

To: Mike Holmes, Head of Planning, Cheltenham Borough Council

From: Paul Hardiman, CIL Manager for the JCS Authorities

Date: 06 September 2021 [Draft 1]

SUBJECT: Request to consider exercising discretion under Regulation 83 of the Community Infrastructure Levy Regulations 2010 (as amended) to waive the surcharge for failure to submit a valid Commencement Notice and APPEAL – Request for Review of Chargeable Amount under Regulation 113 of the Community Infrastructure Regulations 2010 (as amended)

Liable Party: [REDACTED]

Agent: [REDACTED]

Planning Application Reference Number: 21/00931/FUL

Site: Lower Hewletts Farm, Aggs Hill, Cheltenham, Gloucestershire, GL54 4ES

Description of Development: Farm diversification proposal for residential conversion of a former agricultural building for short-term holiday let accommodation.

SUBMISSION

1. Email received from [REDACTED] on 01 September 2021 stated that,

Regarding the failure to submit a Commencement Notice

“Unfortunately, I was struck with a bad case of COVID and so have been unable to work for the last couple of weeks which is why the CIL commencement notice was not submitted prior to commencement. As I was unable to communicate this with the client, they continued with building regulations as planned which is why the development appeared on the Building Control weekly list before I was able to communicate with you. With this in mind I would appreciate the removal of the surcharge”

COMMENT: The surcharge referred to is applied according to Regulation 83 for ‘failure to submit a valid commencement notice’ and is a surcharge of “20 per cent of the chargeable amount payable in respect of D or £2,500, whichever is the lower amount”. In this case this was £1,622.39 being 20% of the original CIL charge of £8,111.96).

Regarding the CIL Chargeable Amount

“when reviewing the CIL form submitted (CIL form 1 ‘Additional Information’) I have also spotted a number of mistakes.

“Firstly, the GIA of this development is 38sqm, as stipulated in the building regulations.

COMMENT: This is an error in Form 1, received on the 22 April 2021, which states that the GIA is 53sqm.

“Secondly, the agricultural building the development relates to has been in lawful use for 6 continuous months of the 36 previous months. The client would be happy to sign a statutory declaration confirming this. As a result of the continuous use and nature of the development, we believe the development is in fact exempt from CIL. Please can you confirm this”.

COMMENT: This is also an error in Form 1, received on the 22 April 2021, which does not identify that the existing structure is a building that is still standing and has actually been in lawful use for 6 months in the last 3 years.

COMMENT: An existing in-use building to be demolished or re-used does not provide an exemption from CIL. It is however possible to justify a deduction under Regulation 40 providing evidence can be submitted which demonstrates to the Charging Authorities satisfaction that the structure is a building, that is still standing on the site on the first day that consent permits development and that it has been in actual lawful use for a period of 6 continuous months in the three years ending on the day that planning permission is granted, the approval of the final reserved matter for an outline application or on receipt of a Notice of Chargeable Development for permitted development or a prior approval.

Unfortunately the regulations are not prescriptive regarding the evidence that is required to demonstrate in-use instead placing responsibility on the applicant to provide the evidence to demonstrate the required period. However since the High Court judgement of R(Hourhope Ltd) v Shropshire Council [2015] EWHC 818 Admin it is clear that the building must actually be used for its lawful use not just that the building has a lawful use which could be carried on.

Examples of information that have been submitted to demonstrate this include:

- Copies of leases
- Electricity/gas bills for the six month period
- Business rate/council tax bills and payments
- Redacted bank statements to show rent has been paid
- Photographs showing the building in the use claimed
- Confirmation from a letting agent/solicitor advising of the period of occupancy
- Law Society property information form with reference to existing use and occupiers
- An affidavit

In line with Regulation 40 (9) the council may still require further evidence of continuous use if it is not evident from the information supplied that it was in actual use during the period claimed and it has the discretion not consider the existing floor area as deductible floor area unless it is satisfied that the applicant has demonstrated this.

Background

Planning Application 21/00931/FUL, which sought permission for the residential conversion of a former agricultural building at Lower Hewletts Farm was granted permission on the 02 July 2021 to the applicant, [REDACTED].

CIL Form 1 ‘Additional Information’ was submitted on the 22 April 2021 but no CIL Form 2 ‘Assumption of Liability’ was submitted.

Development commenced on the 09 August 2021 with notification sent to Building Control at Cheltenham Borough Council.

Regarding the failure to submit a Commencement Notice

The consultant accepts the CIL commencement notice was not submitted prior to commencement but has provided the attached explanation as evidence of this being as a result of illness and respectfully requests:

That the surcharge for failure to submit a Commencement Notice is waived.

██████████, acting on behalf of the liable party, is asking whether we can exercise our statutory discretion to waive the Regulation 83, 20% surcharge for failing to notify us of commencement. The reason(s) given is/are that:

1. The consultant was struck with a bad case of COVID and so has been unable to work for the last couple of weeks; and
2. Whilst unable to communicate with the client, they continued with building regulations as planned which is why the development appeared on the Building Control weekly list.

Your Discretion

Regulation 83(1) of the Community Infrastructure Levy Regulations 2010 (as amended) provides us with the authority to waive the surcharge for failure to submit a Commencement Notice stating that the Charging Authority 'may' impose a surcharge equal to 20 per cent of the chargeable amount payable in respect of D or £2500, whichever is the lower amount.

Regarding the CIL Chargeable Amount

Since receiving the Liability Notice, Deemed Commencement Notice and Demand Notice on the 27 August 2021 the consultant has also noticed that some crucial information in the CIL Form 1 'Additional Information' that was submitted in the clients name on the 22 April 2021 is either missing or incorrect:

1. Email received from ██████████ on 03 September 2021 stated that,

The Gross Internal Area

"The CIL form 1 submitted alongside application 21/00931/FUL outlines the gross internal area of the development to be 53sqm which is incorrect. The initial architect that surveyed the site measured the gross internal area to be 38sqm. This is further supported by the construction drawings which are now being used on site. Therefore, please may I request to change the gross internal area of the development to be 38sqm.

The implications of this will be that the CIL liability is reduced from £8,111.96 for 53sqm to £5,816.12 for 38sqm. This would in-turn reduce the 20% surcharge from £1,622.39 to £1,163.22.

Depending on the outcome of your decision in the review of the chargeable amount it will be either one of these amounts that is the subject of the request to waive the surcharge.

The Existing In-Use Building

Regulation 40 of The Community Infrastructure Levy (Amendment) Regulations 2014 allows for floor area, in an existing building that has been in continuous lawful use for at least six months in three years prior to the day that planning permission is granted, the approval of the final reserved matter for an outline application or on receipt of a Notice of Chargeable Development for permitted development or a prior approval, to be used as deductible floor area against the calculation of the CIL liability for the development.

Unfortunately whilst the regulations are not prescriptive regarding the evidence that is required they clearly place responsibility on the applicant to provide it.

The evidence needs to show that the structure is:

- A building which people normally go into. Photographs may be provided to show this;
- Still standing on the site on the first day that consent first permits development. As a conversion rather than demolition this should not be necessary to prove here; and
- In-use for the required period.

The email received from [REDACTED] on 03 September 2021 requesting a review of the chargeable amount had 5 photographs which clearly show that the structure is of brick construction with tiled roof and windows and doors which make it entirely weather proof.

The meta-data recorded for the photographs shows that they were taken on Wednesday 17 March 2021 and reveal them to be in-use for storage of items associated with the agricultural use, such as logs and tools.

The email also states that, “the client is willing to sign an affidavit to confirm the lawful use of the building” if necessary.

The implications of this will be that CIL liability is removed all together.

Legal Advice on Decision Taking

Whilst we do have a statutory discretion (Regulation 81(3)) it sits with the Local Charging Authority (CBC) and not with any individual officer, such as myself.

However One Legal have previously provided the following advice:

“it is possible that the Lead Officer/Lead Member may feel that they can take the ad hoc decision on the particular case under those parts of the Constitution whereby they can respectively “Take all steps reasonably necessary to facilitate the effective and efficient delivery of services within their portfolio” and “Take all steps reasonably necessary for the effective and efficient delivery of services for which they are responsible” (Chief Planning Lawyer, Email, 31 January 2020)

The amounts referred to are:

- CIL Charge of £8,111.96 for 53sqm or £5,816.12 for 38sqm
- Surcharge for failure to submit a Commencement Notice £1,622.39 or £1,163.22 respectively

Relevant Dates are:

- 02 July 2021 - Decision Date
- 27 August 2021 - Liability Notice Issued
- 27 August 2021 – Liability Notice Registered as Local Land Charge
- 22 April 2021 – Additional Information (CIL Form 1) submitted
- Assumption of Liability (CIL Form 2) not submitted
- 09 August 2021 – Commencement of Development and Building Control Inspection
- 18 August 2021 – Building Control Weekly list of Commencements published
- 27 August 2021 – Deemed Commencement and Demand Notices Issued
- 03 September 2021 – Request for help regarding surcharge received
- 06 September 2021 – Formal review of the CIL Chargeable amount under Regulation 113 and consideration of discretion to waive Regulation 83 surcharge

Summary

The consultant accepts:

1. That mistakes were made by the client in completing the CIL Form 1 'Additional Information', submitted on the 22 April 2021, which meant incorrect GIA was given and it was not identified that the existing structure had been in-use for the required period to justify deduction. As a result of this the consultant therefore requests a review of the chargeable amount under Regulation 113; and
2. That the CIL commencement notice was not submitted prior to commencement but states that this was the result of a genuine illness. As a result of this the consultant therefore requests that the surcharge for not submitting the commencement notice is waived.

A surcharge, in accordance with Regulation 80, for failure to assume liability for the CIL charge prior to the commencement of development has also been applied, Whilst only £50 per party, which in this case is only one, no discretion is provided within the regulations to waive this charge. The liability defaults to those parties that have a material interest in the land, in accordance with Regulation 33. As with all surcharges a formal appeal under Regulation 117 may be made, however this is to the Planning Inspectorate.

Recommendation(s)

Regulation 113 Review of the Chargeable Amount

Do they qualify for a Review?

Strictly speaking under Regulation 113(9) "A person may not request a review:

(a) of the decision reached on an earlier review; or

(b) subject to paragraph (9A), once the relevant development has been commenced”

Whilst Building Control have notified us that development commenced on the 09 August 2021, the Liability Notice was served on the 27 August 2021 and the request was received on the 03 September 2021, the question I would ask you to consider is whether the consultant had the opportunity to request a review prior to commencement.

The consultant is asking to have the surcharge for failure to submit a commencement notice waived as a result of illness and if this is accepted then it may also be justifiable to allow the appeal as the consultant wasn't aware of the date of commencement and therefore could not request a review before it. The consultant could also not request a review until the Liability Notice had been issued.

The charging authority have an obligation to issue a Liability Notice “as soon as practicable after the day on which a planning permission first permits development” (Regulation 65). This is also a matter of judgement as permission was granted on the 02 July 2021 and the Charging Authority only issued a Liability Notice after commencement was highlighted by Building Control, on the 27 August 2021. Should an appeal against the failure to carry out a review be lodged this could undermine the Council's case.

Are the reasons that the CIL chargeable amount should be amended acceptable?

If procedurally you accept that for these two reasons a review may be undertaken then the next decision is whether it is the purpose of the review to correct errors made by the applicant in filling out CIL Form 1:

They got the size wrong; and

They didn't identify that the existing building had been in use for the period required by Regulation 40.

The regulation only says that they may request “a review of the calculation of a chargeable amount”. Does this infer that it is only the calculation that is reviewed rather than the data on which the calculation is undertaken? If you consider that the review does not allow you to correct their error then the CIL Charge of £8,111.96 should stand. If you believe it does allow you to consider the new data then the next step is to consider the evidence now submitted.

Is there sufficient evidence to accept the corrections?

GIA - CIL form 1 submitted on 22 April 2021 states 53sqm in section 6. Consultant claims it should be 38sqm in email of 03 September 2021. Evidences this with reference to ‘initial architect’ surveying the site and that ‘This is further supported by the construction drawings which are now being used on site’. Attached drawings have been downloaded from Uniform Public Access.

Deduction for in-use existing buildings – CIL form 1 submitted on 22 April 2021 leaves section 6 ‘Proposed New Gross Internal Area’ blank and enters 53sqm in section 7 under Brief Description as “currently not in use agricultural building” and does not confirm under Has it been in-use for 6 months in the last three years, whether it has or under the final column when the last time it was used. The consultant states that this is a mistake and provides photographs as evidence of the

building still being in-use in March 2021, which show a well kept and substantial building which supports this.

The consultant signs off the email of the 03 September by stating that, “if you need any more information, please don't hesitate to ask”.