Appeal Decision

By [redacted] MRICS

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: 1854324

Planning Permission Reference: [redacted]

Location: [redacted]

Development: Prior Approval for change of use of the first floor from Use Class E to residential use providing 6 self contained units.

Decision

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

Reasons

1. I have considered all the submissions made by [redacted] (the Appellant) 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. Prior Approval [redacted] granted by the CA on [redacted] for "*Prior Approval for change of use of the first floor from Use Class E to residential use providing 6 self contained units.*"
   b. The CIL Liability Notice was issued by the CA on [redacted] in connection with approval [redacted] with CIL Liability calculated at a total of £[redacted]
   c. The CA's Regulation 113 Review Decision dated [redacted].
   d. The CIL Appeal Form dated [redacted] submitted by the Appellant under Regulation 114, together with documents and correspondence attached thereto.
   e. The CA's representations dated [redacted] together with documents and correspondence attached thereto.
   f. The Appellant's further comments dated [redacted] together with documents and correspondence attached thereto.

Background

2. Prior Approval [redacted] was granted by the CA on [redacted] for "*Prior Approval for change of use of the first floor from Use Class E to residential use providing 6 self contained units.*"

3. A CIL Liability Notice was issued by the CA on [redacted] in connection with approval [redacted] with CIL Liability calculated as:

   [redacted]
   Chargeable Area [redacted] m2 GIA
   X £[redacted] /m2 Rate R indexed at [redacted]
   = £[redacted] CIL Liability

   [redacted]
   Chargeable Area [redacted] m2 GIA
   X £[redacted] /m2 Rate R indexed at [redacted]
   = £[redacted] CIL Liability

   Total CIL Liability £[redacted]

4. The Appellant requested a Regulation 113 review on [redacted], to which the CA responded on [redacted], advising that as per Reg 113(9)(a) they were unable review a previous Reg 113 review decision.

5. A CIL Appeal form dated [redacted] was submitted to the VOA on [redacted].

Appeal Grounds

6. The Appellant is appealing against the refusal to allow the claim for a *KR(i)* deduction to the first floor development based on the lawful in-use use of the flats on the second and third floors of the building.

Consideration of the Parties' Submissions

7. The appellant claims a *KR(i)* deduction on the basis that each of the flats on the second and third floors have been lawfully occupied continuously, with each flat occupied for more than six months since [redacted].

8. The appellant argues it is clear from the photograph within their appeal documentation that this is a single building comprising four floors which is further supported by the floor plan for the first floor which shows a communal staircase going up to the second and third floors and down externally to the public footpath. They argue that as the three upper floors do not each have separate entrances and access ways there is nothing in the internal layout or external features to suggest that the first floor is a separate building from the two upper floors.

9. The appellant also argues that there is no statutory definition of "building" for the purposes of CIL. The definition of building in section 336(1) of the Town & Country Planning Act 1990 is incorporated in the Planning Act 2008 by section 235 but excluded from the operation of that section is Part 11 of that Act which governs CIL. They note there are provisions in the CIL regime relating to what constitutes a building such as paragraph 1(10) of Schedule 1 to the 2010 Regulations which excludes certain types of building, but this gives no guidance as to what actually is a building. They therefore argue that the term "building" therefore has its ordinary and usual meaning.

10. They further note that Regulation 2(1) defines "relevant land" in the case of a general consent as the land identified in the plan submitted to the CA in accordance with

regulation 64(4). No such submission has been made to the CA, but they state this would be the same as the plan submitted to obtain the prior approval.

11. They argue, however, that "the relevant building" is not the same as "the relevant land", but is any building situated on the relevant land which by reason of regulation 2(4)(c) includes any building in, under or over the relevant land. In this case there is only one building which is the whole of [redacted]. There is nothing in the CIL regime which authorises the CA to divide up the actual building into a number of smaller notional buildings.

12. They contend that the building 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, and it is only a part of the building that need satisfy this requirement. The focus of the "in-use building" definition is very firmly on the building. The definition begins by stating that it means "a building" and that the building must separately satisfy each of the two requirements.

13. The appellant argues that, in contrast, the *KR(i)* deduction is limited to the GIA of the retained part of "in-use buildings". For this purpose "retained part" means part of a building which satisfies three requirements (para. 1(10) Schedule 1). The part of the building must be on the relevant land on completion of the chargeable development and must be part of the chargeable development on completion. This recognises that there is a difference between what constitutes part of a building on the relevant land and what forms part of the chargeable development.

14. The appellant references two previous decisions by the AP on CIL appeals: appeal reference 1792686 which concerned a bank which had closed to the public but in which the safes and strong room continued to be used for storing valuables. The addition of the period that a part only of the building was used for storing valuables was sufficient to cause the whole building to qualify as an "in-use building" (paragraphs 59 to 62) and appeal reference 1793245 involving a planning permission authorising the incorporation of the ground floor of the building into use with the first floor annex for dual use with main house and as holiday home, where the AP held the building to be an "in-use building" because there had been a qualifying use of part being the first floor when it was not possible to establish that the ground floor had been in use for the required period.

15. The appellant argues the effect of these provisions is that the use of the whole of the building at [redacted] must be taken into account when determining whether the building is an "in-use building". However, it is only the GIA of the first floor of the building which is deductible as a *KR(i)* deduction. It is only the first floor which is part of this chargeable development and so it is only this part of the building which qualifies as a "retained part". In consequence the building qualifies as an "in-use building" and, therefore, the *KR(i)* deduction for the whole of the GIA of the first floor is available causing the CIL liability to be zero.

16. The Appellant has provided the following evidence of lawful in-use occupation:

<u>First floor</u>

- [redacted] *note for* [redacted] – [redacted] *acting in capacity as Trustee at subject property first floor in fundraising activities at the address.*

- *Letter dated* [redacted] *from* [redacted] *regarding a request for assistance in setting up an administrative office at first floor,* [redacted] *by providing second hand furniture. The letter confirms* [redacted] *would be happy to assist.*

- *Copy of licence dated* [redacted] *between* [redacted] *and* [redacted] *(the Licensee) for a licence between* [redacted] *and* [redacted] *to use premises at first floor,* [redacted] *at a licence fee being the requirement to pay Utility Service costs excluding VAT.*

[redacted]

- *Copy of a letter (Licence Termination) from [redacted] to [redacted] dated giving 90 days notice that they will not be renewing their licence on expiring on [redacted].*

- *[redacted]Gas electricity bill dated [redacted] covering the period [redacted] to [redacted] for £[redacted] based on an estimated reading – there was a credit balance of £[redacted] from the previous bill dated [redacted] and the bill estimated [redacted] kwh of electricity usage plus the standing charge.*

- *[redacted]Gas electricity bill dated [redacted] covering the period [redacted] to [redacted] for £[redacted] based on an estimated reading – there was a credit balance of £[redacted] from the previous bill dated [redacted] and the bill estimated [redacted] kwh of electricity usage plus the standing charge.*

<u>Second & Third floors</u>

- *Statutory Declaration by [redacted] dated [redacted] confirming that in [redacted] capacity as an independent letting agent acting for [redacted] she arranged tenant letting for the 2nd and 3rd floors at [redacted] from [redacted] on eight flats let on ASTs of no less than 12 months duration and enclosing a tenancy schedule and tenant deposit schedule along with sample electricity bills for flat D between [redacted] and [redacted] and Gas certificate for flat D dated [redacted] . There is also a letter from the flat D tenant confirming their continuous occupation from [redacted] along with a tenant payment schedule for flat D. Also enclosed are AST tenancies for flats A and D and she confirms she carries out regular flat inspections at the property.*

- *Annex 1 – Tenancy schedules for flats A to H at [redacted] commencing between [redacted] and [redacted] and ending between [redacted] and [redacted] . All let on ASTs.*

- *Annex 2 – Tenant deposit schedules for A to H at [redacted] .*

- *Annex 3 – [redacted]Gas electricity bill for flat D at [redacted] covering the period [redacted] to [redacted] .*

- *Annex 4 –Gas safety record for flat D at [redacted] dated .[redacted]*

- *Annex 5 – letter dated [redacted] from tenant [redacted] stating they had been in continuous occupation of flat D at [redacted] from [redacted].*

- *Annex 6 – Rental payment schedule for flat D at [redacted] showing monthly rent paid from [redacted] to [redacted] ranging from £ [redacted] to £[redacted] (mostly £[redacted] with more recent figures from [redacted] being £ [redacted] per month.*

- *Annex 8 – [redacted] Bank Transactions Statement dated [redacted] showing deposits into [redacted] Account on a monthly basis between [redacted] and [redacted] almost all at £[redacted] per month described as being in connection with [redacted] Flat D 6B.*

- *Annex 9 –[redacted] Bank Transactions Statement dated [redacted] showing deposits into [redacted] Account on a monthly basis between [redacted] and [redacted] ranging from £[redacted] to £[redacted] per month described as being in connection with [redacted] , [redacted] Flat D 6B.*

- *Annex 10 –[redacted] Bank Transactions Statement dated [redacted] showing deposits into [redacted] Account on a monthly basis between [redacted] and [redacted] ranging from £[redacted] to £[redacted] per month described as being in connection with [redacted], [redacted] Flat D 6B.*

- *Annex 11 – AST rental agreement dated [redacted] for flat A at [redacted] between [redacted] as landlord and [redacted] as tenant for a period of 12 months commencing [redacted] at £[redacted] per calendar month.*

- *Annex 12 – letter from [redacted] dated [redacted] to [redacted] in respect of flat A at 6B [redacted] agreeing to the tenant's request to enter into a periodic tenancy from [redacted].*

- *Annex 13 – [redacted] rental agreement dated [redacted] for flat A at 6B [redacted] between [redacted] as landlord and [redacted] as tenant for a period of 12 months commencing [redacted] at £[redacted] per calendar month.*

- *Annex 14 – [redacted] rental agreement dated [redacted] for flat D at 6B [redacted] between [redacted] as landlord and [redacted] and [redacted] as tenants for a period of 12 months commencing [redacted] at £[redacted] per calendar month.*

- *Annex 15 – letter from [redacted] dated [redacted] to [redacted] and [redacted] in respect of flat D at 6B [redacted] agreeing to the tenant's request to enter into a periodic tenancy from [redacted].*

- *Annex 16 – [redacted] rental agreement dated [redacted] for flat D at 6B [redacted], between [redacted] as landlord and [redacted] and [redacted] as tenants for a period of 12 months commencing [redacted] at £[redacted] per calendar month.*

17. The appellant also notes that on [redacted] the CA served a Default Liability because an assumption of liability notice had not been served by the appellant.

18. The appellant argues that the date a development is first permitted is determined in accordance with regulation 8 of the 2010 Regulations by reference to the particular type of planning permission involved. They note that the subject development is authorised by a general consent (regulation 5(1)(g) and (3)) and that such a Prior Approval is not a planning permission for the purposes of CIL. With such a consent the date on which the development is first authorised is either the date on which the CA receives notice of chargeable development in accordance with regulation 64 or, if no such notice is served, the day on which a notice is served under regulation 64A by the CA (regulation 8(7)). No notice of chargeable development has yet been served under regulation 64 and a notice under regulation 64A cannot yet be served.

19. The appellant further notes that a notice of chargeable development under regulation 64 is not required to be served in certain circumstances, including where a development for which the chargeable amount is zero (regulation 64(1A)(b)). It is the appellant's contention that the chargeable amount is zero due to the claim for a *KR(i)* deduction, so a notice of chargeable development is not required. They further argue that if this is not correct then the Liability Notice is premature.

20. The appellant further contends that in the CA's submissions it is suggested that the date at which the development is first permitted should be [redacted] which is the date that the Prior Approval was granted, and the CA have referred to an AP decision for CIL appeal reference 1774953, but that was a case in which a notice of chargeable development was served (paragraphs 14 and 15). If so then the date in accordance with regulation 8(7)(a) is the date the notice of chargeable development is received by the CA.

21. The CA argue that the flats above the first floor were the subject of a previous planning application in which CIL liability has already been considered, and those flats do not feature on the current application and are not relevant.

22. The CA contend that, like "*a semi-detached house, the fact that the floors exist under the same roof structure does not necessarily make them part of the same 'building' in terms of CIL liability*". They cite a previous CIL Appeal to the VOA (Appendix 11) where the AP

determined that the loft space of a building can be considered on its own as the "relevant land" for CIL purposes. The CA considers that as the prior approval for change of use applies to the first floor only, it would be reasonable to apply the same logic in this case.

23. The CA also considers that the first floor is functionally separate from the residential floors above, referring to [redacted] application for change of use of the ground floor of [redacted] which stated that the ground and first floors should not be considered as part of the same 'building' as the flats above for the purposes of The Assets of Community Value (England) Regulations 2012. They claimed that "the developed residential units cannot properly be considered to be part of the main economic unit of the Property because the residential units and the remainder of the building do not have a sufficiently strong physical and functional relationship in relation to the former economic unit of the now redundant public house unit" (Appendix [redacted] - Planning Statement, para. 32).

24. The CA notes the appellant's reference to the case of Wellington Pub Company v The Royal Borough of Kensington and Chelsea (and another) CR/2015/0007. In this case, Judge Peter Lane determined that the question of whether the ground floor former pub should be considered as part of the same 'building' as the first floor and residential floors above required him to assess whether the two parts of the building in question had a sufficient physical and functional relationship to be considered a single unit.

25. The CA considers that it is reasonable to apply a similar approach in the case of the CIL Regulations. The first floor lacks a sufficiently strong physical and functional relationship to the residential floors above to be considered part of the same "in-use building". Therefore, any use of the flats on these floors does not render the first floor a "*retained part of an in-use building*" to be deducted as *KR(i)* in the CIL liability calculation.

26. The CA therefore does not believe that the use of the flats on the floors above the proposed development should be considered during the CIL calculation process, and in order to deduct the first floor area as a "*retained part of an in-use building*", the CA argue they must therefore have sufficient evidence of the continuous lawful use of that floor itself.

27. The CA note the period the appellant claimed the first floor was in continuous Class E use as an office of [redacted] was during its one-year licence for the period of [redacted] to [redacted].

28. The CA questions why the office use of the first floor during [redacted] was not mentioned in any planning application for the ground floor at [redacted], and notes that first floor vacancy is mentioned at various points in [redacted] and also repeated in application forms and statements shown in the CA's evidence.

29. The CA considers that the energy usage over 6 months wouldn't be consistent with a continuous office use of the first floor. The appellant has explained that the bills were addressed to [redacted] at [redacted] for payment, and claims that this does not disprove the use of the first floor of [redacted] by the charity. However, the charity is also registered at the [redacted] address for contact on the Charity Commission website. Two of the charity's three trustees also have their correspondence address registered at [redacted] on Companies House as beneficial owners of [redacted]. Without evidence of other employees or correspondence relating to the running of the charity, the CA considers it lacks sufficient evidence to determine what the particular continuous use of the first floor of [redacted] was, as opposed to the administration conducted from [redacted]. Registration Number [redacted]- The [redacted]. The registration of the charity to [redacted] leaves open the question of what the purpose and activity of a separate office at [redacted] was.

30. The CA note that as the appellant leased the first floor to [redacted] rent free, there is no record of financial transfers available. However, the CA would expect other invoices to be available as supporting evidence of office activity, such as phone, internet bills,

letterheads, business cards, stationary orders etc. Also, they note that no recent photos have been submitted showing the office as it currently stands, or when it was claimed to be in use.

31. The CA note that the appellant has provided some evidence, such as utility bills and a furniture donation letter, but the evidence as a whole does not have sufficient substance to address the doubts raised by the contradictory photographs, statements of vacancy provided in various planning applications, the registration of [redacted] and its trustees to an alternative address for correspondence, low utility use and no evidence of continuous office use taking place. In the absence of other evidence or indication of relevant activity on the first floor, the CA considers that on the balance of probability that if there was any use at all it would be too minimal for the first floor to be considered "in-use" for the purposes of CIL regulations.

32. The CA have submitted their own evidence as follows:

- *Appendix 1 – CIL Form 1 dated [redacted] – change of use of first floor - existing GIA stated as [redacted] m2. Change from Class E to Class C3. States at 7(b)1: building last occupied for lawful use as being [redacted] .*

- *Appendix 2 – Planning Officer Report dated [redacted] in connection with planning application – change of use of first floor.*

- *Appendix 3 – email from CA to appellant dated [redacted] regarding CIL Form 1 and requesting information supporting the suggestion that the property has been in use.*

- *Appendix 4 – site photos dated [redacted] - photo labelled "First Floor Interior View" in the document "Existing: Photographs, Elevations and Interior" shows the first floor as unfinished and vacant. The comment that the unfinished condition of the first floor in [redacted] is not consistent with continuous office use in [redacted].*

- *Appendix 5 – external photos dated [redacted] - photo of the rear of the building shows the first floor is behind hoardings with construction site warning signs on the access gate. The CA comment that these photos indicate that the first floor was a construction site at or around the time of [redacted] . This is not consistent with its continuous use as an office in [redacted].*

- *Appendix 6 – Planning Statement from [redacted] in respect of [redacted] in connection with a separate application for widening the permitted use as "site is in the ownership of a charity which has been unable to derive an income from it during its extended period of vacancy. A such, this application seeks to widen the permitted use of the property to assist in securing a new occupier." [para 1.8] [my emphasis]*

- *Appendix 7 – Prior Approval Application dated [redacted] – change of use of first floor to form 7 self-contained flats - existing GIA stated as 409 m2. Change from Class E to Class C3.*

- *Appendix 8 – Design and Access Statement from [redacted] [year not stated by CA] in respect of the first floor at [redacted] in connection with an application for change in Use Class from C3 to Residential Class MA.*

- *Appendix 9 – Prior Approval Application dated [redacted] – change of use of first floor to form 8 self-contained flats - existing GIA stated as [redacted] m2. Change from Class E to Class C3.*

- *Appendix 10 – email between CA and Council Tax Team at the Local Authority dated [redacted] asking if there were any Council Tax records for [redacted] and response confirming this former public house had been empty from [redacted] to date.*

33. The CA note that in relation to the appellant's comments with regard to no notice of chargeable development having been served, the current alternative option would be to withdraw the current Liability Notice and invite a Form 5: Notice of Chargeable Development submission from the appellant, and then follow a similar route to what has occurred so far.

34. The CA further comment that the issue with the above route is that as the CA still considers that the CIL calculation is not zero, which in turn would force the CA to deem commencement (at the appropriate time), issue a notice of chargeable development according to Regulation 64A and issue a Liability Notice and Demand Notice for immediate payment. This would limit the appellant's appeal options, as work would have already commenced by this stage.

35. Both parties have made reference to the Asset of Community Value ("ACV") regime: the CA with reference to Planning Statement (Appendix 6) dated [redacted] that offers arguments countering an application for nomination of the whole building as an asset of community value; the appellant arguing that in the Wellington Pub ACV appeal Judge Lane rejected the suggestion that planning law on what constitutes a planning unit can be determinative in an ACV matter. This matter is not pertinent to the matter of determining CIL Liability and was only raised by the CA in relation to paragraph 47 of the Planning Statement, which mentions marketing of the site since [redacted] but made no mention of use of the first floor by the [redacted] during [redacted] . The CA take this as further evidence that the first floor has not been in continuous use, contrary to the appellant's contention.

Consideration of the Decision

36. I have considered the respective arguments made by the CA and the Appellant, along with the information provided by both parties.

37. The appeal arises from disagreement surrounding the issue of identifying the lawful in-use building following Schedule 1 of the CIL Regulations 2010 (as amended), which provides for the deduction or off-set of the GIA of retained parts of in-use buildings from the GIA of the total development in calculating the CIL charge (a *KR (i)* deduction).

38. Schedule 1 of the CIL Regulations 2010 (as amended) Part 1 paragraph 1(10) – standard cases provides that an "in-use building" means a building which 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.

39. Part 1 – standard cases – 1 (10) also provides that "relevant building" means a building which is situated on the relevant land on the day planning permission first permits the chargeable development.

40. Based on the facts of this case, I consider the building that existed on the day planning permission [redacted] was granted to be a relevant building.

41. The relevant period of continuous lawful use in accordance with Schedule 1 of the CIL Regulations 2010 (as amended) is [redacted] to [redacted] , and if the existing building is deemed to satisfy the lawful in-use requirements, then GIA off-set can be applied to the CIL Liability calculation.

42. If, however, lawful in-use cannot be demonstrated then CIL would be calculated with no existing building GIA off-set.

43. It is clear from the CIL Liability Notice issued by the CA that the development permitted under reference [redacted] was the basis for the CA's CIL calculation, described as "*Prior Approval for change of use of the first floor from Use Class E to residential use providing 6 self-contained units*".

44. CIL Regulation 9 (1) is clear on this point, that the "*chargeable development is the development for which planning permission is granted*".

45. In the case of Hourhope Ltd v Shropshire CC (2015) the High Court held that for the purpose of the CIL Regulations (2010) (as amended) the words "lawful use" meant a use that was lawful for planning purposes.

46. The Town and County Planning Act 1990, s.191(2) states that "*uses and operations are lawful if no planning enforcement action may be taken against them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason) and they are not in any contravention of any enforcement notice that is in force*".

47. The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 – s13 PART A - Commercial, Business and Service defines Class E as follows:

    "Class E. Commercial, Business and Service
    Use, or part use, for all or any of the following purposes—

    (a)for the display or retail sale of goods, other than hot food, principally to visiting members of the public,
    (b)for the sale of food and drink principally to visiting members of the public where consumption of that food and drink is mostly undertaken on the premises,
    (c)for the provision of the following kinds of services principally to visiting members of the public—
    (i)financial services,
    (ii)professional services (other than health or medical services), or
    (iii)any other services which it is appropriate to provide in a commercial, business or service locality,
    (d)for indoor sport, recreation or fitness, not involving motorised vehicles or firearms, principally to visiting members of the public,
    (e)for the provision of medical or health services, principally to visiting members of the public, except the use of premises attached to the residence of the consultant or practitioner,
    (f)for a creche, day nursery or day centre, not including a residential use, principally to visiting members of the public,
    (g)for—
    (i)an office to carry out any operational or administrative functions,
    (ii)the research and development of products or processes, or
    (iii)any industrial process, being a use, which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit."

48. It would appear to be the case that prior use of the first floor as an office of [redacted] had fallen under Class E *(c) (iii)" any other services which it is appropriate to provide in a commercial, business or service locality,"* and *(g) (i) "an office to carry out any operational or administrative functions,"* and would represent a lawful use complying with that Use Class.

49. It is therefore my opinion that, from all the information provided, the "lawful use" requirement of Schedule 1 of the CIL Regulations 2010 (as amended) has therefore been met.

50. Before GIA off-set of the existing building can be applied by way of a *KR(i)* reduction against the GIA of the proposed development however, paragraph 1(10) of the CIL Regulations requires that the relevant "in-use building" period must be satisfied, whereby lawful use for a continuous period of at least 6 months within the period of three years ending on the day planning permission first permits the chargeable development has occurred.

51. The period the appellant claimed the first floor was in continuous Class E use as an office of The [redacted] was during its one year licence for the period of [redacted] to [redacted] .

52. The appellant's evidence in support of relevant in-use for the first floor offices included:

    - [redacted] *for* [redacted].
    - [redacted] *letter from* [redacted] *to The* [redacted] *indicating the former's willingness to provide second hand furniture for use at .* [redacted]
    - *Licence dated* [redacted] *between* [redacted] *(the Licensor) and The* [redacted] *(the Licensee) to cover the period* [redacted] *to* [redacted] *for the licensee to use the first floor at* [redacted] *at a licence fee (being the requirement to pay Utility Service costs excluding VAT).*
    - *Licence Termination from* [redacted] *to* [redacted] *dated* [redacted] *giving 90 days notice that they will not be renewing their licence on expiring on* [redacted].
    - [redacted] *Gas electricity bill dated* [redacted] *covering the period* [redacted] *to* [redacted] *for £* [redacted] *based on an estimated reading – there was a credit balance of £*[redacted] *from the previous bill dated* [redacted] *and the bill estimated* [redacted] *kwh of electricity usage plus the standing charge.*
    - [redacted] *Gas electricity bill dated* [redacted] *covering the period* [redacted] *to* [redacted] *for £*[redacted] *based on an estimated reading – there was a credit balance of £*[redacted] *from the previous bill dated* [redacted] *and the bill estimated* [redacted] *kwh of electricity usage plus the standing charge.*

53. The CA have provided:

    - *Appendix 1 – CIL Form 1 dated* [redacted] *– change of use of first floor - existing GIA stated as* [redacted] *m2. Change from Class E to Class C3. States at 7(b)1: building last occupied for lawful use as being "1999".*
    - *Appendix 4 – site photographs dated* [redacted] *provided by the appellant: "First Floor Interior View" in the document "Existing: Photographs, Elevations and Interior" shows the first floor as unfinished and vacant.*
    - *Appendix 5 – external photographs dated* [redacted] *– showing the rear the building first floor being behind hoardings with construction site warning signs on the access gate.*

54. From this evidence, it can be concluded that in [redacted] [redacted] had indicated their willingness to provide furniture for use at the first floor offices, but there is no further evidence that they actually did so. The licence for The [redacted] to occupy the offices ran for a [redacted] month period within the relevant period for CIL purposes, and was terminated by The [redacted] by giving 90 days notice on [redacted]. Electricity bills addressed to [redacted] at [redacted]

covering the period [redacted] to [redacted] and [redacted] have been provided showing use of electricity between those dates at [redacted]. Photographs taken of the interior of the first floor in [redacted] after The [redacted] licence had expired show the floor as unfurnished and vacant, whilst external photographs from [redacted] show construction site hoardings in place indicating the property was no longer occupied as offices at that time.

55. The electricity bills were addressed to [redacted] at [redacted] for payment, and the charity is also registered at that latter address on the *Charity Commission* website, along with two of the charity's three trustees stating that as their correspondence address.

56. The first floor lease to The [redacted] was rent-free, but no other evidence supporting office activities such as telephone or internet bills have been provided by the appellant that would normally be expected to be available for an operational office.

57. It is therefore my opinion that, from a consideration of all the information provided, the first floor has not been proven to be continuously "in-use" during the relevant period, and the requirement of Schedule 1 of the CIL Regulations 2010 (as amended) has not therefore been met.

58. Turning to the matter as to whether a period of lawful in-use for the second and third floors can be taken as representing a part of the building for CIL purposes, Part 1 – standard cases – 1 (10) also provides that "relevant building" means a building which is situated on the relevant land on the day planning permission first permits the chargeable development.

59. Based on the facts of this case, I consider the building that existed on the day planning permission [redacted] was granted to be a relevant building that included the second and third floors.

60. The relevant period of continuous lawful use in accordance with Schedule 1 of the CIL Regulations 2010 (as amended) is [redacted] to [redacted], and if the existing building is deemed to satisfy the lawful in-use requirements, then GIA off-set can be applied to the CIL Liability calculation.

61. It has already been noted that from the CIL Liability Notice issued by the CA the development permitted under reference [redacted] was the basis for their CIL calculation, described as "*Prior Approval for change of use of the first floor from Use Class E to residential use providing 6 self-contained units*".

62. It has also already been noted that CIL Regulation 9 (1) is clear on this point, that the "*chargeable development is the development for which planning permission is granted*".

63. Taking the reference to "*planning permission*" contained within CIL Regulation 9 (1) as equally applying to cases involving "*prior approval*" would mean that whilst the whole building is a relevant building, only the first floor of the building can be considered for the purposes of establishing a lawful in-use period in accordance with Schedule 1 of the CIL Regulations 2010 (as amended), as the "*chargeable development … for which planning permission is granted*" is for "*change of use of the first floor*" and is not connected with existing or proposed use of the separate ground floor public house or, more pertinently, the existing second and third floor residential apartments that were permitted on a previous separate occasion. Only the first floor change of use is subject to permission [redacted] and parts outside of that permission cannot be considered for deduction as lawful in-use space.

64. The appellant has referenced two previous CIL Appeal Decisions 1792686 and 1793245, but these differ from the current case under consideration, where the planning consent is

limited to the first floor only and doesn`t encompass the whole building or other parts of the building.

65. Whilst the appellant has provided in-use evidence for the second and third floors, my decision is that the upper floors are irrelevant when the chargeable development is the first floor only.

66. The GIA of the existing second and third floor therefore cannot be off-set as a *KR(i)* reduction against the GIA of the proposed development.

Calculation of CIL Liability

67. Neither party has presented an argument against the GIAs used in the calculation of CIL liability, nor against the make-up of that calculation, other than the matter of GIA off-set for existing buildings. The AP therefore has no further decision to make in this regard.

68. The CIL Liability is therefore to be calculated using rates and indices at [redacted] relevant at the date of planning permission [redacted] as follows:

[redacted]
Chargeable Area [redacted] *m2 GIA*
X £[redacted] */m2 Rate R indexed at* [redacted]
= £[redacted] *CIL Liability*

[redacted]
Chargeable Area [redacted] *m2 GIA*
X £[redacted] */m2 Rate R indexed at* [redacted]
= £[redacted] *CIL Liability*

Total CIL Liability £[redacted]

Decision

69. 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 £[redacted] ([redacted]) to be appropriate and this appeal is dismissed.

[redacted] MRICS
RICS Registered Valuer
Valuation Office Agency
8 January 2025