal Surveyor
RICS Registered Valuer
Valuation Office Agency
1st September 2023