

Appeal Decision

by [REDACTED] BSc Hons PGDipSurv MRICS

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

Valuation Office Agency - DVS
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Appeal Ref: 1836489

Planning Application: [REDACTED]

Proposal: *“Full planning application for construction of a [REDACTED] food retail unit ([REDACTED]), a [REDACTED] retail unit and drive thru ([REDACTED]), a [REDACTED] charging station, a [REDACTED] industrial unit ([REDACTED]), a [REDACTED] industrial unit ([REDACTED] (self-storage only)), with associated parking, landscaping and infrastructure works.”*

Address: [REDACTED]

Decision

I determine a CIL charge of £nil.

Reasons

1. I have considered all the submissions made by [REDACTED] (the Appellant) acting on behalf of [REDACTED] and [REDACTED], 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 Decision reference [REDACTED] dated [REDACTED] for *“construction of a [REDACTED] food retail unit ([REDACTED]), a [REDACTED] retail unit and drive thru ([REDACTED]), a [REDACTED] vehicle charging station, a [REDACTED] industrial unit ([REDACTED]), a [REDACTED] sq.m industrial unit ([REDACTED]), with associated parking, landscaping and infrastructure works.”*
 - b. CIL Liability Notice ref [REDACTED] dated [REDACTED] for £[REDACTED].
 - c. The CIL Appeal Form dated [REDACTED] submitted by [REDACTED] under Regulation 114.

- d. The Appellant's representations (Grounds of Appeal document) dated [REDACTED] together with supporting documents (as listed in the document).
- e. The CA's representations to the Regulation 114 Appeal and the Appellant's Grounds of Appeal document, dated [REDACTED], Parts One and Two, together with supporting documents.
- f. The Appellant's response to the CA's representations (email dated [REDACTED])

Background

2. A CIL Liability Notice (LN) was first issued on [REDACTED] by the CA and considered that the [REDACTED] fell under the category of "food retail supermarkets". Therefore it was calculated that CIL was payable based on the floor areas of both units. The CIL was calculated by the CA at £[REDACTED].
3. [REDACTED] requested that the original LN was reviewed, and subsequent to this a new Liability Notice was issued by the CA on [REDACTED] which rendered the original LN as "null and void". The revised LN was issued because the CIL amount had been recalculated. The CA had decided to remove the floorspace of the [REDACTED] unit from the CIL calculation, however the CA judged that CIL was still payable on the [REDACTED] unit because it was considered to be a supermarket. The CIL amount as per the revised LN was £[REDACTED].
4. The Appellant raises a point of detail about the calculation by the CA of the floor area of the [REDACTED], which was referred to in the LN dated [REDACTED] as [REDACTED] m². The stated floor area as per the approved planning permission was [REDACTED] m². The Appellant suggests that this issue should not affect the CIL total charge as they believe the rate should be £nil in any case.

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

5. The representations turn on the interpretation of the CIL Charging Schedule (CS) adopted by [REDACTED] (the CA) and the Development Category (Use Type) set out in that Schedule.
6. The CA's CIL CS was adopted on [REDACTED]. The Appellant advises that according to this document, in their opinion the only category that the [REDACTED] unit could fall into for CIL to be chargeable is 'Food Retail (Supermarkets)' or 'Retail Warehouses'.
7. The Appellant refers to Appendix D of the CS which sets out the glossary of terms, with the following definitions:

Food Retail (Supermarkets) 'A supermarket is a retail shop selling food and household items on a self-service basis with the products usually, but not necessarily, arranged in aisles. It may also, but not necessarily, include a range of comparison goods in the overall retail mix. Customers may use a supermarket for their main weekly shop'.

“Retail Warehouses Retail warehousing includes all non-food retail units without restriction to size, specialising in the sale of household goods (for example: carpets, furniture, electrical goods), DIY items and other ranges of goods....”

8. The Appellant suggests that the CS was adopted following an examination process and supported by relevant viability evidence. They refer to a ‘CIL Viability Update of [REDACTED]’ in which the Planning Inspector made conclusions and recommendations for input into the CS. They quote part of the report in relation to ‘representative ranges’ for floorspace that is set out in two Retail Viability Assessments at Appendix 7 of that CIL report. It stated that *“the floorspace for a Larger Supermarket is [REDACTED] sqm, and a Smaller Supermarket is [REDACTED] sqm. Alongside this, the Retail Warehouse space assessed has always been [REDACTED] sqm in the assessments made”*.
9. The Appellant also refers to the [REDACTED] Councils Local Plan Viability update (September 2014) which they say contains the following guidance:

“Retail 9.12 For the purpose of this study, we have assessed the following types of space. It is important to remember that this assessment is looking at the ability of new projects to bear an element of CIL – it is only therefore necessary to look at the main types of development likely to come forward in the future. We have modelled the following distinct types of retail development for the sake of completeness – although it should be noted that no such development is scheduled to take place on the specific sites. This has been altered since the initial work to reflect the change in emphasis in this part of the property market and to include ‘discount operators’ such as [REDACTED]:

- i. Supermarket is a single storey retail unit development with a gross (i.e. GIA) area of [REDACTED] m² (being smaller than that modelled originally). It is assumed to require [REDACTED] car parking spaces, and to occupy a total site area of [REDACTED]. The building is taken to be of steel construction.
- ii. Smaller ‘discount’ supermarkets is a smaller [REDACTED] m² unit on a [REDACTED] site ([REDACTED]) of steel frame construction.
- iii. Retail Warehouse is a single storey retail unit development with a gross (i.e. GIA) area of [REDACTED] m². It is assumed to occupy a total site area of [REDACTED] ha. The building is taken to be of steel construction. The development was modelled alternatively on greenfield and on previously developed sites.”

10. The Appellant proposes that this representative range of floorspace areas for supermarket developments is consistent with national planning guidance for when an impact assessment is required for assessing applications for retail and leisure development outside town centres. They quote the NPPF 2021, para 90 which states *“if there is no locally set proportionate threshold, the default threshold is 2,500m² of gross floorspace”*

11. The appellant has put forward comparable evidence of sites where there was an element of ‘food retail use’ but where no CIL was charged.

Comparable 1- a similar development at [REDACTED].

The Appellant suggests in this example that this site did not require CIL for a development including a [REDACTED] sq ft (c [REDACTED] m²) convenience store. The [REDACTED] RM application sought to agree reserved matters relating to a post-CIL outline permission granted in [REDACTED]. The Officer’s report concluded: *“proposal is for*

convenience store and not a food retail (Supermarket) as set out in the Charging schedule Appendix D so is therefore not CIL liable”

Comparable 2- application ref [REDACTED].

This relates to a development of 4 x retail units (use classes A1, A2, A3 and B1) where no CIL was charged. Each of the units was 100m² in size. The Appellant suggests this permission was granted after the adoption of CIL and argue that if ‘Food Retail (Supermarkets)’ catches all food retail developments, then this site should have been caught by CIL.

12. In their grounds of appeal, the Appellant refers to the nature of the unit in question. They state the approved floor area is [REDACTED]m² and the use of the proposed [REDACTED] Local falls within Use Class E(a) and is *“for the display or retail sale of goods, other than hot food, principally to visiting members of the public.”* They further state it will be a small convenience store, whose format is geared towards top-up shops, not main weekly shops or the selling of a wider range of household items.
13. The appellant suggests the use of the word “supermarket” in the definition for food retail is key. They argue that the CIL CS could have defined this Use Type as ‘Food Retail’ however (in the CS) they have selected to specifically reference ‘Supermarkets’ only. The Appellant suggest the CA has failed to consider the type and size of the retail store type that is covered by the CS. They point out that the Glossary within the CS refers to the ‘main weekly shop’. The Appellant contends that this definition excludes a wide range of shops, including convenience stores, which, due to their size, means you are unable to buy a main weekly shop.
14. The Appellant suggests it is *“irrational to suggest that a store of [REDACTED]m² falls anywhere near the representative range that was assessed for all types of supermarket”*
15. They suggest that their comparable evidence of other sites demonstrates different interpretation of the CS by the CA and previous decisions regarding CIL have not been consistent.
16. The Appellant concludes that the subject [REDACTED] retail unit is not liable for CIL at the rate set for ‘Food Retail (Supermarkets)’ as it is not covered by the definition set out within the CS. They contend that it comes within the category of ‘All Other Uses’ for which the CIL rate is £nil.

The CA has submitted representations that I have summarised as follows:

17. As set out in Part One, when calculating CIL in this locality, the CA state they are guided by the [REDACTED] Community Infrastructure Levy Charging Schedule” ([REDACTED]) and “[REDACTED] Community Infrastructure Levy (CIL) User Guide” ([REDACTED]). The CIL rates applicable in the CS are £[REDACTED] per m² for ‘Food Retail (Supermarkets)’ and £[REDACTED] per m² for ‘Shops’. The CA suggest a key consideration whether CIL is payable in this case is whether the subject [REDACTED] is a shop or a supermarket. The CA decided *“that the [REDACTED] is obviously a supermarket.....”*
18. The CA has clarified why the issue regarding the floor area has arisen. Namely the stated floor area per the Planning Application was [REDACTED]m² however from their

own measurement from the floor plans provided, they have calculated a GIA of ■■■■■ m² as they have identified an area inside the front entrance which they calculate has been omitted from the GIA.

19. The CA advise the revised LN was issued on ■■■■■ to correct two points- firstly that they had decided that no CIL was payable the ■■■■■ unit, and secondly to amend the CIL payable on the ■■■■■ to conform with their calculation of the GIA to ■■■■■ m².
20. The CA state they have consulted with ■■■■■ as he was an individual who was involved putting together the CS. The CA advise that ■■■■■ commented "The definition was provided by the Inspector at the Charging Schedule examination in ■■■■■. I recall it was very narrow because the viability evidence for CIL on retail only supported supermarkets, and this is what the definition seeks to cover. I remember the discussion emphasised the 'weekly shop' to differentiate from a convenience retail store."
21. The CA state there is no precedent in this locality for the consideration of a 'supermarket' because the subject site was the first application the CA had received (since CIL was implemented) to build a supermarket on bare land. Hence they suggest they had considered how other CA's had interpreted CIL regulations and applications to different uses in different localities. They quote the ■■■■■ which uses the following definitions:

"Convenience based supermarkets and superstores¹ and retail warehousing² (net retail selling space of over 280 sq metres)

¹ Superstores/supermarkets are shopping destinations in their own right where weekly food shopping needs are met and which can also include non-food floorspace as part of the overall mix of the unit.

² Retail warehouses are large stores specialising in the sale of household goods (such as carpets, furniture and electrical goods), DIY items and other ranges of goods, catering for mainly car-borne customers."

22. The CA suggest they decided to apply a ■■■■■ m² threshold because it occurred in trading hours legislation. They went on to detail information taken from <https://www.gov.uk/trading-hours-for-retailers-the-law> which sets out the law for trading hours. The distinction that they wish to draw attention to is that, under trading law, a 'small shop' is one that measures up to and including ■■■■■ m² whereas a 'large shop' are those over ■■■■■ m². On review of this, the CA concluded that the subject ■■■■■ was a supermarket, falling under 'Food retail (Supermarkets)' and therefore liable for CIL. Therefore the CA contend that the CIL payable should be £■■■■■.
23. Part Two is written in response to the Appellant's Grounds of Appeal, firstly the CA addresses the Appellant's comparable sites:
24. Comp 1- a similar development at ■■■■■
The CA state that this planning permission relates to a strategic site and part of the ■■■■■ development Plan. Furthermore they state that outline planning consent

was granted before the introduction of CIL in this region and hence it would not have been liable for a CIL charge.

25. The CA has supplied further correspondence, consisting of lengthy and detailed emails between the parties, where the matter of size of the subject [REDACTED] is discussed in relation to the convenience store proposed under this planning application. There is also some discussion regarding the definition of a 'supermarket' and the notion of 'the weekly shop'.

26. The CA explain that CIL was not charged on this development because outline planning permission (planning ref [REDACTED]) was originally granted on [REDACTED] and this was before CIL became to be implemented in this locality. The CA suggest that because the Outline Permission had been granted before the CIL regime became into being, CIL was not payable on this development even though the full planning consent was granted on [REDACTED] (after the introduction of CIL).

27. Comp 2- application ref [REDACTED].

The CA state that CIL was not payable on this development because even though the total 'retail area' for the development was [REDACTED]m², no single unit exceeded 100m². They also state that at the time planning permission was granted, there were no 'end users' identified for these units and hence planning consent was granted for a flexible use to cover A1 (shops & retail outlets), A2 (professional services), A3 (food and drink where food and drink is consumed on the premises, and B1 (business to include offices, research and development). The CA suggest that it is their view that a food retail unit must have a floor area of at least [REDACTED]m² to be liable for CIL and therefore this did not apply to this development.

28. In Part Two of their representations, the CA then make comments in response to specific points raised in the Appellant's Grounds for Appeal. They address their calculation of the floor area (GIA) and the amendment of the [REDACTED] from [REDACTED]m² to [REDACTED]m² GIA (the details of which are noted above). They also explain why this led to a new LN being issued on [REDACTED].

29. They also refer to the CS, adopted by [REDACTED] on [REDACTED], and the similarity to other CS documents for other neighbouring CA's, noting that the only difference between the documents is the first title page (which simply names the different CA). It is stated that there is no requirement to keep CIL rates consistent across CA's boundaries and the CA confirms that there is in fact no difference between the [REDACTED] CS and the [REDACTED] CS (other than the title page). There is also the contention that there is no difference in approach to the CIL calculations for sites located within [REDACTED] and [REDACTED] as the same CIL Monitoring Officer is responsible for both regions.

30. In turning to the size of the subject [REDACTED] again, the CA contend that the proposed is not a "small convenience store". They refer to previous planning permissions granted by [REDACTED] since [REDACTED] for developments containing 'retail units'. They note that the subject [REDACTED] is smaller than the approved [REDACTED] and [REDACTED] but bigger than the approved [REDACTED], [REDACTED] and [REDACTED]. The CA suggest there is no reason why consumers could not use the [REDACTED] for their main weekly shop and it's location to the South of [REDACTED] may lend itself to being more convenient for some consumers

to complete their weekly shop there rather than travelling further afield to larger shops.

31. The CA also comments on the Appellant's reference to the National Planning Policy Framework 2021 (NPPF 2021) document that is explicit in terms of floor areas when assessing applications, specifically in relation to a quoted threshold of 2,500 m². The CA suggest that this reference comes from the section "Ensuring the vitality of town centres" and the floorspace threshold of 2,500 sqm refers to the entire "retail and leisure development outside town centres" and not, as the Appellant infers, the default threshold" for a supermarket. They CA also comments the NPPF 2021 document has no connection to the CIL CS.

Appellants comments in relation to the CA's representation documents:

32. In response to the CA's representations, the Appellant further comments:

"Whilst we will not be providing a detailed response to this, please can the relevant officer take the below comments on board alongside our previous Grounds of Appeal.

Firstly, in the Part Two document, the Council set out on page 9 that:

"After reviewing the liability with senior managers we decided to adopt [REDACTED] policy that a large food retail unit should have a GIA of at least [REDACTED] sqm."

As set out within our Grounds of Appeal, that is not what the [REDACTED] CIL examination considered, this specific CIL schedule was established for [REDACTED]. The officer has missed the distinction that has to be made between the [REDACTED] examination and CIL charges, and the one being considered here, here they only looked at the supermarket size.

Finally, the Council refer to the store being used for weekly shopping. Please note that this is a [REDACTED] store, where the function is for top up shopping. [REDACTED] will not be providing trolleys as highlighted by the approved application plans, with only baskets provided".

Consideration of the Decision

33. I have considered the representations made by the CA and the Appellant, along with the information provided by both parties.

34. In trying to reach my final decision, I have concluded that the primary driver for consideration is Regulation 9(1) of the CIL 2010 Regulations which cites "...the development for which planning permission is granted."

35. In my opinion, I have to decide whether the subject [REDACTED] is a supermarket falling under the CIL charge category for 'Food Retail (supermarkets)'. The definition of a 'Food Retail (supermarkets)' use is set out at Appendix D, Page 42 in the [REDACTED] Community Infrastructure Levy Charging Schedule as:

"Food Retail (Supermarkets) A supermarket is a retail shop selling food and household items on a self-service basis with the products usually, but not necessarily, arranged in aisles. It may also, but not necessarily, include a range of comparison

goods in the overall retail mix. Customers may use a supermarket for their main weekly shop”.

36. It is noted that the CS does not set out a minimum floor area for a supermarket which leaves the categorisation somewhat open to interpretation. In determining this CIL Appeal, I have to consider what the CS actually states (and not really what was considered as part of it's forming).
37. Whilst I find the Comparable sites quoted by the Appellant as interesting, I note that the application for Comp 1 (████) was approved (in outline even if not in full) prior to the CA introducing the CIL and the development did not fall to be considered under the CIL regulations. Comp 2 (application Ref █████) consisted of four separate units, each with a floor area of 100m², and therefore I would not consider it to be directly comparable to the subject. I would comment that each CIL liability is individual and is assessed on its own merits.
38. The crux of the matter for this CIL Appeal is to consider whether the subject █████ is a 'supermarket' and therefore falling under 'Food Retail (Supermarkets)' classification with the █████ CS.
39. The CA seem to have relied, in part, on a threshold of █████m² and have noted that under trading law, a 'small shop' is one that measures up to and including █████m² whereas a 'large shop' are those over █████m². Therefore, the CA concluded that the subject █████ was a supermarket. I do not agree that a 'large shop' automatically deems a shop to be a supermarket. In my opinion, trading law has no connection to the CIL in much the same way, as the CA has contended, the NPPF 2021 document has no bearing on CIL either.
40. I have noted that in relation to the █████m² threshold, the CA have further referred to the █████ CIL CS which uses the following definitions:
█████
41. I do find this clarification in terms of net retail space useful, however it is noted that this definition is from the CS of a different CA and not the one in question. It is my opinion that the CS from another CA, whether neighbouring regions or not, does not bind or influence the CS of another CA in much the same way (as the CA contends) that there is no requirement to keep CIL rates or charging schedules consistent across CA's boundaries.
42. The CS in question, for █████, unfortunately does not clearly define what a supermarket is and offers no explanation in terms of threshold size or net selling space. It is noted that the wording in the definition of 'Food Retail (Supermarkets)' on Page 42 of the CS, refers only to a 'retail shop' and not a 'large retail shop' and therefore it is perplexing that the CA is now seeking to apply a threshold a █████m² in its consideration of what size of food shop constitutes a supermarket.
43. It is also useful to read the descriptions, as referred to by the Appellant, which is stated in █████ Local Plan Viability update (████) regarding indicative sizes and descriptions of various retail units. However, it is noted that this wording and

descriptions have not found their way into the CIL CS and also notwithstanding this, the document has no bearing on CIL either.

44. With the size/floor area issue aside, I have also considered other attempts by the parties to clarify what does or does not constitute a supermarket in terms of the 'main weekly shop', trading hours, the geographical spread of other large food retail stores in [REDACTED] and the absence of trolleys at the subject [REDACTED].
45. Regarding all definitions and clarifications within the CS, I do not find that the CS offers clear guidance as to what does fall into the category of 'Food Retail (supermarkets)' and therefore I do not consider it conclusive that the subject [REDACTED] is a supermarket falling within this category.
46. Having fully considered the representations made by both parties and all the evidence put forward to me, and in the absence of clarity within the CS, I disagree with the CA's contention that the subject [REDACTED] is "obviously a supermarket". I consider the absence of trolleys to be indicative that customers are less likely to use the shop for their main weekly shop and I am mindful to agree with the Appellant that the subject [REDACTED] does not definitively fall within the definition 'Food Retail (Supermarkets)' category. However, I do not agree with their contention that it comes within the category of 'All Other Uses'.
47. The category of 'All Other Uses' encompasses 'education, health, community and other uses' and is defined in the CS, Appendix D (page 42) as 'buildings that are often provided by the public sector, not for profit and charitable sectors and include the following classes within the Town and Country Planning (Use Classes) Order 1987 (as amended): residential institutions (C2, C2a), non-residential institutions (D1) and assembly and leisure uses (D2)''.
48. In my opinion, the [REDACTED] does not fall within this definition and I consider it falls within the category of 'Shops'.
49. There is no definition in the CS of a 'Shop' (Appendix D is silent on this). The definition of a "shop" within the Oxford English Dictionary, (online edition) is defined as:- "A building, room, or other establishment used for the retail sale of merchandise or services". Having regard to this dictionary definition, and in the absence of a clearer definition within the CS, such as that prescribed in the [REDACTED] CIL CS when defining convenience based supermarkets and superstores, I conclude that the subject [REDACTED] does not fall within the 'Food Retail (supermarkets)' category but rather the 'Shops' category and hence no CIL should be charged.
50. In conclusion, I agree with the Appellants calculations of the CIL charge at £nil.
51. I note there has been an area of detail regarding the calculation of the floor area and whether the GIA should be [REDACTED]m² or [REDACTED]m². I have not needed to consider this point further as I have concluded that the [REDACTED] does not fall within the category for chargeable CIL and hence this matter is not relevant in light of my decision.

Award of Costs

52. As part of the representations the Appellant has applied for an award of costs on the CIL appeal. They apply for an award of costs because they feel that the appeal has been an unnecessary and wasted expense. They suggest they raised these issues at the start of the planning application process and the CA has failed to address them. They contend that in previous CIL calculations on other similar cases, the CA has not acted in a consistent manner.
53. In relation to costs for this Appeal, the CA suggests they have provided answers to the Appellant's questions and have been consistent throughout in respect of their decision to consider the subject [REDACTED] as a supermarket. They suggest they have also been consistent in respect of previous CIL decisions on similar developments and have explained why the developments in question (the Appellant's comparables above) have not been subject to CIL.
54. The purpose of such costs awards is to encourage responsible and reasonable use of the appeal system by Appellants and action by CAs, 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.

Decision

55. On the basis of the evidence before me and having considered all the information submitted in respect of this matter, I therefore determine a CIL charge of £nil.

[REDACTED] BSc (Hons) PGDipSurv, MRICS
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