Appeal Decision

By [redacted] **MRICS**

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

Valuation Office Agency
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Appeal Ref: 1857923

Planning Permission Ref. [redacted]

Proposal: Demolition of building and erection of a 40-storey co-living residential tower (Sui Generis) comprising 428 x units with ancillary/communal space (1 x 4-bed cluster, 37 x 5-bed clusters, 37 x 6-bed clusters, 1 x 7-bed cluster and 1 x 10-bed cluster), change of use of basement/ground/first floor and part of second floor of [redacted] **to commercial (Use Class E) and co-living residential accommodation (Sui Generis) comprising 20 x studios with ancillary/communal space, and hard and soft landscaping works/reconfiguration of** [redacted] **/** [redacted]

Location: [redacted]

Decision

I determine that the Community Infrastructure Levy (CIL) payable in this case should be £0 (Nil)

Reasons

Background

1. I have considered all of the 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 ref [redacted] dated [redacted];

    b) Approved planning consent drawings, as referenced in planning decision notice;

    c) CIL Liability Notice [redacted] dated [redacted];

    d) CIL Appeal form dated [redacted], including appendices;

    e) Representations from CA dated [redacted]; and

    f) Appellant comments on CA representations, dated [redacted].

Grounds of Appeal

2. Planning permission was granted under application no [redacted] on [redacted] for demolition of building and erection of a 40-storey co-living residential tower (Sui Generis) comprising 428 x units with ancillary/communal space (1 x 4-bed cluster, 37 x 5-bed clusters, 37 x 6-bed clusters, 1 x 7-bed cluster and 1 x 10-bed cluster), change of use of basement/ground/first floor and part of second floor of [redacted] to commercial (Use Class E) and co-living residential accommodation (Sui Generis) comprising 20 x studios with ancillary/communal space, and hard and soft landscaping works/reconfiguration of [redacted] /[redacted].

3. The CA issued a CIL liability notice on [redacted] in the sum of £[redacted]. This was calculated on a chargeable area of [redacted] m² at the rate of £[redacted] m² plus indexation.

4. The Appellant requested a review under Regulation 113 on [redacted]. The CA responded on [redacted], stating that the chargeable amount that is set out in the Liability Notice that has been sent to the appellant ([redacted]) was correct, and the charge remains at £[redacted].

5. On [redacted], the Valuation Office Agency received a CIL appeal made under Regulation 114 (chargeable amount) contending that the CIL liability should be £0. This was calculated on a chargeable area of [redacted] m² at a base rate of £0/m² plus indexation.

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

    The development is not liable to CIL because the use of the approved development is sui generis and according to the Charging Schedule sui generis use attracts a nil CIL rate.

7. The CA has submitted representations that can be summarised as follows:

   The Council considers that this development comprises residential development and as such will be liable for CIL as residential development type is liable as set out in the CIL Charging Schedule.

8. The area of the chargeable development has been calculated by [redacted] as being [redacted] sq. m. This calculation of the area would appear to be accepted by the appellants – they consider that the chargeable amount has been calculated incorrectly because no part of the development is liable to CIL under [redacted] Charging Schedule.

The Appellant's appeal

9. The Appellant contends that according to Regulation 40 of the Community Infrastructure Levy Regulations requires the Charging Authority is required to calculate the CIL charge in accordance with Schedule1 of the relevant Charging Schedule.

10. The Chargeable Development in this matter is a "suis Generis" development. A Class C3 development would require different planning permission.

11. The Appellant contends that first column of the Charging Schedule refers to the type of development and the second column the relevant CIL charge. The relevant row in the Charging Schedule would be the last row in the table "all other uses" with a relevant rate of £0.

12. The Appellant contends that the Charging Schedule is a public Document. This is not in dispute.

13. The Appellant refers to the Supreme Court case of Trump (33,34) and to that Court confirming the decision in the Carter Commercial (28) to conclude that there is no room for any subjectiveness in the interpretation of public documents.

14. The Appellant objects to the Charging Authority charging a rate above £0 per square metre and claims that it is unlawful.

15. The Appellant contends that the charge for residential development is limited to C3 and C4 and that the use of the parenthesis is to remove ambiguity and limit the charge to only C3 and C4. The Appellants cite the definition of the use of parenthesis from the Shorter Oxford English Dictionary sixth edition the use of parenthesis which states "Parenthesis" means "a word, clause, sentence etc inserted (as an explanation, qualification, aside, or afterthought) into a passage that is already grammatically complete, and marked off by brackets); "(inclusion of words within) a pair of round brackets … used in pairs to disambiguate a complex expression by grouping …".

16. The Appellant contends that the purpose of foot note1 is to ensure that some particular types of development within C3 and C4 are excluded from the CIL

charge: for instance: C3(b) this covers up to six people living together as a single household and receiving care e.g. supported housing schemes such as those for people with learning disabilities or mental health problems; or C3(c) allows for groups of people (up to six) living together as a single household, or C3(a) covers use by a single person or a family (a couple whether married or not, a person related to one another with members of the family of one of the couple to be treated as members of the family of the other), an employer and certain domestic employees (such as an au pair, nanny, nurse, governess, servant, ...or C4 for retired people; are excluded.

17. The Appellant contends that the scope of row 1 of the Charging Schedule is limited to only Use Class C3 and C4. Reference is made to Trump and the statutory framework which includes Regulation 13 that provides for differential rates. It is stated that reference to "Use Classes C3 and C4" can only be in reference to the Town and Country Use Classes Order. The planning permission in this case is not within Use Class C3 or C4.

18. The Appellant contends that the use of the description "student accommodation" within the Charging Schedule shows that the schedule is not tied to "Use Classes".

19. The Appellant contends that the description sui generis for the planning application under consideration can only be in the last row "all other uses".

The Charging Authorities case

20. The Charging Authority refer to a number of matters to which they describe as common ground however the Appellants disagree.

21. The Charging Authority describe the principal issue is the meaning of part of paragraph 5 of the Charging Schedule and the table within it. The Appellants contend that it is the whole Charging Schedule that is required to be considered.

22. The Charging Authority refer to Part 11 of the PA 2008 and the CIL Regulations and how this is applied to chargeable development and refer to these provisions as common ground.

23. The Charging Authority refer to the construction of a CIL Charging Schedule to be uncontroversial. Trump was cited stating the Supreme Court set some general principles applicable to the construction of legal documents.

24. The Charging Authority also refer to Lambeth LBC v Secretary of State for Communities and Local Government and to UBB Waste Essex Limited v Essex County Council and cited Lieven (52,53,54,55,56) that the same approach as confirmed in Trump applied.

25. The Charging Authority refer to Trump and R v Ashford BC ex p. Shepway District Council in the use of extrinsic documents to resolve ambiguity.

26. The Charging Authority explains the construction of the Charging Schedule as follows:

    a. The starting point is the Schedule itself; the interpretative task to ask what a reasonable reader would understand the words used in the Schedule to mean, when read in the context of the document as whole;
    b. The exercise is an objective one and the court will have regard to that natural and ordinary meaning of the words used, the overall purpose of the document and common sense (see Trump at [34])
    c. The reasonable reader of a CIL charging schedule is to be taken as an individual with some knowledge and understanding of planning law and more particularly the CIL regime, its purpose and process (UBB at [52]);
    d. The application of "common sense" includes having regard to the purpose of the document under examination and the words used (UBB [53]).
    e. Where there remains ambiguity, recourse may be had to extrinsic evidence; what evidence it is permissible to have regard to and the weight to be attached to that evidence is a matter of judgment, which should be exercise having regard to the public-facing nature and purpose of the document under interpretation (see Trump at [33] and case cited therein). Generally, caution should be exercised before recourse is had to private documents as opposed to documents which are in the public domain (UBB para.56-57).

27. The Charging Authority refers to the item in dispute is the interpretation of paragraph 5 of the Charging Schedule.

28. The Charging Authority claim that the first entry of the table identifies the type of development and that the first entry in line one is "Residential (Use Classes C3 and C4)" and is applicable to all types of residential development and would include the Chargeable Development which is a co-living residential tower.

29. The Charging Authority claim that the inclusion of "Use Classes C3 and C4 in parentheses is not a qualification or limitation on the term residential and would have indicated to that meaning.

30. The Charging Authority state that if this entry in the table was to be limited to only Residential development falling within Use Classes C3 and C4 then the use of the term "Residential" would be redundant. They state that the use of parenthesis was included as an illustration or reference point.

31. The Charging Authority add, Footnote 1 is in respect of retirement accommodation, extra care, sheltered housing and assisted living accommodation and would be a type of residential development and would generally be within Use Class C2. It is proposed that if the parenthesis are a qualification or limitation then the exclusions provided for within Footnote 1 would be unnecessary.

32. The Charging Authority add that the inclusion of Footnote 1 point strongly to residential as type of development in all its forms and the words in parenthesis do not have the effect of a limitation or qualification as the Appellants contend.

33. The Charging Authority refer case law and that the Charging Schedule needs to be considered having regard to the purpose of the document under examination and common sense (*Trump* at [34] and *UBB* at [53]-[54]). It should be undertaken

by reference to a person with some knowledge and understanding of CIL and its purposes (*UBB* ibid. at [52]).

34. The Charging Authority state that there is a requirement to seek to identify any reason or purpose for excluding from liability for CIL from a "residential" development which may not fall within use classes C3 or C4 from liability for CIL.

35. The Charging Authority state that it is not possible to identify any rational reason or purpose to exclude the development in question from CIL. In addition, they state that the Appellants do not offer any planning-based or practical justification for the development to be excluded from CIL. They state that to exclude all forms of residential development other than that which falls within Use Classes C3 and C4 has no foundation in the purpose of CIL and the Charging Schedule and defies common sense and practical experience.

36. The Charging Authority refer to Paragraph 022 of PPG Guidance which concerns the setting of differential CIL rates. Differential rates may be set by geographical zone and "types of development", but the charging authority should "… seek to avoid undue complexity". The Charging Authority state that the Charging Schedule follows this Guidance in both respects, setting out in the table differential CIL rates by both zone and by "types of development".

37. The Charging Authority refer to Paragraph 023 of PPG Guidance which states that that differential rates may be set by uses but that "The definition of "use" for this purpose is not tied to the classes of development in the Town and Country Planning Act (Use Classes) Order 1987 (as amended) although that Order does provide a useful reference point."

38. The Charging Authority state that this guidance confirms that the Charging Schedule can introduce charges on uses which are not tied to Use Classes and the inclusion of Use Classes C3 and C4 and are included as points of reference.

39. The Charging Authority summarises that in most instances the Charging Schedule charge different rates by types of development rather than uses and that the reference to "Use Classes" is simply illustrative or a point of reference. The exceptions being Student Accommodation and the uses provided by Footnote 1: retirement accommodation, extra care, sheltered housing and assisted living accommodation. This basis is reflected in the Viability Study that supported the draft Charging Schedule. The Charging Authority state that Student accommodation was treated separately from residential as CIL was charged at a different rate.

40. The Charging Authority claim that when considering the Charging Schedule in isolation, and but for the exceptions of student accommodation and retirement accommodation, extra care, sheltered housing and assisted living accommodation, with common sense and without resource to extraneous documentation, that Residential (Class C3 and C4) does apply to all residential development.

41. The Charging Authority state that if they are in error and that the Residential (Class C3 and C4) does not apply to all residential development then the Charging Schedule is ambiguous. In this instance, regard can be had extraneous documentation to include the Background Report and Viability Study used in the preparation of the Daft Charging Schedule and the Examiner's Report, which are all public documents.

42. The Charging Authority state that the evidence included in Background Report, Viability Study and Examiner's Report clearly shows that there was no distinction between types of residential development with the exception of retirement accommodation, extra care, sheltered housing and assisted living accommodation. In addition, the Council's website clearly states that the use classes are not restricted or tied to the use classes shown in the brackets.

Decision

43. I have considered all the arguments put forward by the Appellants and the Charging Authority.

44. The matter to be determined is the correct interpretation of the Charging Schedule.

45. It is necessary to determine if the Charging Schedule is equivocal or is it ambiguous. Only if it is ambiguous, will it be reasonable to have regard to certain additional public documents.

46. According to the CIL Regulation 13 (1)(b) the Charging Authority may set differential rates by reference to different intended uses of development. There should be no overlap between intended uses.

47. The first row of the Charging Schedule is "Residential (Class C3 and C4)". In the normal meaning of words, it is reasonable to understand that the words within the brackets do act as a qualification. According to the definition of the use of parenthesis from the Shorter Oxford English Dictionary sixth edition the use of parenthesis which states "Parenthesis" means "a word, clause, sentence etc inserted (as an explanation, qualification, aside, or afterthought) into a passage that is already grammatically complete, and marked off by brackets); "(inclusion of words within) a pair of round brackets … used in pairs to disambiguate a complex expression by grouping …".

48. The parentheses around Class C3 and C4 are required in the table to prevent overlapping uses which would be in breach of Regulation 13(1)(b) and would otherwise create ambiguity.

49. The presence of Footnote 1 the first row is still relevant to uses within Use Class Use 3 and Use Class 4. For this reason, this does not provide evidence to indicate that Residential was inclusive of all residential property as is proposed by the Charging Authority.

50. The Charging Authorities statement that “Residential” would not have been required if the entry was only applicable to Use Classes C3 and C4 is required as it differentiates from Classes within C1 and C2.

51. The Charging Schedule contains a separate entry for “Student Accommodation” which is a form of residential development, it is also a distinct use. The existence of this entry and the last entry “All other uses” does show that the Charging Schedule is not bound to “Use Classes”.

52. The final entry in the Charging Schedule, “All other uses”, provides the schedule to cover all possible uses and removes any risk of ambiguity from the table.

53. As highlighted by the Appellant the Councils Website is not mentioned on the Charging Schedule. In addition, the Appellants refer to the Guidance Notes on the Council’s website which does state that ”only the Charging Schedule provides definitive information on CIL charges”.

54. In accordance with the decision in Trump ”When the Court is concerned with the interpretation of words…in a public document...it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense.”

55. The Charging Schedule refers to residential uses as C3, C4 and C1 hotels. The fact that such uses are specified implies that these are the only residential uses subject to a CIL charge. The absence of the wording “including but not limited to C3 and C4” would further suggest that it is a closed list for including for a CIL charge. If the CA wanted to include all residential uses then they`d be more explicit and state “residential development” which would have covered this scenario. Stating C3 and C4 (and C1) would suggest that only these categories of residential use are covered and anything outside of that such as a sui generis use and excluded.

56. The planning permission granted for the Chargeable Development is for a “Sui Generis” use. The relevant row in the Charging Schedule would be the last row in the table “all other uses” with a relevant rate of £0.

57. On the basis of the evidence before me, I determine that the Community Infrastructure Levy (CIL) payable in this case should be £0 (Nil)

[redacted]
Valuation Office Agency
Date 14 April 2025