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: 1857931

Address: [redacted]

Proposed Development: Full application for the proposed erection of 2 detached dwellings, associated landscaping and parking. Following demolition of existing buildings.

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

Decision

I determine that the Community Infrastructure Levy (CIL) payable in this case should be £[redacted] ([redacted]).

Reasons

Background

1. I have considered all the submissions made by the Appellant, [redacted] 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 Planning Permission [redacted] dated [redacted].
   c) The CIL Liability Notice (ref: [redacted]) dated [redacted] .
   d) CIL Additional Information Form Part 1, dated [redacted] .
   e) The CA's Regulation 113 Review, dated [redacted].
   f) The Appellant's Appeal Statement of Case document (including Appendices) dated [redacted].
   g) The CA's Statement of Case document (including Appendices) dated [redacted].

h) The Appellant's comments on the CA's Statement of Case document, which are dated [redacted].

Grounds of Appeal

2. Planning permission was granted for the development on [redacted], under reference [redacted]. The approved planning permission was:-

   Full application for the proposed erection of 2 detached dwellings, associated landscaping and parking. Following demolition of existing buildings.

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 (Residential development – Rest of Borough) plus indexation of [redacted].

4. 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 and that no CIL should be payable.

5. The Appellant's appeal can be summarised to a single core point:-

   The Appellant opines that the CIL calculation 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 offset against the chargeable area). It is the Appellant's case that the building has been in lawful use for a continuous period of 6 months within the past 3 years, which results in there being a zero charge as the proposed floorspace of the development of [redacted] m², is less than the existing floorspace of [redacted] m².

   It would appear that there is no dispute between the parties in respect of the Charging Rate, the measurement of constituent areas or the applied indexation.

Approved Development in Dispute

6. The dispute between the parties relates to a parcel of land in a predominantly rural location, situated to the south of [redacted] in [redacted]. The site extends to approximately [redacted] of a hectare ([redacted] of an acre) and has a dilapidated bungalow and 15 outbuildings thereon. The 15 outbuildings comprise a range of single-storey former cattery buildings, which comprise an office, a former grooming building and former cat pens.

Decision

7. 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.

8. Regulation 9(1) of the CIL Regulations 2010 states that chargeable development means "*the development for which planning permission is granted*".

9. The Appellant opines that all of the buildings were occupied until [redacted] and thus satisfy the 'in-use' criteria. The date of [redacted], was the acquisition date of the subject property by the Appellant (a property developer) from the previous owners, [redacted] and [redacted]. Of note, the [redacted] lived in the bungalow and had a history of operating the outbuildings as a cattery. The Appellant has provided a wealth of information in respect of the planning history of the subject property, going back to the late 1960s. The Appellant opines that as the dwelling bungalow was occupied, the outbuildings must also have been occupied, given the nature of the cattery operations.

   The Appellant opines that the use of the outbuildings has always been dependant on the occupants of the dwellinghouse; that the outbuildings are ancillary to the dwelling and the outbuildings are incidental to the enjoyment of the dwellinghouse. The Appellant further opines that the outbuildings have no separate address, parking facility or access away from the dwellinghouse. In addition, the Appellant states that the outbuildings used a water supply and electricity supply from the dwellinghouse.

   The Appellant also cites an error (made by the Appellant) on the CIL Additional Information Form Part 1 dated [redacted], whereby the Appellant erroneously put a cross in the incorrect box in respect of the outbuildings and their lawful use. The Appellant opines that the error is harsh and results in a negative impact on the viability of the development.

10. In support of the Appellant's contention that the outbuildings had been in cattery use, the Appellant has provided:-

    A letter dated [redacted] from [redacted] (the previous owner of the subject property) citing that when the cattery business was not busy, the cattery buildings were used for personal purposes for the keeping of their own cats and equipment. [redacted] further cited that he and his wife used all the buildings when they lived at [redacted].

11. The CA contends that the planning use of the building is a cattery; however, the CA opines that the cattery ceased trading in [redacted] and was subsequently used as a personal storage facility. The CA further opines that the evidence strongly suggests that the planning use as a cattery (defined as "*a boarding or breeding establishment for cats"* with the definition of boarding being "*provide (a person or animal) with regular meals and somewhere to live in return for payment*" had not been abandoned in planning law. The CA opines that given that no abandonment in planning law had occurred, yet the cattery ceased trading in [redacted], the cattery buildings would only have been in lawful use when the above definitions were met and not when being used for personal reasons or storage.

    The CA opines that the Appellant has not provided sufficient evidence to establish that the cattery buildings meet the criteria for being in existing lawful use.

12. As a secondary argument for not granting an off-set for the floorspace of the cattery buildings, the CA also opines that the area of the cattery buildings does not constitute GIA. Specifically, the CA opines that the cattery buildings fall in the category of *garden stores, fuel stores, and the like in residential property* which is excluded within the definition of GIA as per RICS Code of Measuring Practice.

13. The core dispute between the parties in this case relates to the interrelated CIL Regulation concepts of 'In-use building' and lawful use. To clarify, the following three paragraphs summarise the Regulations:-

14. 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."

15. "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.

16. "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.

    The CA has accepted that the Gross Internal Area (GIA) of the dwelling bungalow was in lawful use and have deducted this element from the CIL charge; however, the CA has not accepted that the GIA of the cattery outbuildings can be off-set, as it opines they do not meet the criteria for being in existing lawful use. Accordingly, from the CIL Regulations, to meet the criteria for lawful use the subject buildings (the dwelling bungalow of [redacted] and the cattery outbuildings) would need to have been in a lawful use for a continuous period of six months between [redacted] and [redacted] .

17. The CA notes the error made by the Appellant in completing the CIL Form Part 1 dated [redacted], and that it was not the case that the cattery buildings, *"…had not been occupied in the last 3 years, when they clearly had been."* The CA contends that although this assertion clearly contradicts the position confirmed by declaration in the CIL Form, it is not critical to the determination of CIL Liability in the circumstances. In examining all the documentation advanced to me in this Appeal, I agree with the CA that the Appellant's error on the CIL Form Part 1 dated [redacted] is not material and I have attached no weight to the error, in arriving at my determination.

18. In respect of lawful use, I am guided by 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.

19. 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.

20. The CA has evidenced an inspection note dated [redacted], undertaken for The Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018, which recorded *'No cats at time of inspection as trading has been suspended pending application and inspection'* and '*Own dogs (6 Daxis) live in private dwelling'*. Given the date of the inspection, I consider this item of evidence to be circumstantial; however, I do concede that it arguably does provide minor evidence on the *intentions* of the [redacted].

21. The CA also points to their planning officer site inspection report (site inspection of [redacted]), which refers to the cattery on page 5 of the report as 'redundant'. The CA also

points to the Bat Survey Report, as prepared by [redacted] . There are extensive photographs of the cattery outbuildings within the report; although they are not date stamped within the report, it would appear that the photographs were taken in [redacted] (when the report authors made a Preliminary Roost Assessment and prior to the three Bat Roost Surveys, which were undertaken [redacted] – [redacted]).

It is clear to me from the photographs that the cattery buildings were in a poor state of repair and dilapidated in the main. Indeed, within the Bat Survey Report, the cattery outbuildings are collectively described as 'disused' in paragraph 2.1. The component single-storey cattery outbuildings are individually described within the report and vary from a semi-collapsed prefabricated steel shed (Structure S16) to a cement block kennel building with a pitched roof of cement/asbestos corrugated roof sheets, supported on a steel frame (Structure S3). The majority of the outbuildings are of softwood timber/bitumen felt construction, clad in shiplap timber with wire mesh enclosures.

22. Both parties have advanced to me evidence in support of their respective viewpoints. The Appellant's view is that the storage use is for personal purposes, so it meets the lawful use criteria; however, the CA views it differently. Clearly, the cattery ceased trading as a business in [redacted] , so this date appears to be the trigger date when the cattery business use was abandoned, but not abandoned in planning law. The key question to be addressed in this CIL appeal therefore, is the question… 'is there any evidence to refute the abandonment in planning law from the required date of , [redacted] to the date when the [redacted] sold the property on [redacted] ?' Whilst I must also consider the time period between [redacted] and [redacted], it is clear to me that there is no evidence; it is plainly obvious that the Appellant (a property developer) purchased the property on [redacted] with vacant possession and the property has remained vacant to date.

Based upon the evidence advanced by the Appellant, I find little evidence to support the Appellant's claim. The CA submits that the outbuildings have been used solely for personal storage in connection with the dwelling bungalow and argues that this is not their lawful use – the CA opines that the lawful use of the outbuildings was as a cattery (defined as "*a boarding or breeding establishment for cats"*).

Given the lack of evidence, I can only conclude that the outbuildings were used for personal or storage operations and not as an actual cattery business; in applying the guidance of *Hourhope*, in my view, the degree of activity by the [redacted], clearly does not pass the test of an operational cattery, where cats are boarded. At best, the outbuildings may have been occupied by cats owned or sheltered by the [redacted] for personal/altruistic purposes, but I have not been provided with any evidence of commercial activity on the cattery buildings during the required period. The *Hourhope* case provides guidance on the *intentions* of the parties; I see no evidence of any *intentions* by the [redacted] to refute the abandonment of cattery use in planning law. In conclusion, I agree with the CA that the outbuildings were used for personal storage purposes, which were not their lawful use.

23. Although I have determined that the outbuildings cannot be off-set as they do not meet the criteria for being in existing lawful use, as a secondary argument for not granting an off-set for the floorspace of the cattery buildings, the CA also opines that the area of the cattery buildings does not constitute GIA. Although a largely moot point given my determination on lawful use, I am obliged to address this contention, given the representations by the CA. I shall now turn to this aspect of the Appeal:-

24. 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."

25. The CIL Regulations do not define Gross Internal Area (GIA), so it is necessary to adopt a definition. The definition of GIA provided in the Royal Institution of Chartered Surveyors (RICS) Code of Measuring Practice (6th Edition) is the generally accepted method of calculation.

    GIA is defined as the area of a building measured to the internal face of the perimeter walls at each floor level.

    Including:-

    - Areas occupied by internal walls and partitions
    - Columns, piers, chimney breasts, stairwells, lift-wells, other internal projections, vertical ducts, and the like
    - Atria and entrance halls, with clear height above, measured at base level only
    - Internal open-sided balconies walkways and the like
    - Structural, raked or stepped floors are to be treated as level floor measured horizontally
    - Horizontal floors, with permanent access, below structural, raked or stepped floors
    - Corridors of a permanent essential nature (e.g. fire corridors, smoke lobbies)
    - Mezzanine floors areas with permanent access
    - Lift rooms, plant rooms, fuel stores, tank rooms which are housed in a covered structure of a permanent nature, whether or not above the main roof level
    - Service accommodation such as toilets, toilet lobbies, bathrooms, showers, changing rooms, cleaners' rooms and the like
    - Projection rooms
    - Voids over stairwells and lift shafts on upper floors
    - Loading bays
    - Areas with a headroom of less than 1.5m
    - Pavement vaults
    - Garages
    - Conservatories

    Excluding:-

    - Perimeter wall thicknesses and external projections
    - External open-sided balconies, covered ways and fire escapes
    - Canopies
    - Voids over or under structural, raked or stepped floors
    - Greenhouses, garden stores, fuel stores, and the like in residential property

26. Specifically, the CA opines that the cattery buildings fall in the category of *garden stores, fuel stores, and the like in residential property* which is excluded within the definition of GIA as per RICS Code of Measuring Practice.

    Given the photographic evidence within the Bat Survey report, I agree with the CA that all the cattery buildings fall in the category *of garden stores, fuel stores, and the like in residential property* which is excluded within the definition of GIA as per RICS Code of Measuring Practice. Accordingly, the Appellant's arguments fails on this aspect. In support of my decision, I have also considered the photographs in the Design and Access Statement dated [redacted], as prepared by [redacted]. The three photographs of the cattery buildings on pages 8 and 9 of this document support my determination that even if the planning use of the cattery had been abandoned, their character is such that they fall under the category *of garden stores, fuel stores, and the like in residential property* which is excluded within the definition of GIA.

Collectively, the cattery outbuildings have a GIA of approximately [redacted] m², which in context to the GIA of the dwelling bungalow (of [redacted] m²) is clearly disproportionate in GIA terms and is exceptional in my experience. Nevertheless, the relative GIA's of the dwelling and the outbuildings are factual matters, which must be reflected and considered in accordance with the CIL Regulations; the collective size of outbuildings which fall into the category *of garden stores, fuel stores* is irrelevant; the fact that they individually fall under the category is the determining factor.

The exceptional disproportionality of GIA between the dwelling bungalow and the outbuildings is unfortunate for the Appellant in this case and I am not unsympathetic to his situation; however, in arriving at my decision, I must make my determination based upon the submitted facts of the case, determined under the Community Infrastructure Levy Regulations 2010 (as amended). The viability of any development scheme is not a factor, which I can consider.

27. Having fully considered the representations made by both parties and all the evidence put forward to me, I agree with the CA that the cattery outbuildings of [redacted] had not been in lawful use for the required period and they failed to satisfy the CIL Regulations Part 5 Chargeable Amount, Schedule 1.

28. In conclusion, having considered all the evidence put forward to me, I therefore confirm the CIL charge of £[redacted] ([redacted]) as stated in the Liability Notice dated [redacted] and hereby dismiss this appeal.

[redacted]

[redacted]MRICS VR
Principal Surveyor
RICS Registered Valuer
Valuation Office Agency
17th February 2025