# 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:** 1829548

**Planning Application:** [redacted]

**Proposal:** The Demolition Of [redacted] And Erection Of 5 No Dwellings ([redacted]).

**Address:** [redacted]

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### Decision

Appeal upheld.

### Reasons

1. I have considered all of the relevant 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 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 the demolition Of [redacted] And Erection Of 5 No Dwellings ([redacted]).

3. The CA issued a CIL Liability Notice ([redacted]), dated [redacted] for £[redacted] stating this was levied under [redacted] Charging Schedule, and S211 of the Planning Act 2008, based on a chargeable area of [redacted]sqm.

4. A Regulation 113 Review was requested by the Appellant on [redacted]. The Appellant was of the opinion CIL liability should be zero. The Appellant's stated reason for this was that they expected the Gross Internal area [GIA] of [redacted] property to be offset against the proposed GIA to be developed under the Planning Permission, which would result in a CIL liability of zero because the existing GIA is greater than the proposed GIA. The Appellant explained they considered the continuous occupation of the first floor owner's accommodation as lawful use for the requisite qualifying period which would therefore mean the whole property had to be considered as an in-use building, allowing its GIA to be offset against the proposed GIA.

5. A Regulation 113 Review was undertaken by the CA and on [redacted] the CA wrote to the Appellant confirming the CA's position was unaltered because the CA regarded the property as not being in lawful use as occupation of the owner's accommodation, as part of a larger planning unit, did not meet the criteria for an off set in GIA for the calculation of the chargeable area. The Appellant did not accept this outcome.

6. On [redacted], 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. I summarise the Appellant's grounds of appeal as follows:

    a) The Appellant does not agree with the CA's calculation of net chargeable area, stating there should be no CIL liability because no net additional floor area will be created as the existing GIA is greater than the proposed total GIA.

    b) The Appellant submits that the [redacted] property consists of one single planning unit in composite uses of Public House and Residential, submitting that the Residential use of the first floor dwelling is not an ancillary use. The Appellant explains that [redacted] together with their family have occupied the first floor of the public house as their sole and main dwelling continuously from [redacted]. Therefore, as the flat part of the property was in lawful use for the qualifying period prior to the grant of planning permission, this means the whole of the property's GIA can be off set.

    c) The Appellant has included opinion from planning lawyer [redacted] in support – referenced within this is a case known as Burdle and Another v. SSE and Another [1972] 1 Wlr 1207, [1972] 23 All ER 240, submitting that this demonstrates the first floor dwelling is not ancillary to the public house use and therefore can and should be considered a dual and composite use in tandem with the public house use.

    d) Additionally, the legal opinion references two Planning Inspectorate [PI] Appeal Decisions – both against the CA – arguing these validate that the residential use of the first floor dwelling was in lawful use throughout the CIL reference period. I summarise the interpretation of these within the legal opinion as follows however I note these are not CIL based cases, instead are related to alleged breaches of Planning Control – in simple terms, Enforcement Notices were served because the Local Authority was of the opinion the properties were being used for a different purpose [Residential] from the consented use [Public House].

e) The Planning Inspectorate – Decision Date [redacted] – Appeal Ref: [redacted] – Appeal involved Breach of planning control - alleged change of use of former [redacted] on the land to use as a single dwellinghouse – Decision: Appeal allowed, PI Concluded the planning unit remains in mixed residential and public house use.

f) The Planning Inspectorate – Decision Date [redacted] – Appeal Ref: [redacted] – Appeal involved breach of planning control - alleged change of use from public house (with ancillary residential accommodation and letting rooms) to a single dwellinghouse. Appeal allowed, PI found that planning unit remained in mixed residential and public house use albeit "*the latter is presently dormant*".

g) The 'Burdle' case is referenced because it generated three categories by which the use of the property could be assessed in order to help determine the 'Planning Unit'. The Appellant submits that the residential use of the first floor flat in the Property is a separate primary planning use within the same planning unit and therefore falls within the second category in 'Burdle'. It is understandable why the three categories from the Burdle' case have been referenced in this case – these three points are mainly: "…***First***, [emphasis added] *whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered*…/…*But,* ***secondly***, [emphasis added] *it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time, but the different activities are not confirmed within separate and physically distinct areas of land. /* ***Thirdly***, [emphasis added] *however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit.*" The purpose of outlining the three categories was to help determine what a particular planning unit is in the context of "…*deciding whether there has been a material change of use*."

h) The Appellant's Representations conclude with the argument that the two appeal decisions referred to within the legal opinion provide adequate authority to reach the conclusion that the family dwelling occupying the entire first floor the property is a separate and lawful planning use. Further, that the property constitutes an in-use building as it "*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.*" It therefore follows that the floorspace occupied on the first floor of the Property must be included within the definition of "E" within Schedule 1, Part 1, paragraph 1(6) of the CIL Regulations when calculating the CIL liability for the permission.

8. The CA has submitted representations which I have summarised as follows:

a) The appeal relates to the Reg 113 decision not to discount the floorspace of the flat located above the public house.

b) The dwelling flat needs to be assessed in the context of its relationship to a building with a lawful use as a public house and the consequences of that business's operation.

c) The CA reiterates its view originally provided following the Regulation 113 Review in that it explains the flat is a part of a larger planning unit which comprises the owner's accommodation as well as the public house itself and any associated

parking and outdoor space…not a stand-alone planning unit, rather its layout and internal access within the wider building render it part of a composite use wherein the flat exists to provide staff / owners accommodation rather than independent accommodation.

d) The CA references the "keys tests" from the 'Burdle' case [referenced above] and highlights the two PI cases also referenced by the Appellant are not CIL cases and further that in the most recent of the two PI cases referenced, the PI accepts that notwithstanding the guidance within Burdle, an individual case by case assessment is required.

e) The CA seeks to explain its stance that the first floor dwelling flat is an ancillary use to the public house by examining the relationship between the first floor owners accommodation and the ground floor public house, stating there is no dispute as to the lawful use of the ground floor as a public house and states there is an interdependency between the first floor and ground floor uses because of the single point of access and that there is no evidence the first floor accommodation has any access to outdoor amenity space – making the point that the remainder of the site is either car park or garden to the public house and therefore this results in a family scale dwelling with no outdoor amenity space. The CA appended a separate Planning Appeal decision which it states confirms the need for family size accommodation to provide reasonable amenity space.

9. The CA also examines the amenity of the first floor accommodation by referencing this alongside the what would typically be the operation of the public house including its associated kitchen operation – essentially submitting that the first floor dwelling flat's level of amenity is limited by it being configured above and therefore in close proximity to the commercial operation of public house trade areas and commercial kitchen activities, concluding the dwelling flat could only "*satisfactorily accommodate*" occupiers who have an operational relationship with the same business who would be prepared to make allowances for the reduced residential amenity in ways that occupants unconnected with the public house would not. The CA concludes that it regards the first floor dwelling flat as being part of a single planning unit within which the public house has not been operating for sufficient period within the previous three years to claim CIL relief and as such the planning authority request that the appeal is dismissed. In support of this, the CA cites the High Court Judgement in 2015 of the case between R (oao Hourhope Ltd) and Shropshire Council. The Appellant submitted comments dated [redacted] on the CA's representations, much of which is reiteration of points made within the principal Representation and therefore I summarise the most pertinent to this CIL Appeal as follows:

a) The Appellant clarifies that the appeal is in relation to the whole of the [redacted] premises, not just the flat at first floor and that the lawful use of the flat for the qualifying period of time brings the whole of the GIA of the property into consideration to be off set from the chargeable area in the calculation of CIL.

b) The Appellant reiterates its interpretation of the CIL Regulations that if any part of the property is in lawful use, the full GIA must be incorporated into the CIL calculation.

c) The Appellant refutes the CA's viewpoint that the unconnected PI cases referenced are not relevant to CIL as the CIL regime is wholly within the realm of planning law across England and Wales with the CIL Regulations 2010 (as amended) being brought into existence under Part 11 of the Planning Act 2008.

d) The Appellant reiterates the concurrent uses of the public house element and the residential element of the property as two composite uses of a single planning unit is what the Appellant is arguing and that the CA argues the residential element is an ancillary use to the public house – the Appellant submits the PI cases and respective reference therein demonstrate that the CA's position is incorrect.

e) The Appellant refutes the CA's view that the dwelling flat does not have external amenity / garden space, explaining the flat has its own private parking and garden space which is indicated on an appended plan.

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 part of [redacted] property – the dwelling flat at first floor level, remained in use for the qualifying period and the CIL Regulations allow the lawful in use area to be offset from the Chargeable Area in the CIL calculation. Further, the Appellant submits that the CIL Regulations permit the whole of the property to be treated as in use because part of the property was in use.

**In-use buildings / Lawful use**

b) "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.

c) The Appellant's contention is that because the first floor dwelling flat was occupied for the requisite time period, the criteria for the whole property being in lawful use was met because the Regulations allow the whole property to be considered for offset against the Chargeable Area because part of the property was in lawful use.

d) I acknowledge the Appellant's point that to lawfully occupy the first floor owner's accommodation of the [redacted] property aligns with CIL Regulations at Schedule 1, Part 1, paragraph 1(6),especially "*…in-use building means a building which*

*(i) is a relevant building, and*
*(ii) 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) I am aware there is some similarity in terms of property type with that at the centre of the High Court judgement of R (OAO Hourhope Ltd) v Shropshire Council [hereinafter referred to as "the Hourhope case" for ease].

f) There are similarities between the subject Appeal and the Hourhope case in that both concern a closed public house property and the contention in both is a matter of what constitutes the properties being in 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 is most relevant.

g) Clause 30 of the Hourhope Judgement provides an expression which clarifies how any use other than the principal use should be regarded, namely "*…It is no doubt right that part of the use of premises as a public house may include using parts of those premises for storage (such as a cellar to store beer kegs or other stocks , or an outbuilding in which furniture or garden machinery is kept). Such use would be lawful for planning purposes as long as the main activity is permitted. In my view however* [redacted] *is right to say <u>these are not separate uses which are themselves authorised for planning, but activities ancillary to and part of the overall permitted use as a public house</u>. The lawful use carried on in such a storage area, for planning purposes, is use as a public house, not use for storage.*". I acknowledge the obvious dissimilarity between storage and residential. I am of the opinion that there is a fundamental distinction made between lawful primary uses such as a public house and as a residence and those activities which occur as either a result of or to enable the lawful use, like storage which itself is not a principal use of a public house property.

h) The Hourhope judgement provides further clarification that in that case the principal activity of a public house was 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.

i) In the subject case, there is no declared date of cessation of trade, however, there is no dispute that that the public house part has not been in lawful use [open and trading] for the qualifying period.

j) However the Hourhope case does not address the Appellant's contention around a mixed or composite use and that continuation of a composite primary use qualifies the property as an 'in-use building' for CIL purposes. Whilst it appears that the public house in the Hourhope case must have contained some residential accommodation (the decision states that a director of the company that previously owned the public house remained in the manager's accommodation for a period of time) whether that residential use was a composite primary use or ancillary to the public house use was not considered. The judge commented that even if that occupation would have been sufficient, it ended before the expiry of the six month period that the claimant needed to show.

k) However the two PI cases submitted by the Appellant do consider this point, albeit in relation to a material change of use and enforcement matters rather than for CIL purposes. In the [redacted] case the inspector found that "*As a matter of fact and degree I find that the historic residential use of the property, providing not just incidental accommodation for staff but a family home amounted to more than an activity ancillary to the public house use. Whilst it is not uncommon for a publican to live on the premises, it is not a necessary requirement. In this case the substantial residential use was not parasitic on the public house use but rather was a separate use in its own right. Notwithstanding that it was occupied by the publican, it was for the most part a functionally separate use. This is in part demonstrated by the fact that the residential use has continued largely unchanged since the public house closed.*"

l) With the [redacted] case the Inspector summarises that "*The Council says the public house was the single main purpose and that residential use of the first floor was ancillary to that use such that with its cessation the residential use cannot survive. The Appellants say the premises were in mixed use, such that it falls within the second category in Burdle. I consider that this is quintessentially a matter of fact and degree.*" He then went on to find that on the facts of that case the family home was not an ancillary use to that of the pub.

m) The facts of this case are that the flat is of a substantial size, being 5 bedrooms, and has been occupied as a family home since the [redacted]. I consider that there are considerable similarities between the subject property and the properties which were the subjects of the planning cases submitted and I am satisfied that the subject property was a single planning unit with a composite or mixed use – i.e. there were two primary uses, one for residential use and one for use as a public house which was dormant. The CA accept that the property was in composite use and their representations focus on there being one planning unit. However, there being one planning unit does not mean that the residential use is necessarily ancillary. Burdle confirms that a single planning unit can have two primary uses and as the Planning Inspectors have noted it is a matter of fact and degree in each case as to whether uses within a single planning unit are ancillary or primary uses. As such, based on the facts of this case, I consider that the continued residential use of the flat was a lawful primary use rather being ancillary to the pub which had ceased trading.

n) I am of the opinion [redacted] contained a part that was in lawful use for a continuous period meaning the qualification of lawful use for CIL purposes has been established and therefore [redacted] was an in-use building as defined within the CIL Regulations, permitting the floorspace to be off-set against the chargeable area of the proposed development.

11. Commentary on CIL Liability as Determined by Appointed Person

a) There appears to be no dispute in relation to the rates adopted or indexation. In summary, I determine that the net chargeable area has been calculated incorrectly by the Collecting Authority, therefore I determine the CIL Liability as follows.

b) The CA adopted a Chargeable Area [sqm] of [redacted] which was used in the calculation of Total CIL Liability of £[redacted] as per CIL Notice Ref: [redacted]. I have undertaken my own check measurements of the proposed plans for Plots 01 – 05 and concur with the CA's total proposed GIA of [redacted]sqm. The Appellant makes repeated reference to the existing GIA of [redacted] being greater than the proposed GIA however I cannot find a statement of the existing floor areas within Representations. I have undertaken check measurements on the floor plan of the 'Existing' accommodation and estimate the GIA to be approximately [redacted] sqm which is greater than the total proposed GIA [Plots 01 – 05] of [redacted] sqm, therefore the CIL Liability is Nil.

12. The Appellant has applied for an award of costs as part of their Representations. The purpose of such costs awards is to encourage responsible and reasonable use of the appeal system by Appellants and action by Collecting Authorities, by introducing financial consequences for unreasonable behaviour. I have considered the facts of this case, the evidence submitted and the conduct of the Parties. In this case, I have not seen evidence of unreasonable behaviour by either Party and therefore dismiss the claim for costs.

[redacted] BSc FRICS
Valuation Office Agency
13 November 2023