

Appeal Decision

by [REDACTED] BSc FRICS

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

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VOA Appeal Ref: 1833688

Planning Application: [REDACTED]

Proposal: Permitted Development Assessment - Prior Approval sought for a change of use from Commercial, Business and Service (Use Class E) to 15 flats ([REDACTED]) (Use Class C3).

Address: [REDACTED]

Decision

Appeal dismissed.

Reasons

1. I have considered all of the relevant submissions made by [REDACTED] (the Appellant) and by [REDACTED] - the Collecting Authority (CA), in respect of this matter. In particular, I have considered the information and opinions presented in the following documents:-
 - a) Planning decision in respect of Application No: [REDACTED] dated [REDACTED].
 - b) CIL Liability Notice CIL – [REDACTED], dated [REDACTED] for £[REDACTED].
 - c) CIL Appeal form dated [REDACTED], along with supporting documents referred to as attached.
 - d) Representations from the Appellant.
 - e) Representations from the CA.
2. Prior Approval – Change of Use was granted as detailed within the Decision Notice for Application reference [REDACTED], dated [REDACTED] for the Proposal: Permitted Development Assessment - Prior Approval sought for a change of use from Commercial, Business and Service (Use Class E) to 15 flats ([REDACTED]) (Use Class C3).

3. The CA issued a CIL Liability Notice Liability Notice reference: CIL – [REDACTED], dated [REDACTED] for £[REDACTED] stating this was levied under the CIL Charging Schedule for the [REDACTED] and s211 of the Planning Act 2008, based on a chargeable area of [REDACTED] sq. m.
4. On [REDACTED] the Appellant's Architect, [REDACTED], emailed the CA to request a Regulation 113 Review.
5. A Regulation 113 Review was undertaken and on [REDACTED] the CA emailed [REDACTED] explaining the review found that the CIL Liability Notice was correct and that the CIL payment should be as stated. The Appellant did not accept this outcome.
6. On [REDACTED], the Valuation Office Agency received a CIL appeal from [REDACTED] (Appellant) made under Regulation 114 (Chargeable Amount Appeal) confirming the Appellant disagrees with the CA's Regulation 113 Review decision on the basis that the chargeable amount has been calculated incorrectly, with supporting documents attached.

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

- a) The Appellant does not agree with the CA's calculation of the chargeable area.
- b) The Appellant submits that CIL should be NIL because parts of [REDACTED] were in lawful use. Appellant's case and reasoning for this is based on the letting / use of three office suites within [REDACTED] from [REDACTED] until the leases were surrendered [REDACTED].
- c) The Appellant notified the CA on CIL Form 5: Notice of Chargeable Development that the building had been in lawful use for a continuous period of at least 6 months within the past 36 months, the intended use was C3 Residential with a new build floorspace of [REDACTED] sq. m. A building plan, photographic evidence of the building in use and a plan identifying the chargeable development were meant to be submitted along with Form 5 however the Appellant was unable to locate any photographic evidence for use and the plans were not appended to the form – said plans were submitted along with this Appeal. The form was dated [REDACTED].
- d) The [REDACTED] wrote to the CA [undated letter – appeal statement refers to the [REDACTED] letter as being submitted "about in use at the same time"] referring to appended three Tenancy Agreements, four Business Rates Bills, six VOA website URL's and "Decision Notice for Planning Application No. [REDACTED] dated [REDACTED]". The letter sought to confirm CIL would be Nil given the evidence attached demonstrating the building was in use.
- e) A request for a Regulation 113 Review was made to the CA by email on [REDACTED]. Additional supporting information (Statutory Declaration dated [REDACTED] (TH6) was submitted on [REDACTED]. On [REDACTED] the CA emailed [REDACTED] explaining the review found that the CIL Liability Notice was correct and that the CIL payment should be as stated. The Appellant did not accept this outcome.
- f) The Appellant references the CA's inclusion of a past and separate CIL Appeal Decision and also the CA's own guidance 'Demonstrating that buildings are in continuous lawful use' in the form of a print off from the CIL section of the CA's website.
- g) The Appellant submits that ample evidence has been submitted to establish that at least part of the building was in use and that the CA is incorrect by rejecting it.

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

- a) The CA considers the information provided by the Appellant insufficient in order to determine the in lawful use criteria has been met.
- b) The CA refers to its previous Regulation 113 Review reply and makes additional references to Schedule 1 Part 1 of The Community Infrastructure Levy Regulations 2010 (as amended), specifically 1. (8) [whereby] the CA does not have sufficient information, or information of sufficient quality, to enable it to establish that a relevant building is an in-use building, it may deem it not to be an in-use building.
- c) The CA refers to the explanations provided to the Appellant in an email [REDACTED] in response to information submitted [REDACTED]. Within this email the CA explains it has concluded the development is CIL liable as it considered it did not have information of sufficient quality to establish the building had been in-use. The CA advises that as the [Form 5] Notice of Chargeable Development [NCD] was dated [REDACTED] however was not received until [REDACTED], the [qualifying] relevant period to determine whether the building was in use was therefore [REDACTED] to [REDACTED] .
- d) The CA provides feedback on five elements explaining why it has taken the decision the information is insufficient to determine the building as in lawful use.
- e) Subsequently, on [REDACTED] the CA received a request for a Regulation 113 review, as described above, and states that at this point additional information to demonstrate the 'in-use building' was not forthcoming until [REDACTED]. The CA states that the additional information submitted as part of the Regulation 113 Review included a Statutory Declaration to support the three leases previously provided. The CA considered the leases and other information were inadequate to demonstrate continuous lawful use, referencing reasoning already provided.
- f) The CA's position after considering the Appellant's submissions, both before and as part of the Regulation 113 Review, was that the leases and the declaration did not demonstrate how the building was actively being used or show that any use was continuous. The CA states evidence such as an electricity bill showing electricity consumption would help demonstrate active use during the lease period. An additional challenge to the evidence submitted was conflicting information from the CA's Business Rates Team which contradicted the Declaration.
- g) Specifically, the CA quoted the information from its Business Rates Team received [REDACTED] which I summarise as follows:
 - i. 'The property is split into **six different assessments** of which three were let for a period of [REDACTED] months for exactly the same dates - [REDACTED] to [REDACTED] .
 - ii. [REDACTED] 1st Floor middle was let to [REDACTED] ; [REDACTED] ground floor rear was let to [REDACTED] ; [REDACTED] ground floor front was let to [REDACTED] .
 - iii. The NDR Department state that it billed all three of the Suites as vacant rates throughout the leased period and were not advised of any occupation / the bills paid were for vacant assessments. Further, that the other three assessments remained in the Appellant's name and were billed vacant throughout. The Appellant disputes the assessment basis.
- h) The CA additionally also highlights that the leases commenced just after the start of the first UK government issued Covid-19 national lockdown measures which legally came into force [REDACTED] – the CA submits a 'stay at home order' was in

operation during a substantial amount of the lease period which it argues makes it unlikely that continuous use could have occurred.

- i) The CA addresses the Appellant's reference to the CA's own publicly available guidance on demonstration of continuous lawful use. The CA reiterates said guidance that the information on the CA's website is given as guidance only, and specifies that *"It is the applicant's responsibility to provide the evidence to demonstrate the continuous lawful use... The Council will require further evidence of continuous use if it is not evident from the information supplied..."* which in this connection the CA is stating as the case.
- j) The CA's Representation made under this appeal lastly addresses the Appellant's application for costs under CIL Regulation 121. The CA considers it has been very accommodating to the Appellant and not acted unreasonably, therefore requests that both the Regulation 114 Appeal and the Regulation 121 Costs Appeal are dismissed for the previously referred to reasons and specifically in relation to costs, the CA summarises that it:
 - i. Prior to issuing the Liability Notice gave the Appellant opportunity to provide 'in-use information'
 - ii. When the Liability Notice was issued, the accompanying email, outlined the concerns that it had with the 'lawful use' information and what it expected to be submitted to address the issues.
 - iii. As the Liability Notice was issued on [REDACTED], the Appellant had until [REDACTED] to request a Regulation 113 review. [REDACTED] it received a phone call from the Appellant's agent asking if it would accept a request for a Regulation 113 review however with the supporting information to be submitted after [REDACTED]. However, the CA received the Regulation 113 information on [REDACTED], 43 days after the Liability Notice had been submitted when the relevant Regulation states the must be requested within 28 days, the CA highlights it therefore could have refused the Review on day 29.

9. The Appellant submitted comments on the CA's representations which I summarise as follows:

- a) The Appellant addresses the CA's concern over the lack of electricity bills and advises these have been located and provided for the period [REDACTED] to [REDACTED] (although [REDACTED] is missing).
- b) The Appellant refutes the CA's argument that prevailing Covid-19 national lockdown measures meant it was unlikely that continuous use could have occurred. The "stay at home order" (copy attached [REDACTED]) did not prevent travel to work and describes how the business activities of the Tenant companies at [REDACTED] were not able to work from home, did not have the IT to allow that and needed to attend the offices to perform their work functions – also that [REDACTED] contained tools and materials as well as accounting records and in person access was required for these. [REDACTED] was the key holder for various residential properties and required access for those, as well as paper file records and storage of various items. [REDACTED] acquisitions department moved to the premises to save travelling to [REDACTED] and that none of this was prohibited.
- c) The Appellant highlights that it disputes the CA's position on Non Domestic Rates, referring to a separate dispute in this connection and referencing appended copy correspondence. Said correspondence comprises email exchanges initially between the Appellant's NDR Agent and the CA's NDR Team between [REDACTED] and [REDACTED] and subsequently between the NDR Agent and the Appellant.
- d) Lastly the Appellant reiterates its reasons for seeking costs.

10. Having fully considered the representations made by the Appellant and the CA, I make the following observations regarding the grounds of the appeal:

- a) In this case, the Appellant does not agree with the CA's stated net chargeable area used in the calculation of CIL. The Appellant submits the whole of the existing GIA should be excluded from the calculation of the chargeable area for CIL because parts of [REDACTED] remained in use for a qualifying period and that the CIL Regulations permit the whole of the property to be treated as in use because part of the property was in use.
- b) In-use buildings / Lawful use - The CIL Regulations Part 5 Chargeable Amount, 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."
- c) "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.
- d) In this case, instead of the grant Planning Permission being required, Prior Consent was sought for a Permitted Development. The CA's published [website] guidance, as referenced by the Parties, "Demonstrating that buildings are in continuous lawful use" describes how Regulation 40, in accordance with Schedule 1, of The Community Infrastructure Levy (Amendment) Regulations 2019 allows for existing floor area that has been in continuous lawful use for at least six months in three years prior to the day that planning permission is granted to be used as deductible floor area against the calculation of the CIL liability for the development.../...for Prior Approval or permitted development cases this is on receipt of a Notice of Chargeable Development form – **IN THIS CASE, [REDACTED]**, therefore the [qualifying] relevant period to determine whether [REDACTED] was in use was therefore [REDACTED] to [REDACTED].

- (i) The overlapping time period within [REDACTED] to [REDACTED] of the Leases to the three Companies were in place [from stated entry in on [REDACTED] and [REDACTED] to early termination [REDACTED]] was therefore an eight month period from [REDACTED] until [REDACTED] .
- e) The three leases in isolation do not provide evidence of actual use of [REDACTED]. I also note the leases were not accompanied by proof of rental payments.
- f) The **Statutory Declaration** by [REDACTED] of [REDACTED] states how [REDACTED] moved in on the [REDACTED] into suites [REDACTED] and [REDACTED] respectively and [REDACTED] moved in on [REDACTED] and ended when the three companies ended their leases early on [REDACTED]. I note from this an overlap with the qualifying period of eight months. I note the following as being significant in respect of evidence of active lawful use:
- (i) [REDACTED] states they visited [REDACTED] approximately once a week although no range of dates are specified.
- (ii) [REDACTED] stated [REDACTED] was in a poor state when the Appellant bought it and had clearly been unused for a while and was earmarked for redevelopment.
- (iii) [REDACTED] arranged the refurbishment of the offices so they could be let pending development / refurbishment was minimal to try to keep costs low. [REDACTED] describes the refurbishment as including redecorating and installing electrics throughout, plumbing such as installing new hot and cold feeds to all basins sinks and toilets and the installation of a hot water cylinder. The cost was approximately £[REDACTED] and took several months, was finished by [REDACTED]. Copy invoices from [REDACTED] to [REDACTED] totalling £[REDACTED] inclusive of VAT where applicable were appended [pages 10 to 14 of [REDACTED]].
- [REDACTED]
- (iv) [REDACTED] states [REDACTED] rates were paid while the building was empty however no explanation for why [REDACTED] is able to state this is provided.
- (v) [REDACTED] states [REDACTED] is a property maintenance company, owned by [REDACTED] which has **two employees**. [REDACTED] is a property development company, owned by [REDACTED] with two employees/directors [REDACTED] who are also directors of the Appellant company, [REDACTED]. [REDACTED] is an investment company owned by [REDACTED] with two employees.
- (vi) [REDACTED] states [REDACTED] went to the office usually once a week, [REDACTED] less frequently. [REDACTED] used the offices for [REDACTED] on average once a week.
- (vii) [REDACTED] has not explained how he knows specific details of the attendance of other Tenant companies and their respective arrangements for payment of Non Domestic Rates.

- (viii) Whilst the [REDACTED] confirms that "[REDACTED] went to the office usually once a week, [REDACTED] less frequently' and [REDACTED] 'used the offices on average once a week', it does not confirm that the suites were in lawful use for a 'continuous' period. Firstly, there is no confirmation of how long these visits were for and secondly even if they were for a full day's use it would seem unrealistic that, in the case of a building with an active use such as an office, once weekly visits would qualify as use for a continuous period.
- (ix) Unfortunately, the opportunity to further corroborate [REDACTED] statement with evidence of payments for invoices, rates bills and rents does not appear to have been taken up.
- g) I note the [REDACTED] bills provided with Representations are for dates out with the qualifying period. Within the Appellant Comments, three relevant [REDACTED] bills are provided covering [REDACTED].
- h) The copy correspondence between the Appellant's NDR Agent, the CA and the Appellant does not itself provide evidence of occupation – there was clearly a form of ongoing dispute.
 - (i) I note that evidence to show payment of NDR bills is not provided. Further, the Business Rates Bill provided with Appellant Comments in respect of Suite [REDACTED] Ground Floor Front of [REDACTED] from the CA's NDR Department is dated [REDACTED] for £[REDACTED] and is in respect of Liability Period [REDACTED] to [REDACTED] – required payments comprising £[REDACTED] on [REDACTED], £[REDACTED] on [REDACTED] and £[REDACTED] on [REDACTED]. [REDACTED] – dated [REDACTED] is a chase for payment confirming NDR payments have not been paid. In isolation, this does not prove occupation.
- i) Schedule 1 (9) states that where the collecting authority does not have sufficient information, or information of sufficient quality, to enable it to establish whether any area of a building falls within the definition of "in-use building" then it can deem the GIA of this part to be zero.
- j) The Appellant's contention is that the property was occupied and used by employees of three companies, commencing within days of Lockdown and Restrictions legally enforced by the UK Government from [REDACTED].
- k) Unfortunately, the Appellant has not, in my opinion, provided evidence which is sufficiently strong to prove continuous use during requisite time period. There has been ample opportunity to collate evidence that could include actual payments for rent, bills or other occupational costs that would be incurred, other than [REDACTED] bills for three months.

The evidence in relation to use of the property during the period in question is inconclusive in my opinion and insufficient evidence has been provided to demonstrate continuous use for the required six months within the relevant qualifying period.

In summary, I am of the opinion that the criteria for demonstrating that parts of [REDACTED] were in active lawful use for the required six months within the relevant three year period as detailed above has not been met.

There appears to be no dispute in relation to the rates adopted or indexation and I therefore dismiss this appeal.

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



BSc FRICS
Valuation Office Agency
29 January 2024