

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: 1774953

Planning Permission Reference: [REDACTED]

Location: [REDACTED]

Development: Prior approval for a change of use of the first floor and part of the ground floor from shop (Use Class A1) to 3 studio flats (Use Class C3).

Decision

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

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. CIL Form 1: CIL Additional Information dated [REDACTED]
 - b. Determination of Application reference [REDACTED] issued by the CA on [REDACTED].
 - c. CIL Form 5: Notice of Chargeable Development dated [REDACTED].
 - d. CIL Liability Notice reference [REDACTED] issued on [REDACTED] by the CA at £[REDACTED] CIL liability.
 - e. The Appellant's request dated [REDACTED] for a Regulation 113 review and the CA's response dated [REDACTED].
 - f. The CIL Appeal Form dated [REDACTED] submitted by the Appellant under Regulation 114, together with documents and correspondence attached thereto.
 - g. The CA's representations to the Regulation 114 Appeal dated [REDACTED].
2. On [REDACTED] the Appellant submitted "CIL Form 1: CIL Additional Information" for "Conversion of shop and storage areas to form 1 shop and 3 studio flats".



3. On [REDACTED] the CA issued a "Determination of Application" reference [REDACTED] as the scheme was deemed to fall within permitted development rights - the proposal is described as "*Prior approval for a change of use of the first floor and part of the ground floor from shop (Use Class A1) to 3 studio flats (Use Class C3)*".
4. A CIL Liability Notice reference [REDACTED] was issued on [REDACTED] by the CA at £[REDACTED] CIL Charge ([REDACTED]) based on the CA's assessment of Gross Internal Area (GIA) for the chargeable residential part of the development at [REDACTED] m2.
5. The appellant requested a Regulation 113 Review of the Chargeable Amount on [REDACTED]
6. Following the Regulation 113 Review the CA wrote to the Appellant on [REDACTED] confirming their CIL calculation as per their previous CIL Liability Notice.
7. On [REDACTED] the Valuation Office Agency received a CIL appeal made under Regulation 114 (chargeable amount) contending that the CIL charge should be £0 (zero).
8. The Appellant requests the Appointed Person to consider either:-
 - i) *That the claim for a CIL payment from the CA is unfair, as the property had been in use as a shop and store for at least 6 months in the last 3 years and CIL relief should be applied to the property with the result that liability is zero.*
 - Or
 - ii) *The Regulation 113 review by the CA was completed outside of the 14 days permitted and the CIL Liability Notice issued by the CA should be disallowed.*
9. The Appellant also testifies that they have been selling stock from the shop since [REDACTED]
10. With regards to the first request by the Appellant: i) that the CIL liability should be zero: Disagreement surrounding the issue of identifying whether the premises constitute an in-use building has arisen due to the effect of Regulation 40(7) of the CIL Regulations 2010 (as amended) which provides for the deduction of the GIA of an existing in-use building from the GIA of the total development.
11. Regulation 40(11) 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.
12. Regulation 40(9) states that where a 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 and Regulation 40(10) states that where a CA does not have sufficient information, or information of a sufficient quality, to enable it to establish – a) whether part of a building falls within a description in the relevant definition or b) the GIA of any part of a building falling within such a description, "*it may deem the GIA of the part in question to be zero*".
13. The Appellant has provided the following information to support their case:-
 - 1) CIL Form 5: Notice of Chargeable Development dated [REDACTED]
 - 2) Business Rates bill dated [REDACTED]
 - 3) Photographs of the interior of the shop
 - 4) Water utility bills for the periods [REDACTED] - [REDACTED] and [REDACTED] – [REDACTED]
 - 5) Electric utility bills for the periods [REDACTED] – [REDACTED] and [REDACTED] – [REDACTED]
 - 6) Statement of Truth from [REDACTED]
 - 7) Email dated [REDACTED]

14. "CIL Form 5: Notice of Chargeable Development" advised of the scheme's proposed Gross Internal Areas (GIAs) as follows:-

Ground floor shop – front part [REDACTED] m2

Ground floor shop – rear part [REDACTED] m2 to be converted to a flat of the same size

First Floor shop stores [REDACTED] m2 to be converted to two flats of [REDACTED] m2 each – ie total same floor area

External garage store [REDACTED] m2 to be converted to shop/bike/bin store of same size

15. CIL Form 5 was received by the CA on [REDACTED], and the CA propose that the relevant three year period in which continuous lawful use for a minimum of six months is required to be demonstrated runs from [REDACTED] to [REDACTED], but planning permission/its equivalent was issued on [REDACTED] when the CA issued a Determination of Application reference [REDACTED] – therefore the relevant three year period is actually [REDACTED] to [REDACTED].
16. A Business Rates Bill from [REDACTED] dated [REDACTED] for the sum £[REDACTED] with 100% Small Business Rates Relief applied was submitted by the Appellant along with a Statement of Truth by [REDACTED] dated [REDACTED] stating at point 3: *"I made a promise to my uncle [REDACTED], the proprietor of the shop] that I would maintain the shop and security of his goods in storage there until he was well enough to return to his shop"* and at point 9: *"The shop and store have remained fully stocked and ready in anticipation of the possibility of [REDACTED] returning and opening the store on a day to day basis...I have paid all relevant bills and rates for the property until its sale [to the Appellant] in [REDACTED]."*
17. The Appellant argues that this was an owner-occupied shop and store run by [REDACTED] and his Niece [REDACTED] (whilst he was too ill to run the shop or continue paying the bills himself). The Appellant states he purchased goods from the shop both in [REDACTED] and [REDACTED], and from the date-marked photographs also submitted that the shop and stores can be shown to have remained fully stocked until the Appellant purchased them from the previous owner.
18. The Appellant believes they have demonstrated, through the evidence provided as part of the appeal, that in accordance with Regulation 40(11) the property did constitute a lawful in-use building, and the GIA should thus be offset against the total GIA of the proposed residential development in calculating the CIL Charge, resulting in zero CIL liability.
19. The CA have commented that *"It is fair to say there is some evidence on both sides concerning the use of the property in recent years, however the utility bills are considered to be inconclusive in terms of use. The most recent electric bill ([REDACTED] – [REDACTED]) is largely a standing charge with limited usage (18 units), whereas the previous one which does show greater use (530 units) from [REDACTED] falls outside of the 3 year period for the use to be demonstrated. The water bills similarly suggest little use, however without the breakdown of the charge it is unclear and presumably a shop would have more limited water use in any case"*. With the corrected relevant period of [REDACTED] to [REDACTED] applied, both electricity bills fall outside of the relevant period.
20. The CA note *"The statement of truth provided by [REDACTED] would appear to indicate that since [REDACTED] the shop has been maintained with stock in place, as has also been evidenced with the photographs provided, but the statement does not suggest that the shop has been open to the public in that time. The statement makes clear that the hope was [REDACTED] would return to open the shop, but there was no fixed date for this and unfortunately was ultimately unable to do so, resulting in [REDACTED] the building, including the shop and all of the stock, being made available for purchase. Selling the stock in bulk in such a manner cannot be considered a normal activity but is more akin to the actions of a shop that has ceased to trade."*
21. The CA have also referred to a High Court case: R (oao Hourhope Ltd) v Shropshire Council [2015] EWHC 518 (Admin) in respect of a public house in support of their views,

stating that for a premises to be considered 'in-use' for the purposes of CIL it must be regularly open to the public for the sale of goods, and that the presence of stock/fixtures and fittings does not amount to a continuation of the use if the shop is not regularly trading.

22. The CA, in accordance with Regulation 40(9), did not consider the information the Appellant had provided sufficient to demonstrate that the building had been in continuous lawful use as a shop for at least 6 months in the past 3 years. They suggest that images on *Google Street View* indicate the shop has been closed since "at least [REDACTED]", and their Business Rates team are unable to confirm if the property has been occupied during the relevant period, as they are billing for small business rate relief only.
23. With regards to the second request by the Appellant: ii) that as the Regulation 113 review by the CA was completed outside of the permitted 14 day time period the CIL Liability Notice issued should be disallowed:
The CA's late response to the Regulation 113 Review Request dated [REDACTED] upholds their earlier CIL Liability Notice reference [REDACTED]. This does not preclude the fact that the latter Notice was issued within a reasonable period of time from the CA's receipt of "CIL Form 5: Notice of Chargeable Development" on [REDACTED], which had followed their email to the Appellant on [REDACTED] advising they did not consider the information submitted to be substantive enough to demonstrate the building had been in continuous lawful use as a shop for at least 6 months in the past 3 years, and pointing to their website pages "*Demonstrating that buildings are in continuous lawful use*". The CIL Liability Notice reference [REDACTED] dated [REDACTED] therefore would remain valid, subject to the outcome of the *first request i) by the Appellant* in this Regulation 114 Appeal, which is addressed elsewhere in this appeal decision.
24. The matter for the Appointed Person to decide upon is therefore whether the requirements of CIL Regulation 40 are met with regards to the continuous use of a part of the accommodation (the existing building GIA), which the Appellant considers should be off-set against the total GIA of the proposed development.
25. *Google Street View* images referred to by the CA show the shop to be shuttered when the images were captured in [REDACTED], which was within the relevant period for Regulation 40. Whilst the property was later placed on the market for sale, it would have been perfectly possible for it to have remained "in-use" insofar as it was occupied. Whilst the photographs submitted by the Appellant dated [REDACTED] and [REDACTED] and [REDACTED] and [REDACTED] show stock or stored goods to be situated inside the shop, whether or not the premises were openly trading at this time remains unclear, especially in view of the electricity bills submitted by the Appellant being very low for an operational retail premises.
26. The application form submitted with the *Application for Prior Approval* in [REDACTED] states that the shop had been vacant for the past four years. Whilst the Appellant has since stated this was an erroneous statement, the property sales particulars from the "[REDACTED]" website also state "*The premises have been closed since [REDACTED] but are now offered for sale freehold, in need of extensive refurbishment*".
27. From all this information, it would seem on the face of it questionable whether the building was in use during the relevant period [REDACTED] to [REDACTED].
28. The Statement of Truth by [REDACTED] dated [REDACTED] states "I made a promise to my uncle that I would *maintain the shop and security of his goods in storage [my italics]* there until he was well enough to return to his shop" and "*The shop and store have remained fully stocked and ready in anticipation of the possibility of [REDACTED] returning and opening the store [my italics]* on a day to day basis...I have paid all relevant bills and rates for the property until its sale *[to the Appellant]* in [REDACTED]." Contrary to the Appellant's stated view, the wording in this statement would not appear to confirm that the shop has been

open to the public during the relevant period, but merely that it was stocked and secured and that bills were being paid during [REDACTED]'s absence.

29. The Appellant confirms that no Business Rates have been paid, and the CA have confirmed that the premises benefit from *Small Business Rate Relief*.
30. The evidence available would not appear to clearly demonstrate that the property was operating as a retail business during the relevant period [REDACTED] to [REDACTED]. The premises would appear to have been kept secure with stock, some of which was sold on a sporadic basis during this time by prior appointment, but predominantly leaving the premises closed to the general public with bills being paid for low levels of water and electricity usage commensurate with non-operational premises that were actively marketed for sale in [REDACTED] and were described as having been "closed" since [REDACTED].
31. When the premises were eventually sold along with their stock in [REDACTED] to the Appellant, the latter has confirmed they commenced selling stock from the shop on [REDACTED]. The premises were therefore not in lawful use by the Appellant during the relevant period that ended on [REDACTED], which fails to meet the requirements of regulation 40(11) for "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".
32. Regulation 40(7) of the CIL Regulations 2010 (as amended) allowing for the deduction or off-set of the GIA of the existing in-use building from the GIA of the total development cannot therefore be applied.
33. The CIL Charge for the newly created (through change of use) dwellings totalling [REDACTED] m2 GIA of residential floorspace is therefore to be calculated in accordance with the [REDACTED] CIL Charging Schedule published on their website as follows:-

Residential use

Chargeable Area [REDACTED] m2 GIA

@ £[REDACTED] /m2 indexed to £[REDACTED] /m2 as at [REDACTED]

= £[REDACTED] CIL Liability

34. 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.

[REDACTED] DipSurv DipCon MRICS
RICS Registered Valuer
Valuation Office Agency
15 September 2021